

**FRINGE BENEFITS TAX ON HIV/AIDS DISEASE MANAGEMENT OF  
EMPLOYEES IN THE WORLD OF WORK**

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## SUMMARY

HIV-positive employees that receive treatment for HIV/AIDS by having their employers pay for the treatment are being taxed on their lifesaving HIV benefits paid by their employer.

This comes after the Commissioner of Inland Revenue (CIR) or South African Revenue Service (SARS) identified the provision of treatment by employers as a “fringe benefit” in terms of paragraphs 2(e), 2(h) and 2(i) of the Seventh Schedule to the Income Tax Act<sup>1</sup> and as such is taxable if the treatment is given from the work place.

The treatment contribution is included in an employee’s remuneration package as a fringe benefit. Pay-as-you-earn (PAYE) and other assessed taxes are calculated from that. The taxable benefit is included on the employees’ annual IRP5 certificates. In order for the employer’s Human Resources department to affect this on the IRP 5 certificates the affected employee has to disclose his HIV/AIDS status and accordingly pay the PAYE on the fringe benefit.

In terms of paragraph 2(e) of the Seventh Schedule to the Income Tax Act No. 58 of 1962, any service rendered at the expense of the employer to the employee, whether by the employer or by some other person, which has been utilised by the employee for private or domestic use, such value of the service must be included in the employee’s consideration for remuneration.

Paragraph 2(h)<sup>2</sup> taxes the employees on debts paid by the employer on behalf of the employees and paragraph 2(i)<sup>3</sup> taxes a one third contribution benefit back in the hand of an employee for contributions to medical aids. If the employee were to receive chronic medication from a medical aid for HIV/AIDS treatment this will be included in the fringe benefit tax as a medical contribution.

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<sup>1</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>2</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>3</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

The Employment Equity Act No. 55 of 1998<sup>4</sup> promotes the elimination of unfair discrimination in the work place and ensures the implementation of Employment Equity to redress the effects of discrimination. Above all it also promotes the constitutional right to equality. In terms of confidentiality of the employees HIV/AIDS status; the Income Tax Act No. 58 of 1962 (Income Tax Act)<sup>5</sup> as interpreted seems to be in conflict with the Employment Equity Act No. 55 of 1998.

A solution therefore has to be sought where:

- The anonymity of an employee in terms of his/her HIV/AIDS status is protected as envisaged by the Employment Equity Act<sup>6</sup>.
- It is also necessary to understand whether there is in fact conflict between the Income Tax Act<sup>7</sup> and the Employment Equity Act<sup>8</sup>.
- It is also necessary to establish whether there are any misconceptions in the interpretation of the legislation and
- Try to find the best possible solution to minimise the impact of Income Tax and yet protect the confidentiality of the employees concerned.

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<sup>4</sup> Employment Equity Act 55 of 1998

<sup>5</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>6</sup> Employment Equity Act 55 of 1998

<sup>7</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>8</sup> Employment Equity Act 55 of 1998

## OPSOMMING

MIV-positiewe werknemers wat behandeling vir MIV/VIGS ontvang by hul werkgewers word belas op hul lewensreddende MIV voordele wat deur hul werkgewers betaal word.

Hierdie word bepaal nadat die Kommissaris van Binnelandse Inkomste (KBI) of die Suid-Afrikaanse Belastingdiens (SAB) die voorsiening van behandeling deur werkgewers ag as 'n belastingbyvoordeel in terme van paragrawe 2(e), 2(h) en 2(i) van die Sewende Skedule van die Inkomste belastingwet<sup>9</sup> indien die diens gelewer word buite die werksplek.

Die bydrae tot behandeling word ingesluit in die werknemer se vergoedingspakket as 'n belasbare byvoordeel. Werknemersbelasting of LBS en ander aangeslaande belasting word hiervandaan bereken. Die byvoordeel word op die werknemer se IRP5 sertifikaat aangedui. Om hierdie aan te dui op die IRP5 sertifikaat van die geaffekteerde werknemer moet die werknemer se MIV status aan die werkgewer se Menslike Hulpbron departement bekend wees om die nodige byvoordeel te bereken.

In terme van paragraaf 2(e)<sup>10</sup> van die Sewende Skedule van die Inkomste Belastingwet nr. 58 van 1962, word enige diens gelewer deur die werkgewer namens die werknemer, of deur die werkgewer of deur sekere ander persone, wat gebruik word deur die werknemer vir privaat en huishoudelike gebruik geag as vergoeding te wees en die diens moet ingesluit wees in die vergoedingspakket.

Paragraaf 2(h)<sup>11</sup> belas die werknemers op skuld betaal namens die werknemer deur die werkgewer en paragraaf 2(i)<sup>12</sup> belas een derde van die bydrae terug in die hand van die werknemer vir bydraes betaal deur die werkgewer aan mediese fondse. Indien die

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<sup>9</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>10</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>11</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>12</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

werknemer kroniese medikasie ontvang van die mediese fonds vir MIV/VIGS behandeling sal dié belas word as 'n belasbare byvoordeel.

Die Gelyke Indiensnemingwet nr 55 van 1998<sup>13</sup> bevorder die eliminasië van ongeregmatige diskriminasië in die werksplek en verseker dat die implementasië van die wetgewing die impak van diskriminasië reg aanspreek. Die wetgewing bevorder die konstitusionele reg tot gelykheid. In terme van die vertroulikheid van die MIV/VIGS status van werknemers bleik die Inkomstebelastingwet in konflik te wees met die Gelyke Indiensnemingswetgewing.

'n Oplossing moet dus gevind word, waar:

- Die anonimiteit van die werknemers in terme van hul MIV/VIGS status beskerm word soos veronderstel word in die Indiensnemingswetgewing
- Dit is ook nodig om te verstaan of daar inderdaad konflik is tussen die onderskeie wetgewings, naamlik die Inkomstebelastingwet en die Indiensnemingswetgewing.
- Dit is ook belangrik om te bepaal of daar enige miskonspesies in die interpretasië van die wetgewing is en
- Om te probeer om die bes moontlike oplossing te vind om die impak van Inkomstebelasting te verminder en terselfdertyd die konfidensialiteit van die werknemers te verseker.

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<sup>13</sup> Employment Equity Act 55 of 1998

## TABLE OF CONTENTS

MAIN AND SUB-HEADINGS OF SECTIONS	PAGE NUMBERS
1. BACKGROUND MEDICAL FACTS CONCERNING HIV/AIDS	pages 1-4
2. STATISTICS AND DEMOGRAPHICS OF THE HIV/AIDS EPIDEMIC	pages 5-7
3. FINANCIAL IMPACT OF HIV/AIDS IN THE WORLD OF WORK (WOW) AND THE MOTIVATION FOR HIV/AIDS WORLD OF WORK PROGRAMMES	pages 8-13
4. RESEARCH STUDY TOPIC AND METHODOLOGY	pages 14-15
5. PROBLEM STATEMENT AND MOTIVATION	pages 16-18
6. RESEARCH STUDY LIMITATIONS	page 18
7. TAXABLE BENEFIT DEFINITION	pages 19-20
a. Gross Income definition	page 20
b. Excessive remuneration	pages 21-23
c. The Seventh Schedule	pages 23-28
8. PROTECTION OF EMPLOYEE RIGHTS THROUGH EMPLOYMENT EQUITY ACT NO 55 OF 1998	pages 29-33
9. INDUSTRY OPINIONS AND INITIATIVES	
a. Opinions of Business Leaders such as BUSA and SACOB	pages 34-39
b. Initiatives of British American Tobacco (S A) BATSA	pages 40-43
c. Opinions of SARS officials and Corporate Companies	pages 43-45
10. POTENTIAL SOLUTION TO THE PROBLEM BY INVESTIGATING OTHER ALTERNATIVES	pages 46-49
a) Adapting Existing Initiatives:	

**TABLE OF CONTENTS (continued)**

<b>MAIN AND SUB-HEADINGS OF SECTIONS</b>	<b>PAGE NUMBERS</b>
i) Amendment of Paragraph 10(2)( c) of the Seventh Schedule <sup>14</sup>	pages 49-51
ii) Paragraph 12A (1) of the Seventh Schedule <sup>15</sup>	pages 51-52
iii) A limited outsourced payroll	pages 52-53
b) <u>New Proposed Initiative</u>	
i) Section 25B and section 30 of the Income Tax Act <sup>16</sup> in terms of distributions or donations from Trusts.	pages 53 -57
ii) Paragraph 12(A) (2) <sup>17</sup> as a mechanism to calculate the taxable benefit in the hands of all employees as interpreted as a deemed taxable benefit according to paragraph 16(1) of the Seventh Schedule	pages 57-67
11. CONCLUSION	pages 67-69
12. REFERENCES	pages 70-73

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<sup>14</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>15</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>16</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>17</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

## **1. BACKGROUND MEDICAL FACTS CONCERNING HIV/AIDS<sup>18</sup>**

HIV is known as the Human Immunodeficiency (Retro) Virus, with a unique enzyme that enables the virus to multiply in living human cells.

The human body fights the attack of the virus through the immune system but the process of multiplication tires out the immune system and leads to AIDS (Acquired Immune Deficiency Syndrome).

Through mathematical modelling the origin of the virus was traced and indicates that the mutation of the HIV 1 virus occurred as late back as the 1930's and had probably entered the human race from chimpanzees, probably through contamination of human blood with infected chimpanzees through the slaughtering process. A similar virus exists in the chimpanzee population, the Simian Immunodeficiency Virus (SIV).

The African epidemic began in the 1970's as a heterosexual epidemic in East Africa from where it spread to other areas.

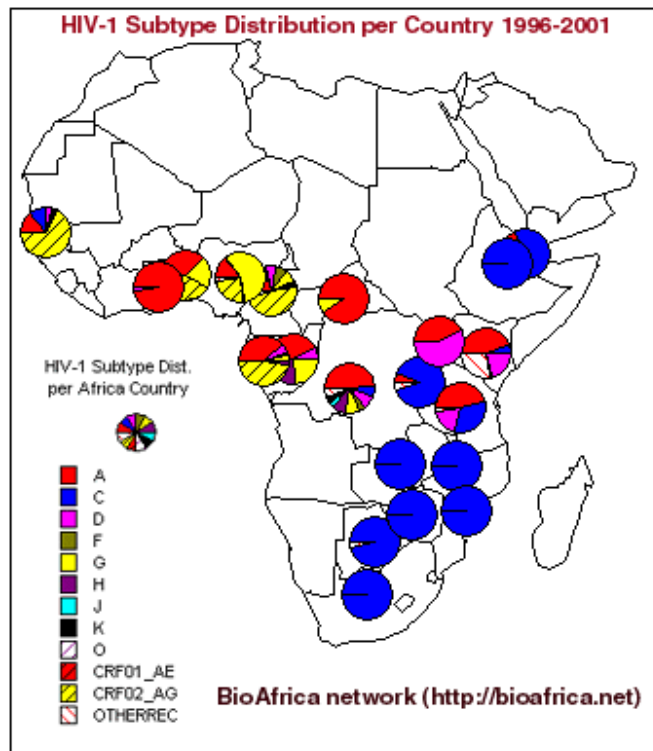
As many as 15 different types of viruses exist and the subtype B virus in South Africa originated in the 1980's from the homosexual HIV/AIDS epidemic overseas.

The subtype C virus in South Africa arrived mainly from heterosexual migrant labourers and truck drivers towards the end of the 1980's.

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<sup>18</sup> E Bokelman, assignment 1, MPhil, epidemiology from Prof E Van Rensburg, [Notes on epidemiology, module 1](#), 2004, MPhil in HIV/AIDS, University of Stellenbosch,





Source: WHO Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Diseases, 2002 update<sup>19</sup>

The HIV is transmitted via body fluids from people who are infected with the virus. Examples of body fluids are; semen, secretions of the prostate gland and vagina, breast milk and infected blood. Infected body fluids such as tears, saliva and urine contain very low concentrations of the virus and are not considered a risk for infection.

High risk factors considered to lead to HIV infection are:

- Multiple sex partners
- Unprotected sex (not using condoms)
- Intravenous drug use or needle stick injuries (sharing of contaminated needles)
- An infected mother and her child during childbirth and breastfeeding.

<sup>19</sup> WHO, 2002 update, [Epidemiological fact Sheets on HIV/AIDS and Sexually Transmitted Diseases](#),

The HIV enters cells predominantly via host cells known as CD4+ T receptor cells. These cells are always present when cells are infected. The infection is detected through a process of inflammation of the infected sites. The body's immune system recognises the virus or components of the virus as being invaders when infected with the virus. The immune system's response to these foreign substances is an attack on these substances by trying to eliminate them from the body through the formation of antibodies by the white blood cells.

An HIV test detects the antibodies to HIV in the blood and confirms that a person was in fact infected. Through Rapid HIV assays a drop of blood from a finger prick can be used to determine one's HIV status and the test results are available immediately.

If the HIV Rapid test gives a positive result, a confirmatory laboratory test needs to be conducted through a process of venepuncture (taking blood through a needle stick) or another Rapid assay from another medical supplier of Rapid HIV screening tests.

HIV infection has a major impact on one's social and family life and carries with it a corresponding death sentence if the infection goes undetected and untreated, the virus being undetected leads to AIDS (where the AIDS patient will probably die in 7-10 years).

The emotional effect of the infection on the individual is that it causes internal conflict as the individual is in a precarious situation where it is necessary to tell people; family and friends of the HIV+ status but yet the social impact of discrimination and stigmatisation is too much to handle. It places a further responsibility on the individual to consider other people, whilst being traumatised by a possible death sentence that can be placed on sexual partners through sexual intercourse or children through childbirth, if the HIV positive status is not disclosed.

ARV's (Anti-Retroviral) refer to the drugs used in the treatment of HIV/AIDS. ARV's inhibit the replication of the viruses. The drugs not only intercept but also target specific steps in the life cycle of the virus.

Amongst epidemiologists, pathologists and HIV/AIDS experts it is generally accepted that it is impossible to eradicate the HIV disease with the current ARV combination therapies in use. The immediate effect of successful ARV treatment is a suppression of the viral load, this allows the immune system to recover and regain its function through a process known as immune reconstitution. This results in a rise of CD4 cells and an improvement in their function. The recovered immune system can ward off intruders and reduce the risk of HIV-associated diseases. Less infections result in better quality of life and ultimately longer survival.

With HAART (Highly Active Anti- Retroviral treatment), HIV becomes manageable rather than a deadly disease. ARV therapy has toxic side effects as well as other side effects but despite this the advantages of the therapy lead to survival.

The challenges and difficulties that an individual on ARV therapy experience are the following:

- The high cost and availability of medicine
- The difficulty to take drugs due to the discipline involved in taking the drugs regularly
- Different drugs and combinations have different side effects.
- Different drugs have different toxicity profiles and therefore different systems and organs of the body can be affected depending on the drugs prescribed.
- Strict adherence to combination ARV therapy is necessary otherwise resistance will soon develop.
- Disturbing changes take place in body composition of the person on ARV treatment.
- To add to the distress is the fact that if the individual's employer pays for his treatment "off-site", the South African Revenue Services (SARS) taxes the benefit as a fringe benefit and makes the cost of treatment even higher.

## 2. STATISTICS AND DEMOGRAPHICS OF THE HIV/AIDS EPIDEMIC

Statistics show that more than 20 million people have already died of AIDS<sup>20</sup>. Between 34 and 46 million people live with HIV/AIDS<sup>21</sup> of which 25 to 28 million people are from Sub-Saharan Africa.<sup>22</sup> As many as 5 million people were newly infected with HIV (over 3 million in sub-Saharan Africa) and 2,3 million died as a result of AIDS in 2003.<sup>23</sup>

A summary of the HIV/AIDS epidemic as supplied by UNAIDS a division of the World Health Organisation (WHO):<sup>24</sup>

	Population	Estimate	Range
<b>Number of people living with HIV/AIDS</b>	Total	40 million	(34 – 46 million)
	Adults	37 million	(31 – 43 million)
	Children under 15 years	2.5 million	(2.1 – 2.9 million)
<b>People newly infected with HIV in 2003</b>	Total	5 million	(4.2 – 5.8 million)
	Adults	4.2 million	(3.6 – 4.8 million)
	Children under 15 years	700 000	(590 000 – 810 000)
<b>AIDS deaths in 2003</b>	Total	3 million	(2.5 – 3.5 million)
	Adults	2.5 million	(2.1 – 2.9 million)
	Children under 15 years	500 000	(420 000 – 580 000)

Source: *Global summary of the HIV/AIDS epidemic*, December 2003 UNAIDS

The HIV/AIDS prevalence rate in South Africa is currently estimated at 17,1% based on tests performed on 101 202 pregnant women at Government clinics,<sup>25</sup> by the Department of Health, but exact figures are not available. By the end of 2002 as many as 5 million

<sup>20</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), [HIV/AIDS, human resources and sustainable development](#), paper presented at the World Summit on Sustainable Development Johannesburg 2002.

<sup>21</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), [Global AIDS epidemic shows no sign of abating: highest number of HIV infections and deaths ever](#) Press Release accessed at [www.unaids.org](http://www.unaids.org)

<sup>22</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), [Global AIDS epidemic shows no sign of abating: highest number of HIV infections and deaths ever](#) Press Release accessed at [www.unaids.org](http://www.unaids.org).

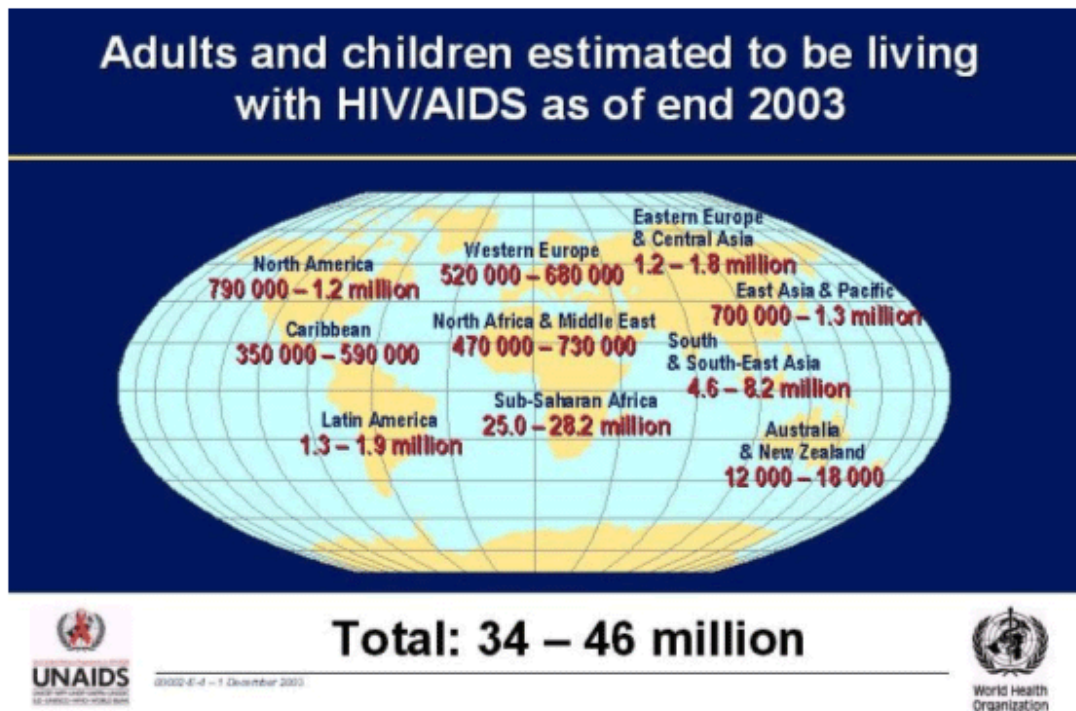
<sup>23</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), [Global AIDS epidemic shows no sign of abating: highest number of HIV infections and deaths ever](#) Press Release accessed at [www.unaids.org](http://www.unaids.org)

<sup>24</sup> UNAIDS, December 2003, [Global summary of the HIV/AIDS epidemic](#),

<sup>25</sup> South African Government, 19 March 2003, [Update on the national HIV and AIDS programme](#).

people in South Africa were HIV-positive and seem to be the highest number in any country in the world.<sup>26</sup>

### WORLD DEMOGRAPHICS OF HIV/AIDS PREVALENCE<sup>27</sup>



Source: *Global summary of the HIV/AIDS epidemic*, December 2003 UNAIDS

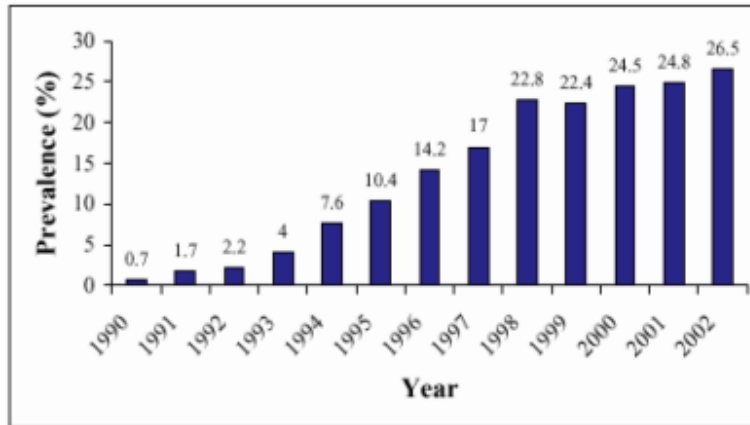
The Department of Health in South Africa conducts a national HIV and syphilis seroprevalence survey annually in October each year, through sampling from 396 clinics throughout South Africa. The statistics<sup>28</sup> are drawn from information gathered from predominantly Black females, who predominantly frequent these clinics. These women visiting these clinics are normally pregnant and therefore women in their fertile years. The information can therefore not be extrapolated to the population at large, but it gives us a good indication how HIV prevalence has progressed. The following data and graph extracted from this survey demonstrates the increase in HIV prevalence:

<sup>26</sup> Joint United Nations Programme on HIV/AIDS (UNAIDS), *Global AIDS epidemic shows no sign of abating: highest number of HIV infections and deaths ever* Press Release accessed at [www.unaids.org](http://www.unaids.org)

<sup>27</sup> UNAIDS 2002, *Report on the global HIV/AIDS epidemic*, Geneva, Switzerland, September 2003,

<sup>28</sup> National HIV and Syphilis Antenatal Sero-prevalence Survey in South Africa: 2002 report

**HIV seroprevalence in antenatal attendees, 1990 – 2002, Dept of Health**



**The number of HIV infected persons in South Africa for 2001.**

<b>Total adults + children</b>	<b>5 000 000</b>
<b>Adults</b>	<b>4 700 000</b>
<b>Women</b>	<b>2 700 000</b>
<b>Children</b>	<b>250 000</b>
<b>Deaths in 2001</b>	<b>360 000</b>
<b>Living orphans</b>	<b>680 000</b>

Source: *National HIV and Syphilis Antenatal Sero-prevalence Survey in South Africa: 2002 report*<sup>29</sup>

Figures released in February 2005<sup>30</sup> by Statistics South Africa from a National mortality study states that deaths had risen from 318 287 in 1997 to 499 268 in 2002. The death rate amongst adults over 15 had increased by 62%. The report further shows that the death rate had increased the most amongst women aged between 20 and 49. Females in the category 20 to 49 are also regarded as the most vulnerable to HIV/AIDS. The study seems to give indirect evidence of the fact that HIV/AIDS raises the mortality rates of prime aged adults.

<sup>29</sup> National HIV and Syphilis Antenatal Sero-prevalence Survey in South Africa: 2002 report

<sup>30</sup> The Weekend Argus, February 19 2005

### **3. FINANCIAL IMPACT OF HIV/AIDS IN THE WORLD OF WORK AND THE MOTIVATION FOR HIV/AIDS WORLD OF WORK PROGRAMMES**

“Death from AIDS of working age adults is a real an immediate crisis”; according to the opposition Democratic Alliance, in response to the Statistics South Africa mortality report as reported in the Weekend Argus of 19 February 2005. He furthermore states: “Many of the adults who are dying include nurses and teachers, are critical to South Africa’s future. Yet the Government has no comprehensive human resources plan in place to address this”.

The disease therefore has a macro-economic impact as well as a micro-economic impact in the World of Work.

The financial impact of the HIV/AIDS epidemic in the World of Work is manifested through loss of productivity. There is increased disorganisation in the work place as a result of the loss of productivity caused by morbidity and mortality. The morbidity leads to absenteeism as a result of ill health, or colleagues attending funerals of deceased colleagues or family members. Morbidity further leads to increased staff turnover due to accommodation of infected and affected employees in the work place (with different job descriptions or posts) and eventual loss of skills due to mortality. The resultant drain of skills of highly trained or educated employees are lost to the work force and there is the continuous pressure by employers to train new employees. All of this disorganisation and loss of productivity weaken the staff morale and the financial resources of the employer companies.

The financial cost of the pandemic and the financial impact on a company is difficult to quantify accurately. The cost to specific companies varies because of various factors such as geographic location, industry sector and the degree of dependence on labour.

Actuarial studies at AngloGold Limited for instance forecast that by 2009 HIV/AIDS-related costs will be between 8% and 17% of the company's payroll<sup>31</sup>. At the end of December 2002 the payroll amounted to \$392 million. AngloGold, as South Africa's second-largest employer with as many as 44 828 employees,<sup>32</sup> provided ARV treatment for infected workers at a cost of R2 440 per month per worker. The budget for new HIV/AIDS intervention programmes in 2003 was R7,4 million.

Forecasts from the Department of Labour in a published article in June 2003 predict that 3% of the South African workforce (about 500 000 people) will have full-blown AIDS by 2010.<sup>33</sup> The South African work force adds up to about 16,67 million people and the cost to companies of HIV/AIDS work place programmes vary between R220 and R480 a year per employee. The total cost of these work place programmes will therefore add up to R5 833 million per year (R350 x 16,67 million), this excludes the financial impact of loss of productivity due to mortality or morbidity or the financial loss for an affected family .

The vulnerability of companies can be measured by making financial impact projections based on published HIV/AIDS prevalence rates for different regions or the country as a whole.

HIV/AIDS prevalence statistics as per the ASSA model<sup>34</sup> show the typical impact on the World of Work in terms of HIV/AIDS; it gives an idea of the probable percentage of the workforce that will need ARV treatment. (This enables one to ascertain the materiality of the fringe benefit tax on the company's payroll.)

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<sup>31</sup> Financial Mail, Corporate AIDS awareness, 6 December 2002.

<sup>32</sup> Financial Mail, Corporate AIDS awareness, 6 December 2002.

<sup>33</sup> Mail & Guardian, 4 June 2003, Shock Figures on HIV/AIDS in Workplace.

<sup>34</sup> Dorrington, R E, Bradshaw D & Budlender D, HIV/AIDS profile in the provinces of South Africa, Indicators for South Africa (ASSA model 2000), Centre for Actuarial Research, Medical Research Council, Actuarial Society of South Africa, 2002



A prevalence rate is the percentage of a group that is infected by HIV at a particular time and the rates in the ASSA model <sup>35</sup> are classified in the different provinces of South Africa in different categories and distinguish between gender and age bands.

Other statistics<sup>36</sup> in South Africa make further distinctions in terms of style (race) and specific age bands.

Through the statistics supplied by the ASSA model <sup>37</sup> a company can make an assessment of the potential financial impact in the World of Work or work place specifically and re-assess the situation as the future demographics of the company change. A mathematical projection is made with the estimated prevalence for gender and race and designation given the cost-to-company of the employees.

It is with this potential prevalence rate that the company normally embarks on a Voluntary Counselling and Training (VCT) programme where the employees then get to know their HIV status. Knowing their status is all fair and well but owning their status involves social, cultural, psychological and medical issues that the employee is not equipped to finance with his monthly income. The employee needs HIV/AIDS Disease Management or medical treatment if diagnosed as HIV positive. The company in turn wants a healthy work force, as a healthy work force equates to production and if the company is financially secure and healthy it would be sustainable and the income of the employees will therefore be sustainable. The employer augments the income of the employee to make the treatment of the disease affordable by paying for the HIV/AIDS Disease Management. As such the employer is securing the health of the company's human capital and therefore as the expense is incurred in the production of income it is a section 11(a) deduction for Income Tax purposes.<sup>38</sup>

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<sup>35</sup> Dorrington, R E, Bradshaw D & Budlender D, HIV/AIDS profile in the provinces of South Africa, Indicators for South Africa (ASSA model 2000), Centre for Actuarial Research, Medical Research Council, Actuarial Society of South Africa, 2002

<sup>36</sup> Progress report on the Global response to the HIV/AIDS Epidemic 2003, UNAIDS, Geneva, Switzerland, September 2003

<sup>37</sup> Dorrington, R E, Bradshaw D & Budlender D, HIV/AIDS profile in the provinces of South Africa, Indicators for South Africa (ASSA model 2000), Centre for Actuarial Research, Medical Research Council, Actuarial Society of South Africa, 2002

<sup>38</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

The tax deductibility of Awareness, Training and VCT should not be questioned as this is seen as a normal section 11(a) deduction.

*“11. General deductions allowed in determination of taxable income.—For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived—*

- (a) expenditure and losses actually incurred in the production of the income, provided such expenditure and losses are not of a capital nature... ”<sup>39</sup>.*

Many initiatives exist that put pressure on the World of Work to proactively protect their human capital by making use of HIV/AIDS Awareness and Training programmes either internally or through external consultants.

Voluntary Counselling and Testing (VCT) programmes are conducted in the World of Work as prescribed in the Employment Equity Act<sup>40</sup>. The VCT process makes the individual employee aware of his or her HIV/AIDS status and as such the employee or employer can take the necessary action for the employee to maintain the HIV negative status or if HIV positive to get involved in HIV/AIDS Disease Management programmes.

Course material presented by the Department of Virology on Epidemiology University of Stellenbosch, Prof Estrilita Van Rensburg<sup>41</sup>; discuss different stages, five in total of AIDS progression caused by HIV and if undetected an individual will die within 10 years of contracting the disease. Once the employee knows his HIV status and has been taken care of by a medical practitioner or Disease Management programme, the employee's life can

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<sup>39</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>40</sup> Employment Equity Act 55 of 1998

<sup>41</sup> Prof E Van Rensburg, Notes on epidemiology, module 1, 2004, MPhil in HIV/AIDS, University of Stellenbosch

be prolonged considerably. It is known that with the correct care and treatment an individual can lead a normal life.

The VCT- and Disease Management treatment consist of:

- Determining the HIV status of the employee through a Rapid test procedure either by testing the saliva of the individual or doing a finger prick test after the employee has been given pre-test counselling.
- Confirmation of the HIV status of the employee by way of an ELISA laboratory testing procedure where blood is drawn from the individual and the blood samples are sent to a laboratory for screening and testing.
- The employee's status is divulged at a post-test counselling session at which time a confirmatory ELISA test is normally conducted.
- Once the HIV status has been confirmed as positive CD4 laboratory testing on blood samples will determine how far the disease has progressed (Stage 1 -5).
- The CD4 count is an indication of the resistance of the immunological system of the individual to the disease. A low CD4 count indicates that treatment should start.
- In South Africa treatment generally starts at a CD4 count of 200.
- ARV treatment is administered by choosing the correct ARV combination or regime.
- The ARV treatment often has adverse side effects and therefore the individual needs to be monitored.

The effect of the treatment furthermore has to be monitored by taking further blood samples to be screened at a pathology laboratory to determine whether the individual's CD4 count improves.

If the employer were to pay for the Disease Management component, the Commissioner of Inland Revenue determines that a fringe benefit arises and determines that the

employee has to be taxed according to the Seventh Schedule of the Income Tax Act<sup>42</sup> by having the benefit taxed.

The Employment Equity Act<sup>43</sup> however determines that the HIV/AIDS testing process has to be confidential but the Income Tax Act<sup>44</sup> imposes the fringe benefit tax.

The International Labour Organisation (ILO)<sup>45</sup> has the following to say of confidentiality, continuation of employment relationship and care and support:

#### Confidentiality

‘There is no justification for asking job applicants or workers to disclose HIV-related personal information. Nor should co-workers be obliged to reveal such personal information about fellow workers. Access to personal data relating to a worker’s HIV status should be bound by the rules of confidentiality consistent with the ILO’s code of practice on the protection of workers’ personal data, 1997’

#### Continuation of the employment relationship

‘HIV infection is not a cause for termination of employment. As with many other conditions, persons with HIV-related illnesses should be able to work for as long as medically fit in available, appropriate work.’

#### Care and support

‘Solidarity, care and support should guide the response to HIV/AIDS in the world of work. All workers, including workers with HIV, are entitled to affordable health services. There should be no discrimination against them and their dependants in access to and receipt of benefits from statutory social security programmes and occupational schemes.’

*ILO Code of Practice on HIV/AIDS and the World of Work, 2001*

<sup>42</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>43</sup> Employment Equity Act 55 of 1998

<sup>44</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>45</sup> ILO Code of Practice on HIV/AIDS in the World of Work, 2001

#### 4. RESEARCH STUDY TOPIC AND METHODOLOGY

##### **Topic: Fringe Benefits Tax on HIV/AIDS Disease Management of Employees in the World of Work**

The purpose of the research study topic would be to, to find a possible solution to the problem as stated, by:

1. Analysing the definition of taxable benefit (section 7 below of this article) by looking at the Seventh Schedule and paragraph ( c ) of the Gross Income definition of the Income Tax Act<sup>46</sup>
2. Analysing the protection of rights of employees (section 8 below of this article) in terms of the Employment Equity Act<sup>47</sup>
3. Investigating opinions by business leaders (section 9 below of this article) in terms of possible solutions:
  - a. Business Unit South Africa (BUSA)
    - i. Paragraph 10(2) c of the Seventh Schedule to the Income Tax Act<sup>48</sup>
    - ii. Addition of a sub-paragraph 10(3) or a new paragraph 10B<sup>49</sup>
    - iii. Section 18(1) deduction and Paragraph 11B (4) of the Fourth Schedule<sup>50</sup>
  - b. British American Tobacco South Africa (BATSA)
    - i. The establishment of a Public Benefit Organisation (PBO), in terms of section 30<sup>51</sup>
    - ii. Considering whether the Income Tax Act<sup>52</sup> is in conflict with the South African Constitution
    - iii. Considering a Benefit fund versus the law in terms of Insurance and Medical funds or schemes.

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<sup>46</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>47</sup> Employment Equity Act 55 of 1998

<sup>48</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>49</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>50</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>51</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>52</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

- iv. No taxable benefit for employees if the employer does not seek to deduct the Disease Management expenses for Income tax purposes.
  - v. Considering Cell Captive Insurance as an option
4. Look at tax relief measures proposed by business leaders (section 9 below of this article) and other vehicles that could possibly fund the Disease Management component:
- a. Adapting existing initiatives:
    - i. Amendment of paragraph 10(2) c of the Income Tax Act<sup>53</sup>
    - ii. Paragraph 12A of the Income Tax Act <sup>54</sup>
    - iii. A limited outsourced payroll
  - b. Proposing new initiatives
    - i. Section 25B and section 30 of the Income Tax Act<sup>55</sup> in terms of donations and distributions from Trusts.
    - ii. Paragraph 12(A) (2)<sup>56</sup> as a mechanism to calculate the taxable benefit in the hands of all employees as interpreted as a deemed taxable benefit according to paragraph 16(1) of the Seventh Schedule

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<sup>53</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>54</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>55</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>56</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

## 5. PROBLEM STATEMENT AND MOTIVATION

The problem to be addressed in industry is that employers need to know how:

- a. To maintain the anonymity of employees in terms of the South African Constitution and the Employment Equity Act<sup>57</sup> in terms of their HIV/AIDS status.
- b. To obtain the optimum tax benefit for the employer and employees
- c. To address the perceived conflict between the Income Tax Act<sup>58</sup> and the Employment Equity Act<sup>59</sup>.

The HIV/AIDS Disease Management or treatment programmes provided by employers are seen as a crucial element in combating the adverse effects of the AIDS caused by the HIV contracted due to social and economic reasons (section 2 above of this article).

An employer can make a serious contribution by augmenting an employee's income by offering to pay for the medical services associated with Anti- Retroviral (ARV) therapy. These services can be given from clinics situated at the World of Work or through independent organisations that manage the HIV/AIDS World of Work programmes on behalf of the employers.

Government through the Department of Health<sup>60</sup> recognises the role of the employers and as such endorses a guideline document to be used in the World of Work. The Employment Equity Act<sup>61</sup> recognises the employees' right to confidentiality and prescribes procedures for Counselling and Treatment and specifies that the process has to be voluntary and hence the term VCT for the Voluntary Counselling and Testing programmes conducted in the World of Work.

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<sup>57</sup> Employment Equity Act 55 of 1998

<sup>58</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>59</sup> Employment Equity Act 55 of 1998

<sup>60</sup> National HIV and Syphilis Antenatal Sero-prevalence Survey in South Africa: 2002 report

<sup>61</sup> Employment Equity Act 55 of 1998

The adverse interpretation of the Seventh Schedule of the Income Tax Act<sup>62</sup> in terms of the HIV/AIDS Disease Management benefit, results in a breach of confidentiality and possible resultant discrimination of the employees in the World of Work. In order to comply with the Income Tax Act<sup>63</sup> the employees' HIV/AIDS status have to be known in order for Human Resource Management to affect the necessary fringe benefit effect on their Income Tax certificate, the IRP5. The South African Revenue Services (SARS) had made a statement in public that in terms of their secrecy regulations the confidentiality of the employees will be safe. It however still means that employees in the Human Resource Departments of the respective employers need to be sworn to secrecy in order to comply with SARS' regulations. Suggestions such as an outsourced payroll have been made but it would still mean that the employers need to keep records of the IRP5's and maintain responsibility for the deduction of PAYE and maintenance of records in terms of the Income Tax Act<sup>64</sup> and Companies Act, 1974 and Close Corporations Act 1984 and therefore the confidentiality as suggested in the Employment Equity Act<sup>65</sup> stays in breach.

The cost of Anti-Retroviral Drug therapy and Disease Management can be very severe and most employees will not be in a position to pay between R8 500<sup>66</sup> and R33 600<sup>67</sup> a year for treatment. The company in order to secure its human capital supplies the necessary treatment via some Disease Management programme that it pays for as part of their general deductions for Income Tax. The Commissioner of Inland Revenue through the implementation of the Seventh Schedule of the Income Tax Act<sup>68</sup> imposes PAYE on the benefit. A blue-collar worker earning say R30 000 a year will pay no Income Tax in the 2005 tax year. The treatment of say R30 000 will constitute a fringe benefit of R10 000 according to paragraph 2(i)<sup>69</sup> and R30 000 according to paragraph 2(e) and

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<sup>62</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>63</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>64</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>65</sup> Employment Equity Act 55 of 1998

<sup>66</sup> Aid for Aids, NUMSA, volume 3 nr 2, July 2004, Employers trip on the Receiver's carpet

<sup>67</sup> Du Plessis J A *South Africa*, 20 January 2003, countdown to 2010: Management Briefing

<sup>68</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>69</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003



2(h)<sup>70</sup> and hence will attract tax in the form of PAYE of R116.67 per month on the additional R10 000 per year, constituting an increase in spending of 4.67% per month for employees with a medical aid, according to paragraph 2(i)<sup>71</sup> and three times more for employees without a medical aid as they will be taxed according to paragraph 2(e)<sup>72</sup>. As salaries differ in an organisation and tax increases on a sliding scale, the impact of the benefit will compound for the lower to medium income earners.

The deduction of PAYE is easy to calculate but the impact on the individual of making an HIV status known in the WOW in terms of discrimination and stigmatisation is immeasurable.

A happy medium should therefore be found to maintain anonymity and the lowest tax benefit for the individual when the employer is prepared to not only pay for VCT and Education and Training of HIV/AIDS in the work place, but is also prepared to pay for HIV/AIDS Disease Management outside of the work place or “off-site”.

## **6. RESEARCH STUDY LIMITATIONS**

The study is limited to South Africa and no opinion will be given on International practice.

It is also limited to the interpretation of The Income Tax Act 58 of 1962, as amended at the last Revenue Laws Amendment Act 45 of 2003.

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<sup>70</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>71</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>72</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

## 7. TAXABLE BENEFIT DEFINITION

The Income Tax Act <sup>73</sup> poses a threat to employers and employees alike in terms of the deductibility of HIV/AIDS treatment or Disease Management “off-site”; where the deduction for the employer can be disallowed as excessive expenditure in terms of excessive payments of remuneration and the interest paid component if a bank overdraft is used to finance the cost of the taxable benefit.

In turn in terms of the employees, a taxable benefit could be recognised in terms of paragraph (c) of the gross income definition for benefits received in cash or cash equivalents or in terms of the Seventh Schedule of the Income Tax Act <sup>74</sup> for the benefits derived from HIV/AIDS Disease Management programmes offered by the employer “off-site”.

The taxable benefit in the hands of the employee can be a full taxable benefit in terms of:

- “cheap services” paragraph 2 (e)<sup>75</sup>,
- payment of debts as described by paragraph 2(h)<sup>76</sup> or
- in terms of paragraph 2(i)<sup>77</sup> that of a medical benefit.

In order to satisfy paragraph 2(i) the contribution needs to be made to a medical fund and for employees that have Standard Income Tax for Employees (SITE) deducted from their remuneration the payment has to be adjusted on a monthly basis. This is to correctly calculate the taxable income from which SITE is deducted in order for SITE to be correctly calculated once the employees’ IRP 5 certificates are issued. The treatment of a medical benefit is more beneficial for an employee as one third of the benefit is taxable and two thirds of the benefit is exempt.

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<sup>73</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>74</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>75</sup> Seventh Schedule Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>76</sup> Seventh Schedule Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>77</sup> Seventh Schedule Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

A taxable benefit does not only exist for the employees' individual benefit but also in terms of redirected expenses e.g. when a spouse or child or other person receives a benefit by virtue of the employee's employment. The employee will be taxed on the benefit, according to paragraph (i) of the definition of the term 'gross income'.<sup>78</sup>

This article will therefore scrutinise the Income Tax Act in terms of paragraph (c) of the gross income definition, excessive remuneration and focus in particular on the taxable benefits described in the Seventh Schedule<sup>79</sup>.

#### **a) Gross Income definition**

Paragraph (c) of the Income Tax Act<sup>80</sup> determines that there must be included in a person's gross income in any year or period of assessment<sup>81</sup>, any amount, including a voluntary award, received or accrued in respect of services rendered or to be rendered or any amount received or accrued in respect of or even by virtue of any employment or the holding of an office, other than an amount referred to in section 8(1) (allowances or advances to employees or office holders).

Excluded from the outline of paragraph (c) is any benefit or advantage to which paragraph (i) of the definition applies, that is specifically any fringe benefit taxable in the hands of the individual in terms of the Seventh Schedule (paragraph (c)(i)). The general definition of 'gross income' relates specifically to amounts 'in cash or otherwise', it is therefore understood that any reward for services in a form other than cash escaping inclusion under the Seventh Schedule could still be taxable under paragraph (c) of the definition of gross income.

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<sup>78</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>79</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>80</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>81</sup> Silke on South African Income Tax, 2004, (electronic copy)

## b) Excessive remuneration

The policy of SARS<sup>82</sup> is to challenge amounts paid as excessive only when such amounts reflect relatively large increases in comparison with amounts charged in previous years. If an employer therefore embarks on a Voluntary Counselling and Testing programme (VCT) as well as pay for the Disease Management for the employees “off-site”; the VCT would be seen as a fresh expense in year 1 and would be scrutinised in terms of section 11 (a) of the Income Tax Act<sup>83</sup> the next year.

If Disease Management were to be included in remuneration and it results in a substantial increase in the remuneration expense of the employer from one year to another it can be interpreted as an excessive increase and the South African Revenue Service (SARS) may want to disallow the expense for the company despite the fact that the employee had paid fringe benefit tax. SARS will further look at particular employees on the payroll to see whether their salaries are not excessive.

In the example of the blue-collar worker that earns a market related salary of say R30 000, he now effectively earns R60 000, and can be taxed in three different ways as a taxable benefit:

- If he has a medical aid, R40 000 will be exempt and R20 000 taxable in his hands making his taxable income taxable R50 000 in terms of paragraph 2(i)<sup>84</sup>
- R60 000 in terms of “cheap services paragraph 2 (e)<sup>85</sup>”
- R60 000 in terms of payments of employee debts according to paragraph 2(h)<sup>86</sup>.

The affected and infected employee now no longer earns a market related salary and the salary could be seen as excessive!

In one case<sup>87</sup> it was said in the Special Court that:

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<sup>82</sup> Silke on South African Income Tax, 2004, (electronic copy)

<sup>83</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>84</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>85</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>86</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

*“Now, when it is said that remuneration is excessive, and accordingly must be regarded as not expended in the production of the income, this court, in determining the question under s 11(2)(a) is not exercising discretionary powers, nor must it necessarily look to the direct effect of the remuneration which is said to be excessive. Accordingly, when it is sought to rule out remuneration under s 11(2)(a) it would seem that the considerations that should influence the court would be – (a) that the remuneration is so grossly excessive that it could not possibly be regarded in its total amount as producing income, and (b) that it had been awarded from some ulterior motive, such as, for example, tax evasion or favouritism or the like. For apart from such motives, any award, however high, only results in the liability for tax being transferred from the shoulders of one taxpayer to another.”*

From this court case it can be construed that SARS could see the benefit deducted by the employer to secure his human capital in order to secure its survival and improve its production by paying for a Disease Management programme as excessive and can disallow the expense for the company.

As justification for the excessive remuneration one can look at a number of court cases where the Special Court<sup>88</sup> had to decide whether alleged excessive remuneration was in fact in the production of income. The court took into account various factors such as the particular value or the nature of the services rendered, the nature of the business, the relationship between the employer and the employee. Another factor looked at was whether the amount of the remuneration in relation to the net profit earned by the employer was realistic and the dependence of the remuneration paid on the profits earned.

From some of these Special Court cases quite a strong argument can be formulated where despite the fact that the net profit in relation to the remuneration paid may not be in line in a particular year, the pro-active intervention of a Disease Management programme will

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<sup>87</sup> ITC 569 (1944)

<sup>88</sup> ITC 335 (1935), ITC 345 (1935), ITC 348 (1936), ITC 397 (1937), ITC 428 (1938), ITC 473 (1940), ITC 502 (1941), ITC 577 (1944), ITC 610 (1945), Verrinder Ltd vs. CIR 1949 (2) SA 147(T), ITC 781 (1953), ITC 1214 (1974), ITC 1518 (1989), ITC 1530 (1990)

secure the net profit of the company in ensuing years. Another argument would be the converse in that due to increased morbidity and mortality the net profit of the company is decreasing and therefore it is imperative to spend excessive amounts on remuneration.

The Commissioner of Inland Revenue normally, before objection, then disallows a portion of remuneration, interest or rental payable by a company to its shareholders as being excessive and not incurred in the production of income. The rationale for an apportionment of say interest paid as a deduction is that the interest paid on an overdraft facility to finance the excessive expense is not in the production of income. It is SARS's practice to subject the recipient of the benefit to tax on the full amount received as an amount in respect of services rendered. This does not make sense because any particular amount disallowed as a deduction should not be taxable in the hands of the recipient according to case law<sup>89</sup>. It has been held that a recipient of salary or remuneration is not entitled to claim that his assessment should be reduced, on the grounds that his services are not worth the whole of the remuneration received<sup>90</sup>. From this last reported case the employer stands a chance of losing the tax deduction of excessive remuneration and possible excessive interest paid but the employee will still be taxed on the benefit in terms of the Seventh Schedule<sup>91</sup>.

### **c) The Seventh Schedule**

The Seventh Schedule to the Income Tax Act <sup>92</sup> determines the actual amount to be included in the gross income of a person for the year or period of assessment. This amount includes the cash equivalent, of the value during the year of assessment of a benefit or advantage granted in respect of employment or in respect of the holding of an office that is a taxable benefit as defined in that Schedule.

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<sup>89</sup> W F Johnstone and Co Ltd v CIR 1951 (2) SA 283 (A)

<sup>90</sup> Director v COT 1949 (2) SA 751 (SR)

<sup>91</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>92</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

Paragraph 2 deems a taxable benefit to an employee by his employer in respect of the “...a taxable benefit shall be deemed to have been granted by an employer to his employee in respect of the employee’s employment with the employer if, as a benefit or advantage of or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer, certain types of fringe benefits are bestowed upon the employee”. This deeming of a taxable benefit applies to the Seventh Schedule<sup>93</sup> and of paragraph (i) of the definition of the term ‘gross income’ in section 1.

No liability for tax can arise under the Seventh Schedule<sup>94</sup> unless the necessary, causal link with services required by paragraph 2 is present. The fringe benefit that the employee benefits from must also be in the following manner

- As a benefit or advantage of the said employment
- By virtue of the employment or
- As a reward for services rendered or to be rendered by the employee to the employer.

It therefore follows that for a tax liability to exist under the Seventh Schedule<sup>95</sup> there must be an employment contract between an employer and an employee. An ‘employer’ is defined as a person who is an ‘employer’ as defined in paragraph 1 of the Fourth Schedule<sup>96</sup>.

An ‘employee’ is defined in paragraph 1 of the Seventh Schedule in relation to an employer. An ‘employee’ is primarily defined as a person who is an employee in relation to a particular employer for the purposes of the Fourth Schedule<sup>97</sup> and as a consequence receives remuneration and where the employer deducts employee’s tax from the remuneration.

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<sup>93</sup> Silke on South African Income Tax, 2004, (electronic copy)

<sup>94</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>95</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>96</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>97</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

The Income Tax Act<sup>98</sup> expands the definition of employer to include an associated institution. This associated institution is any other company managed or controlled by substantially the same people who manage the employer's company. The benefits derived from funds<sup>99</sup> set up by the employer or an associated institution, where the benefits of the funds are made available for the benefit of employees, former employees or family of deceased employees or distributed to these individuals, also fall in the ambit of the definition of employment benefits. The benefits are taxable in the hands of the employee who enjoys the benefit. This also applies to the heir of the deceased employee or the spouse or the retired employee.

A taxable benefit is therefore deemed to be taxed or is taxed in the hands of the employee according to the Seventh Schedule<sup>100</sup> but there is also a further safety net for SARS in the Income Tax Act<sup>101</sup> in that the benefit that the employees receive can also be taxed in the employees' hands in terms of the definition of gross income if the benefit was received in cash.

The Seventh Schedule<sup>102</sup> further obliges the employer to make the necessary tax deduction from the employees' remuneration but SARS has the right to redetermine the amount once the employee is assessed in terms of Income Tax. All employees are not registered for Income Tax and predominantly pay SITE and as the Seventh Schedule obliges the employer to deduct the correct employees' tax it follows that the employer could possibly be held liable by SARS if an audit of the payroll were to be conducted by SARS. The author's experience is that SARS's practice is to conduct payroll audits and as such levy penalties for non submission of PAYE/SITE and section 89(quat) interest on underpayment of PAYE/SITE to the employer.

*“When an amount of provisional tax, penalty or additional tax payable in terms of the Fourth Schedule and an amount of interest payable in terms of s 89bis... becomes due or*

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<sup>98</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>99</sup> Silke on South African Income Tax, 2004, (electronic copy)

<sup>100</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>101</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>102</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003



*is payable, it will be deemed to be a debt due to the state and may be recovered by the Commissioner in the manner prescribed in s 91 ... for the recovery of tax and interest due or payable under the Act (para 31 of the Fourth Schedule). No reference is made in this provision to the interest payable under s 89quat ..., but s 91 itself makes provision for the recovery of this interest.”<sup>103</sup>*

The employee however has a right to request a directive from SARS if he were to be unsatisfied about the amount of the cash equivalent included in his gross income.

The employer must prepare and furnish ‘fringe-benefit certificates’ 30 days after the end of a year or period of assessment during which the employee has enjoyed a taxable benefit granted to him by the employer (paragraph 14 Fourth Schedule)<sup>104</sup>. The certificate must show the nature of the taxable benefit and the full cash equivalent of its value during the year or period. The employer, within the same thirty-days, must also deliver a copy of this fringe-benefit certificate to the Commissioner of Inland Revenue for the period or authorised extended period<sup>105</sup>. An onerous penalty is imposed on the employer by SARS of 10% of the cash equivalent of the employee.

The taxable benefit or cash equivalent in terms of Disease Management would be in terms of paragraph 2(e) “cheap services” or paragraph 2(h) “payment of employee’s debts” of the Seventh Schedule<sup>106</sup>. It arises when the employer pays for a service rendered to the employee by the employer or by any other person and that service has been utilised by the employee for his private or domestic purposes either for no consideration or for a consideration less than the amount of the ‘lowest fare’ referred to in paragraph 10(1)(a)<sup>107</sup> or less than the cost referred to in paragraph 10(1)(b)<sup>108</sup>.

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<sup>103</sup> Silke on South African Income Tax, 2004, (electronic copy)

<sup>104</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>105</sup> Paragraph 17(3) Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>106</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>107</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>108</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

The cash equivalent of the value of a taxable benefit derived from the rendering to the employee of such a service will be fixed under either the 'lowest-fare' or the 'cost' method:

- Services rendered by an employer to his employees at their place of work for the better performance of their duties.
- Services rendered by an employer to his employees at their place of work as a benefit to be enjoyed by them at that place.

Employees' tax must be deducted from the full cash equivalent of the value of the taxable benefit enjoyed by an employee and the amount of this cash equivalent must be reflected on the employee's tax certificate. The employees' tax must be deducted in the month in which the benefit accrues to the employee, unless the deduction is excessive in relation to his remuneration for that month, in which event the deduction of tax may be spread over the balance of the year of assessment during which the benefit accrued.

In the example of an annual salary for a blue-collar worker of R30 000 per year with Disease Management of R30 000; the employee would therefore be taxed at a full R60000 per year unless it is funded as a medical benefit where under these circumstances only one third of the benefit<sup>109</sup> is taxable in the hands of the employee.

Furthermore where an employer contributes a lump sum in respect of all or a class of employees 'in such a manner that an appropriate portion thereof cannot be attributed to' the relevant employee or his dependants, the excess contribution (the taxable benefit) is apportioned equally amongst the employees in accordance with the formula depicted in paragraph 12A (2)<sup>110</sup> akin to a medical fund contribution. If the Commissioner of Inland Revenue is not satisfied that this formula is a fair representation of apportionment, he may use his discretionary powers to tax it differently.

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<sup>109</sup> Paragraph 2(i), Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>110</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

In conclusion the Income Tax Act<sup>111</sup> therefore poses a threat to an employer in terms of deductibility of Disease Management in terms of excessive remuneration or in terms of an apportionment of interest paid on overdraft to finance the expense.

Furthermore in terms of the employee the Seventh Schedule<sup>112</sup> sanctions the employer to deduct PAYE from the employee's income for the taxable benefit enjoyed if the employer pays for Disease Management. Paragraph ( c) of the Gross Income definition<sup>113</sup> imposes a further threat if the employee were to receive a benefit in cash or otherwise for the treatment of the disease.

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<sup>111</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>112</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>113</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

## 8. PROTECTION OF EMPLOYEE RIGHTS THROUGH EMPLOYMENT EQUITY ACT NO. 55 OF 1998

As a first resort we need to scrutinise the Employment Equity Act<sup>114</sup> to determine whether this Act is in conflict with the Income Tax Act<sup>115</sup> in terms of the confidentiality of the employee, specifically with regards to HIV/AIDS treatment.

The preamble to the Employment Equity Act<sup>116</sup> quotes that as a result of apartheid and other discriminatory laws and practices disparities exist in the labour market creating pronounced disadvantages for certain categories of people. The Employment Equity Act<sup>117</sup> therefore promotes the constitutional right of equality, eliminates unfair discrimination in employment and ensures the implementation of Employment Equity to redress the effects of discrimination.

The preamble to this Act wants to equalise the “pronounced disadvantages for certain categories of people”. These categories of people had existed as a result of Apartheid. HIV/AIDS is more prevalent amongst Black Females<sup>118</sup> the HIV/AIDS disease is therefore perceived as <sup>119</sup>a disease of the Black or the poor or the disadvantaged. Not only is employment encouraged that will alleviate poverty but the employees’ right in terms of discrimination also seems to be protected.

Chapter II on Prohibition of Unfair Discrimination, paragraph 5<sup>120</sup>, encourages every employer to take the necessary steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

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<sup>114</sup> Employment Equity Act 55 of 1998

<sup>115</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>116</sup> Employment Equity Act 55 of 1998

<sup>117</sup> Op cit

<sup>118</sup> National HIV and Syphilis Antenatal Sero-prevalence Survey in South Africa: 2002 report and The Weekend Argus, February 19 2005 (females only)

<sup>119</sup> Cf. DUESBERG, P.H. (1996): *Inventing the AIDS Virus*, Washington D.C.: Regnery; RASNICK, D. *Talked with President Thabo Mbeki* (2 March 200), <http://www.virusmyth.com/aids/news/drtalkmbeki.htm>; GESHEKTER, C. The Plague that Isn't: *Poverty is Killing Africans, not an alleged AIDS Pandemic*, says U.S. Policy Adviser, <http://www.virusmyth.com/aids/data/cgpoverity.htm>

<sup>120</sup> Employment Equity Act 55 of 1998

Paragraph 6(1) of the Employment Equity Act <sup>121</sup> states that “no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”

The Employment Equity Act stipulates in paragraph 7(2)<sup>122</sup> of the Employment Equity Act how medical testing of an employee for HIV purposes should be conducted; “Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of this Act.”

The Employment Equity Act <sup>123</sup> is in essence a law to combat unfair discrimination and promote equal opportunities for previously disadvantaged people. The Act furthermore specifies the targeted numbers of previously disadvantaged employees to be given equal opportunities in different sectors of the work place. Statistics from UNAIDS<sup>124</sup> designate HIV/AIDS prevalence in race, gender and age bands. From these statistics the Black female seems to be the most vulnerable in terms of HIV infection and a trend in terms of gender and race can clearly be seen across the gender and race divide. Companies are encouraged to get their internal Employment Equity in line and furthermore laws and regulations exist in terms of Black Economic Empowerment (BEE) when dealing with suppliers or when a company wants to tender or when tenders are awarded.

The pressure from Employment Equity or Affirmative Action measures and BEE requires that companies have to employ more Black employees and as a result employ more vulnerable people. Paragraph 15 of the Employment Equity Act <sup>125</sup> divides a whole section on Affirmative Action measures to ensure that suitably qualified people from designated groups have equal employment opportunities.

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<sup>121</sup> Employment Equity Act 55 of 1998

<sup>122</sup> Employment Equity Act 55 of 1998

<sup>123</sup> Employment Equity Act 55 of 1998

<sup>124</sup> WHO Epidemiological fact Sheets on HIV/AIDS and Sexually Transmitted Diseases, 2002 update

<sup>125</sup> Employment Equity Act 55 of 1998 <sup>125</sup>

Paragraph 15(2)<sup>126</sup> describes measures that the Labour Court can take if an employee has been unfairly discriminated against; the Labour Court has the right to make any appropriate order that is just and equitable in the circumstances.

Paragraph 15(4)<sup>127</sup> describes the process when the Labour Court declares that the medical testing of an employee as contemplated in section 7<sup>128</sup> is justifiable, the Labour Court may make any order that it considers appropriate and may impose conditions relating to—“

- a. the provision of counselling;
- b. the maintenance of confidentiality;
- c. the period during which the authorisation for any testing applies; and
- d. the category or categories of jobs or employees in respect of which the authorisation for testing applies. “

The Employment Equity Act<sup>129</sup> therefore goes to great lengths to protect employees' rights and Part C paragraph 51 is dedicated to Employees' rights<sup>130</sup>. Paragraph 51 (1) limits discrimination; *“No person may threaten a person by preventing an employee from exercising any right conferred by this Act or prejudicing an employee because of past, present or anticipated “*

Paragraph 51(3) dictates that no person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

Paragraph 59 of the Employment Equity Act<sup>131</sup> specifies fines to be imposed on any person convicted of an offence. Paragraph 51 (1)<sup>132</sup> imposes a limitation on any person who discloses any confidential information acquired in the performance of a function in

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<sup>126</sup> Employment Equity Act 55 of 1998

<sup>127</sup> Employment Equity Act 55 of 1998

<sup>128</sup> Employment Equity Act 55 of 1998

<sup>129</sup> Employment Equity Act 55 of 1998

<sup>130</sup> Employment Equity Act 55 of 1998

<sup>131</sup> Employment Equity Act 55 of 1998

<sup>132</sup> Employment Equity Act 55 of 1998

terms of this Act, for instance an Human Resource Manager who knows the HIV/AIDS status of an employee by virtue of his function as a manager. As a manager responsible for the payroll function who by virtue of his knowledge of the source of the taxable benefit discloses the confidential information to another will be in breach of this paragraph.

This section of paragraph 51<sup>133</sup> could imply that a Human Resource Manager may not divulge confidential information to SARS but then Paragraph 51 (2)<sup>134</sup> states that the subsection (1) does not apply if the “*information*

- a. is disclosed to enable a person to perform a function in terms of this Act; or*
- b. must be disclosed in terms of this Act, **any other law** (bold inserted) or an order of court.”*

The Employment Equity Act<sup>135</sup> seems to be a very severe Act that imposes penalties on employers for not complying with the conditions of Act but then paragraph 51(2)(b)<sup>136</sup> sanctions the disclosure of the information to the South African Revenue Services (SARS). With the words “any other law” the spirit of the Employment Equity Act<sup>137</sup> is broken. Is this an oversight or an inferior law?

The Employment Equity Act<sup>138</sup> therefore complies with the Income Tax Act<sup>139</sup> in terms of the taxation of taxable benefits for employees and has no real say outside of the Income Tax Act<sup>140</sup>. It is in essence in conflict with the International Labour Organisation’s (ILO) Code of Practice<sup>141</sup> in terms of confidentiality, continuation of the employment relationship and care and support.

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<sup>133</sup> Employment Equity Act 55 of 1998

<sup>134</sup> Employment Equity Act 55 of 1998

<sup>135</sup> Employment Equity Act 55 of 1998

<sup>136</sup> Employment Equity Act 55 of 1998

<sup>137</sup> Employment Equity Act 55 of 1998

<sup>138</sup> Employment Equity Act 55 of 1998

<sup>139</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>140</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>141</sup> ILO Code of Practice on HIV/AIDS and the World of Work, 2001

It is obvious from the following section that Business Leaders are endeavouring to have the Income Tax changed rather than the Employment Equity Act, whereas it would probably have been much easier to attempt to change paragraph 51(2) (b) of the Employment Equity Act to by adding a third condition by way of section c : “(1) *does not apply if the information* “

- a. *is disclosed to enable a person to perform a function in terms of this Act; or*
- b. *must be disclosed in terms of this Act, any other law or an order of court,*
- c. ***unless conflict exists between this Act and any other law then this must be referred to a higher court*** (self inserted proposed change to Employment Equity Act).



## 9. INDUSTRY OPINIONS AND INITIATIVES

### a) Opinions of Business Leaders such as BUSA and SACOB

HIV/AIDS is seen as a pandemic that affects the employer and employee alike and has a higher financial impact on the employer than other chronic diseases such as cancer and diseases of the heart. The HIV/AIDS prevalence statistics (section 2 above of this article) available gives an indication of the potential prevalence in a company and from prevalence rates the potential financial impact on the company can be calculated.

It is therefore encouraging to see initiatives from business leaders to try and alleviate the pandemic by setting up workgroups to change the tax legislation although these initiatives should not be seen as the only solution to the behavioural problem surrounding HIV/AIDS.

SACOB or the South African Coalition of Business has a tax committee which has set up a workgroup on AIDS to inter alia look at the question of the taxable benefits arising from HIV/AIDS Disease Management in the work place. SACOB again forms part of Business Unity South Africa or BUSA, along with other organisations such as NAFCOG.

The BUSA AIDS task team has considered possible options for dealing with the taxable benefit arising from HIV/AIDS treatment or Disease Management and the associated breach of confidentiality.

In their opinion *“no value is placed on the fringe benefit where services are rendered by an employer to employees at their place of work for the better performance of their duties or as a benefit to be enjoyed by them at that place. This includes medical services and medicines. Thus, employees who benefit from HIV/AIDS treatment on site are not liable for fringe benefit tax. Where the same treatment is provided off site, the exemption does not apply and the employees in question are subject to tax...”*

The interpretation therefore is that no taxable benefit exists if the Disease Management is conducted at the employees' place of work, “on-site”.

BUSA<sup>142</sup> however has given Government three proposed changes to the Income Tax Act<sup>143</sup>. As a provisional measure they offer the following options for consideration and as a first option considers revising paragraph 10(2)<sup>144</sup> to clarify the question of “on-site” or “off-site” treatment:

**Option 1: Paragraph 10(2) of the Seventh Schedule of the Income Tax Act<sup>145</sup>** “(2) *No value shall be placed under this paragraph on*” to be amended by adding a subparagraph (d) reading: “(d) *any services rendered by an employer to his employee for the treatment of HIV/AIDS with which the employee is infected*”

The proposed change of inserting (d) to section 10 (2) exempts the benefit arising as a result of HIV/AIDS treatment at the place of work (“on-site”) or from the place of work (“off-site”) as the benefit is taxable in paragraph 10(1)(b):<sup>146</sup>

Paragraph “10. (1) *The cash equivalent of the value of any taxable benefit derived from the rendering of a service to any employee as contemplated in paragraph 2 (e) shall be—*<sup>147</sup>, “*The cash equivalent of the value of any taxable benefit derived from the rendering of a service to any employee as contemplated in paragraph 2 (e) shall be - ... (b) the cost to the employer in rendering such as service or having such a service rendered, less the amount of any consideration given by the employee in respect of such a service.*”

The motivation for the proposed revision of inserting (d) in paragraph 10(2) is on what is provided for in paragraph 10(2) ( c)<sup>148</sup>: “*any services rendered by an employer to his employees at their place of work for the better performance of their duties or as a benefit to be enjoyed by them at that place or for recreational purposes at that place or a place of recreation provided by the employer for the use of his employees in general.*”

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<sup>142</sup> BUSA, 31 August 2004, [third draft \(not for publication\)](#), BUSA AIDS task team,

<sup>143</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>144</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>145</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>146</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>147</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>148</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

The Income Tax Act in paragraph 10(2)(c)<sup>149</sup> allows an exemption for:

- Any service rendered by the employer for the better performance of the employees at their place of work (on site)
- Or recreational purposes
- Or a place provided for recreational purposes.

The first portion of paragraph 10(2) (c) “*any services rendered by an employer to his employees at their place of work for the better performance of their duties*” is sufficient to argue that “on-site” HIV/AIDS treatment is exempted and therefore (d) as proposed needs to be inserted to allow for HIV/AIDS treatment “off site”.

As this paragraph allows for off-site recreation it would be difficult for the legislature to argue against the provision of relief for treatment of HIV/AIDS off site by the insertion of (d).

**Option 2:** As the danger exists that SARS will not allow the taxable benefit other than as “cheap services” paragraph 2 (e), and paragraph 2(i) only gives relief in terms of employees that belong to a medical aid, BUSA proposes the amendment of paragraph 10 by adding a **sub-paragraph 10(3)** or a new paragraph 10B reading: “*Where any amount, being the cash equivalent as determined under the provisions of paragraph 2(i) and paragraph 10(1), of the value of a taxable benefit derived by any taxpayer being medical expenses or medical aid contributions paid by the employer on behalf of the employee, has been included in such taxpayer’s taxable income in any year of assessment, such amount shall for the purposes of section 18 of this Act be deemed to be medical expenses or medical contributions paid by the taxpayer*” .

Their motivation for this provision is based on similar deeming provisions in the Income Tax Act<sup>150</sup> contained in paragraphs such as in paragraph 11(5) of the Seventh Schedule, in terms of loan interest. If the legislature deems expenses such as interest on staff loans, taxable in the hands of the employees, these taxable benefits in the form of HIV/AIDS

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<sup>149</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>150</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

Disease Management received by the employees and interpreted as that of “cheap services paragraph 2 (e)”<sup>151</sup>, can therefore be deemed to be that of medical expenses. Their motivation<sup>152</sup> being that it is probably fair to say that expenditure to cover medical expenses be recognised as such for the purposes of section 18 and that the employee derives the benefit in terms of the deduction allowed for in section 18(2) ( c)<sup>153</sup>, where employees who do not belong to a medical fund or have medical aid excesses to pay, are allowed to deduct medical expenses to the extent that they exceed 5% of the employee’s income before these medical deductions.

Statistics indicate that an HIV-infected employee will pay between R6 000 and R24 000 per year for Anti-Retroviral (ARV) medicine currently available in South Africa. In addition to the ARV drugs the Disease Management treatment includes the monitoring of the employee’s CD4 count (a guide of the employee’s immunity ( section 1 of this article above)) as well as other pathology tests done; which amounts to between R40 and R2 000 per test.<sup>154</sup> An infected individual could therefore incur costs of approximately R33 600 per year on ARV treatment and blood tests conducted through regular monitoring of the disease.

In a discussion paper by Jacqueline Arendse and Magda Turner,<sup>155</sup> they look at the impact of section 18<sup>156</sup> on the cash flow of an individual employee.

The application of Section 18(1)<sup>157</sup> deduction above on a hypothetical case<sup>158</sup> listed below, with the average annual cost of HIV/AIDS treatment or Disease Management of about R33 600 per year or R2 800 per month<sup>159</sup> and an annual salary for an employee of R60 000 and a 7,5% contribution of his salary to a pension fund, the allowable deduction

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<sup>151</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>152</sup> BUSA, 31 August 2004, third draft (not for publication), BUSA AIDS task team

<sup>153</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>154</sup> Du Plessis J A *South Africa*, 20 January 2003, countdown to 2010: Management Briefing.

<sup>155</sup> Jacqueline Arendse and Magda Turner, HIV/AIDS in South Africa: is a change of tax policy required? SAICA and School for Accountancy, University of Witwatersrand

<sup>156</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>157</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>158</sup> Jacqueline Arendse and Magda Turner, HIV/AIDS in South Africa: is a change of tax policy required? SAICA and School for Accountancy, University of Witwatersrand

<sup>159</sup> Du Plessis J A *South Africa*, 20 January 2003, countdown to 2010: Management Briefing.

for medical expenditure can be calculated; the effect of the employees' tax on his cash flow and how by re-determining SITE in terms of paragraph 11B (4) of the Fourth Schedule<sup>160</sup> some relief will be provided on assessment. The section 18<sup>161</sup> deduction is available to a SITE-only taxpayer, whose net remuneration, or annual equivalent thereof, does not exceed R60 000 per annum (section 5(1A) (b)) of the Income Tax Act<sup>162</sup>. SARS will redetermine the SITE payable if the employer had not allowed for the expense on the IRP 5 certificate or the cash flow advantage.

Paragraph 11B (4) of the Fourth Schedule<sup>163</sup> empowers the Commissioner of Inland Revenue to amend the SITE determination and make the necessary refund of applicable.

<u>DESCRIPTION</u>	<u>CALCULATION</u>	<u>AMOUNT</u>	<u>PER MONTH</u>
Salary		R60 000	R5 000
<i>Less:</i> Pension contribution	(R60 000 * 7,5%)	<u>(4 500)</u>	<u>(375)</u>
Subject to employee's tax		R55 500	R4 625
Normal tax liability		<u>(6 215)</u>	<u>(518)</u>
After tax income		<u>R49 285</u>	<u>R4 107</u>
Cash flow after medical expenses	R4 107 – 2 800		<u>R1 307</u>
<b>Re-determination of SITE: At the end of the tax year:</b>			
Salary		R60 000	R5 000
<i>Less:</i> Pension	(R60 000 * 7,5%)	<u>(4 500)</u>	<u>(375)</u>
		R55 500	R4 625
<i>Less:</i> Medical expenditure	R33 600 - (55 500 * 5%)	<u>(30 825)</u>	<u>(2 569)</u>
Taxable Income		<u>R24 675</u>	<u>R2 056</u>

<sup>160</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>161</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>162</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>163</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

Tax per tables	(R24 675 * 18%)	R4 442	R370
<i>Less:</i> Primary rebate		(4 860)	
<i>Less:</i> SITE paid		<u>(6 215)</u>	
Refund limited to SITE		<u>R6 215</u>	

Source: Jacqueline Arendse and Magda Turner, HIV/AIDS in South Africa: is a change of tax policy required? SAICA and School for Accountancy, University of Witwatersrand

The authors<sup>164</sup> mentioned above have a further view to what BUSA had proposed in that the 5% reduction of medical expenditure calculated on the taxpayer's taxable income as determined before the deduction as unfair and the application of section 18 on persons suffering from HIV/AIDS should be reviewed.

BUSA<sup>165</sup> proposes an option 3, because by proposing option 2, feels that option 2 offers a technical solution but with profound repercussions. It can result in a double deduction of expenditure as the employee would be allowed to claim the excess of 5% of his taxable income contributed as a deduction in his Income Tax return and the employer will be allowed the deduction. BUSA<sup>166</sup> through some simulations arrive at a conclusion in option 3 by proposing that the employer adds back approximately 25% of his total outlay on HIV/AIDS Disease Management benefits as a deduction if the employee were to afford himself of this option. Their assumption assumes that an employee with a taxable benefit of R20 000 would pay R1 441 in tax and would therefore get the corresponding Section 18<sup>167</sup> deduction. Adding back 25% will result in the company forfeiting R1 500 in Income Tax calculated at the company tax rate of 30%.

<sup>164</sup> Jacqueline Arendse and Magda Turner, HIV/AIDS in South Africa: is a change of tax policy required? SAICA and School for Accountancy, University of Witwatersrand

<sup>165</sup> BUSA, 31 August 2004, third draft (not for publication), BUSA AIDS task team

<sup>166</sup> Op cit

<sup>167</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

## **b) Initiatives of British American Tobacco (South Africa) BATSA**

BATSA<sup>168</sup>, as a corporate private company, like other private and public companies, wishes to provide ARV treatment to employees free of charge and at the same time maintain anonymity of employees' HIV status and obtain the maximum tax benefit for BATSA and the employees.

BATSA<sup>169</sup> recognises the following in the Income Tax Act<sup>170</sup>:

- In terms of paragraph 2(h) of the Seventh Schedule of the Income Tax Act<sup>171</sup> the payment of employees debts including that of medical expenses, paragraph 2 (i) will be taxed as a taxable benefit in the hands of the employees and as such must be included on the IRP 5 certificate of the employees and as such breaches the employees' confidentiality in terms of their HIV/AIDS status.
- In terms of paragraph 2(e) of the Seventh Schedule to the Income Tax Act<sup>172</sup> any service rendered at the expense of the employer will be rendered as a taxable benefit or fringe benefit in the hands of the employee. Once again the benefit has to be disclosed on the employees' IRP 5 certificates and their HIV confidentiality is in breach.
- Paragraph 10(2) (c)<sup>173</sup> offers tax relief in that no value will be placed on any services rendered by an employer to his employee at their place of work for the better performance of their duties. An opinion was sought by BATSA<sup>174</sup> from PWC<sup>175</sup> who considers that there are reasonable grounds for demonstrating that the provision of on-site medical treatment (including HIV treatment) for the benefit of all employees is directly related to the better performance of their duties. PWC<sup>176</sup> recommends that a

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<sup>168</sup> British American Tobacco South Africa, 4 November 2003, [AIDS benefit – Tax](#)

<sup>169</sup> British American Tobacco South Africa, 4 November 2003, [AIDS benefit – Tax](#)

<sup>170</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>171</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>172</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>173</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>174</sup> British American Tobacco South Africa, 4 November 2003, [AIDS benefit – Tax](#)

<sup>175</sup> PriceWaterhouseCoopers, 11 September 2003, [Opinion on HIV/AIDS Treatment and Fringe Benefits Tax](#)

<sup>176</sup> PriceWaterhouseCoopers, 11 September 2003, [Opinion on HIV/AIDS Treatment and Fringe Benefits Tax](#)

ruling be sought from SARS confirming the interpretation. On-site medical treatment may not necessarily solve the confidentiality issue as other employees or colleagues may observe the HIV infected employees visiting the on-site clinics for regular treatment.

- In terms of paragraph 12A of the Income Tax Act<sup>177</sup>, contributions or payments to a registered medical aid fund by an employer on behalf of an employee are taxable in the hands of the employee to the fact that it exceeds two-thirds of the total amount due. This paragraph is generally applied to monthly payments to a medical aid fund and as such if the HIV/AIDS treatment is considered to be a contribution to a fund would limit the taxable benefit taxed in the hands of the employees as to one third instead of the full benefit.

BATSA therefore sought opinions from tax experts, has representation on the AIDS committee of BUSA, had asked for opinions from experts such as PWC, for solutions to minimize the tax on employee benefits and try and preserve the anonymity of the employees' HIV/AIDS status :

- The establishment of a **Public Benefit Organisation (PBO)**, in terms of section 30 of the Income Tax Act<sup>178</sup>. The Ninth schedule<sup>179</sup> lists those activities that are accepted as Public Benefit activities; paragraph 2 under the heading "Health Care" lists paragraph 2 ( c ) "*the prevention of HIV infection, provision of preventative and education programmes relating to HIV/AIDS*" and paragraph 2(d) includes "*the care and counselling or treatment of persons afflicted by HIV/AIDS*". It also allows for the care of families and dependants. However, in terms of the definition of a Public Benefit Organisation as amended; the benefits of the fund must be applied as widely as possible and must be accessible to the general public at large.

Claire van Zuylen and Betsie Strydom of Bowman Gilfillan<sup>180</sup> support the idea of a Public Benefit Organisation in the form of a trust, where the trust receives the

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<sup>177</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>178</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>179</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>180</sup> M Metcalfe, October 2004, [How can I support Africa?](#) The Foundation for the development of Africa,



subsidised payment from the Employer or Associated Institution to provide the HIV/AIDS benefits. The Public Benefit Organisation status exempts the trust from income tax on income received in the form of donations.

SARS however interprets the section 30 of the Income Tax Act<sup>181</sup> in that a public benefit activity must be rendered for the benefit of the public at large, which unfortunately excludes a company's HIV/AIDS programme to their employees because “general public at large” definition seems to be that of any member of society at large that is not necessarily an employee.

- Due consideration was given whether the **Income Tax Act**<sup>182</sup> **was in conflict with the South African Constitution**, but it was decided not to pursue this avenue.
- The option of a **Benefit fund** was also considered but the advice of PWC<sup>183</sup> was that due consideration has first got to be given to the provisions of the law in terms of Insurance and Medical funds or schemes.
- Another option was to suggest to SARS that, **provided the employer does not deduct the expense the employees will not receive a taxable benefit**. SARS confirmed that there was no provision in the Income Tax Act<sup>184</sup> to give them the discretion to come to such an arrangement
- BATSA<sup>185</sup> considered making use of **Cell Captives** as a solution, in that funds are transferred to its cell captive facility in an insurance company where BATSA is the insured. As a short term insurance measure the policy could typically cover the cost associated with HIV/AIDS. Premiums are renewable and payable annually. The premium could be based on the estimated cost of the HIV/AIDS intervention and an estimate can be made based on the estimated HIV/AIDS prevalence amongst the employees and their spouses or life partners. An opinion from PWC<sup>186</sup> was not very positive as in their opinion it can be construed as a debt paid on behalf of the

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<sup>181</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>182</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>183</sup> PriceWaterhouseCoopers, 11 September 2003, [Opinion on HIV/AIDS Treatment and Fringe Benefits Tax](#)

<sup>184</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>185</sup> British American Tobacco South Africa, 4 November 2003, [AIDS benefit – Tax](#)

<sup>186</sup> PriceWaterhouseCoopers, 11 September 2003, [Opinion on HIV/AIDS Treatment and Fringe Benefits Tax](#)

employees by BATSA and therefore the cell captive could be perceived merely as a finance vehicle<sup>187</sup>. PWC's opinion can be interpreted as too conservative as BATSA will be insuring itself against the risk of AIDS and BATSA derives the benefit.

Another option was considered where cell captives are used and instead of BATSA the employer being the insured, the employee is the insured. An opinion from PWC's<sup>188</sup> was positive in that an arrangement where the employee is the insured would not be construed as a payment of debts of employees. However, from a practical point of view the employees' pro-rata share from the premium is payable to the employee and may not be ceded to BATSA or a third party, such as a Disease Management entity (e.g. QUALSA). This option is therefore not considered as BATSA has no control over what the employees do with the money once the insurance benefits are received by the employee concerned.

### **c. Opinions of SARS officials and Corporate Companies**

- **NUMSA<sup>189</sup> (NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA)**

*"We're no longer focusing on wage increases alone," says Numsa spokesman Dumisa Ntuli. "Benefits are also important. All aspects of HIV/Aids treatment need to be negotiated, including family responsibility and sick leave, as well as medication."*

- **DE BEERS<sup>190</sup> MINING HOUSE**

The mining house De Beers wanted to give employees the additional choice of going to private doctors to receive treatment and counselling, in addition to its on site medical facilities. The HIV/AIDS manager Tracey Peterson found that SARS considers any medical treatment provided at an employer's expense outside the company's premises to

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<sup>187</sup> Paragraph 2(h), Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>188</sup> PriceWaterhouseCoopers, 11 September 2003, Opinion on HIV/AIDS Treatment and Fringe Benefits Tax

<sup>189</sup> NUMSA, Employers trip on the Receiver's carpet, volume 3 nr 2, July 2004

<sup>190</sup> NUMSA, Employers trip on the Receiver's carpet, volume 3 nr 2, July 2004

be a fringe benefit and therefore taxable. De Beers has decided to shoulder the cost until it can convince Government to change the tax law.

- **Chamber of Mines**<sup>191</sup> head Zoli Delisa says the tax system has the effect of pushing workers into an artificially higher earnings bracket.
- **Aid for Aids**<sup>192</sup> clinical director Leon Regensberg, in the publication Aids Management Report maintains that employers should alter existing employee contracts and make medical aid membership compulsory. It is also Regensberg view that the most cost-effective way for uninsured employees to comply with regulations is to have a combination of access to medical aids by the employees supplemented by Disease Management programmes offered by employers.
- According to Jillian Green in an article on July 15, 2004 she quotes opinions from **SARS**<sup>193</sup> on the provision of treatment by employers as a "fringe benefit". The treatment is seen as a benefit and hence taxable according to SARS.
- **SARS**<sup>194</sup> spokesperson Sechaba Nkosi said: "The income tax system measured such contributions against the same standards as employer contributions for provisions of other goods and services." Nkosi said that, in terms of confidentiality, SARS was bound by strict secrecy provisions and would not disclose the HIV status of an employee.

As far as confidentiality of treatment funded by employers is concerned, Nkosi said employers had different approaches. "Some employers take advantage of exclusion in the fringe-benefits tax system for medical treatment provided to employees on an employer's premises, while some may use external suppliers and pay them on a no-questions-asked basis."

- According to Monique Metcalfe in an article published in October 2004, **SARS**<sup>195</sup> opinion on the fringe benefit tax for HIV/AIDS treatment is that: "The income tax system measured such contributions against the same standards as employer

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<sup>191</sup> NUMSA, Employers trip on the Receiver's carpet, volume 3 nr 2, July 2004

<sup>192</sup> NUMSA, Employers trip on the Receiver's carpet, volume 3 nr 2, July 2004

<sup>193</sup> NUMSA, Employers trip on the Receiver's carpet, volume 3 nr 2, July 2004

<sup>194</sup> NUMSA, Employers trip on the Receiver's carpet, volume 3 nr 2, July 2004

<sup>195</sup> Monique Metcalfe, How can I support Africa? October 2004, The foundation for the development of Africa

contributions for provision of other goods and services". The opinion is therefore that SARS or Government does not distinguish between taxable benefits and treat HIV/AIDS Disease Management as any other taxable benefit. The newspaper, The Star, quoted SARS spokesman Sechaba Nkosi as saying that companies providing such contributions are "up in arms" and have accused the Revenue service of taxing their HIV-positive workers to death!

- **SARS**<sup>196</sup> is of the opinion that if concessions are given for HIV/AIDS in terms of taxable benefits the move would have to be extended to all major diseases.

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<sup>196</sup> Monique Metcalfe, How can I support Africa? October 2004, The foundation for the development of Africa

## **10. POTENTIAL SOLUTIONS TO THE PROBLEM BY INVESTIGATING OTHER ALTERNATIVES**

In summary, the problem surrounding HIV/AIDS in the World of Work; is that the undetected HIV positive status of employees and resultant untreated AIDS lead to death, and therefore individuals need to know their status in order to proactively get the life-saving Anti-Retroviral treatment that will save the individual's life, the sex partners' lives, preserve their family lives, social standing and the life of the employer. If HIV/AIDS is eradicated a healthy work force results with a healthy or financially secure and sustainable company that in turn can give employees job security. A healthy work force leads to a healthy company and an economically stable country.

It is the author's opinion that there is a general reluctance from individuals to have their HIV/AIDS status determined. This might be because of fear of death, fear of the unknown, fear of the stigma surrounding the disease, ignorance or generally an attitude of "it cannot conceivably happen to me". There is obviously the factor of financial constraints or being uneducated about how to find out more about the disease or what avenues are available for treatment. From VCT programmes run by companies such as AfriSIDA Management Services (Pty) Ltd employees often believe that they could potentially not contract the disease as they trust their sleeping partners in terms of a commitment of one sexual partner only. It is only human to only to deduce that when morbidity strikes people go to Medical Practitioners and often too late as the nature of the disease is such that it goes undetected until the immune system is worn out and then the individual contracts AIDS (section 1 above of this article).

From business initiatives discussed in this article it is clear that in order to curb morbidity and mortality, companies pay for HIV/AIDS Awareness, Training and VCT. However, once the employee knows his status, the employee needs some form of treatment; initially to determine his CD4 count to determine his level of immunity or stage of infection and depending on the progression will need Anti-Retroviral (ARV) treatment. It is here that companies supplement the cost of HIV/AIDS treatment and look at Government for tax concessions. It is the author's opinion that the company feels morally more indebted

because often the employee gets to know his status through an HIV/AIDS campaign or programme in the work place.

Government has divested themselves from further assistance as it sees the disease as any other life threatening disease and as such has given the necessary tax concessions in terms of medical benefits and company tax deductions. (Section 10 c above of this article) To the employer the concession of a section 11(a) deduction in the Income Tax Act<sup>197</sup> is afforded. The argument is that it taxes the employee as having received a taxable benefit<sup>198</sup> in the form of a cheap service, a payment of debts on behalf of the employee or a medical benefit where the employee can get a two third benefit through a medical aid. But it gives the necessary further tax concessions, like any other life threatening disease, to employees by allowing the medical excesses paid by the individual directly to the medical aid or medical practitioner as a deduction according to Section 18(1) or re-directed SITE through paragraph 11B (4) of the Fourth Schedule<sup>199</sup>. Unfortunately no consideration is given to the fact that the employee suffers severely from a cash flow point of view (section 9 above of this article) as they have to wait more than a year for a tax refund on cash expended on ARV treatment from SARS.

The author and PWC<sup>200</sup> are further of the opinion that a further argument in Government's favour is that Government subsidised clinics are available for individuals to receive the necessary primary care treatment. Unfortunately the clinics are not accessible after hours for employees. If they were to attend these clinics during the day they are treated on a "first-come-first-serve" basis and as such means that employees will have to take prolonged sick leave or time off work. Questions will be asked by the employers about the sick leave and immediately the matter of "confidentiality" or anonymity becomes an issue again. Even if Government clinics are an option not all

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<sup>197</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>198</sup> Paragraphs 2(e), 2(h) and 2 (i) of the Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>199</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>200</sup> PriceWaterhouseCoopers, Budget 2004, Review of medical aid and HIV-related expenses in the budget, Tax and Legal Services

employees will attend these clinics due to transport constraints, work pressure etc. or a general reluctance to queue.

There seems to be a definite burden shift from Government to the private sector, as a result of Government's view that the disease should be treated like any other life-threatening disease, to a situation where the employers have to take responsibility for the pandemic.

Some employers offer to pay for the HIV/AIDS Disease Management as we have seen that the cost of ARV treatment can be anything from R8 500 per year to as high as R33 600 per year. The employer's motivation is that with the potential death sentence of the employee comes the financial strain of finding a way to foot the medical bills. It is therefore the moral obligation and protection of the employer's human capital that drives the company to help foot the bill for the ARV treatment or HIV/AIDS Disease Management. It is also imperative from the employer's point of view that everyone knows their HIV/AIDS status and takes responsibility for it

In the National budget review of 2004 PWC<sup>201</sup> reviewed medical aids and HIV related expenses; it is their view that because of the unaffordability of medical bills more individuals are becoming dependent on Government medical care and assistance. The burden on Government or dependency on Government will increase as a result of HIV/AIDS. Government is according to them already contributing by way of the Seventh Schedule to the Income Tax Act when employees' medical aid contributions are paid by the employer.

A further factor driving the private sector to find solutions is the fact that Government with a perceived dissident view<sup>202</sup> or history of allegedly saying that HIV does not cause AIDS, poverty does, is now asked to alleviate the problem through tax concessions. No

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<sup>201</sup> PriceWaterhouseCoopers, Budget 2004, [Review of medical aid and HIV-related expenses in the budget](#), Tax and Legal Services

<sup>202</sup> DUESBERG, P.H. (1996): [Inventing the AIDS Virus](#), Washington D.C.: Regnery; RASNICK, D. *Talked with President Thabo Mbeki* (2 March 2000), <http://www.virusmyth.com/aids/news/drtalkmbeki.htm>;

wonder a SARS spokesperson makes the statement that the disease is treated like any other life-threatening disease, one almost feels that by making such a statement SARS supports Government's view on HIV/AIDS.

Given that Government is classified as dissidents in terms of HIV and AIDS, the Employment Equity Act sanctions the taxable benefit taxation and employers want to protect their human capital and employees are not going to change their sexual behaviour through abstinence; we will have to find a way to get some further tax relief and protect the employees right to confidentiality and anonymity.

Anglo Gold's<sup>203</sup> Dr Eisenstein observes that HIV/AIDS can only be tackled in an environment conducive to do so:

*“A challenge for the industry is to ensure that all parties are active partners in this process, Business cannot overcome this problem alone and I would rate the absence of a national supportive framework as the single biggest challenge in coping with the HIV/AIDS epidemic. From the State we need an overall plan that recognises the severity of the epidemic, with adequate budgetary allocation in terms of support and infrastructure for the people of South Africa”*

The following options will therefore be considered:

**a) Adapting Existing Initiatives:**

**i) Amendment of Paragraph 10(2)(c) of the Seventh Schedule<sup>204</sup>**

The direct implications of the taxable benefit is that in terms of paragraph 2(e) of the Seventh Schedule to the Income Tax Act <sup>205</sup> any service rendered at the expense of the employer will be rendered as a taxable benefit or fringe benefit in the hands of the

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<sup>203</sup> Financial Mail *Corporate AIDS awareness* 6 December 2002

<sup>204</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>205</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003



employee. There is the conception in industry that the taxable benefit only exists once the service is “off-site” based on paragraph 10(2) (c) of the Seventh Schedule<sup>206</sup>, no value will be placed on “.. *any service rendered by an employer to his employees **at their place of work** (self inserted bold) for the better performance of their duties or as a benefit to be enjoyed by them at **that place** (self inserted bold) or for recreational facilities...*”. It is PWC’s<sup>207</sup> view that an opinion must first be sought from SARS but the author tends to disagree as the intention of the paragraph is clear in that no value will be placed on a service rendered by an employer “on-site” for the better performance of their duties and therefore further agrees with Industry’s interpretation. It is not clear why PWC needs an opinion from SARS. The proposed changes of the Income Tax Act by BUSA (section 10 a above of this article) by the insertion of (d) in paragraph 10(1) is based on the assumption that, because recreational facilities are allowed off-site, therefore HIV/AIDS Disease Management will be allowed off site and hence probably why PWC wants to seek an opinion first.

An HIV/AIDS Disease Management programme at the place of work or “on-site”, will thus be the answer in terms of the exemption of the taxable benefit in terms of section 10(1) (c )’s first portion, but will definitely not secure anonymity as any employees called away from a work station or production lines will attract the attention of co-workers and they could be stigmatised and discriminated against as a result of their HIV status becoming known.

The extension of the paragraph 10(2) ( c)<sup>208</sup> referring to the recreation facilities provided by the employer “.. *for recreational facilities at that place (sic on-site) or a place of recreation provided by the employer for the use of employees in general*”, “*place of recreation*” should be substituted by “*place of recreation or for the benefit of HIV/AIDS care not covered under paragraph 2(i)*”. This then would enable the employees to attend a clinic or medical practice “off-site” earmarked by the employer as part of an HIV/AIDS work place programme. The rationale to include “HIV/AIDS” in the proposed

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<sup>206</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>207</sup> PriceWaterhouseCoopers, 11 September 2003, Opinion on HIV/AIDS Treatment and Fringe Benefits Tax,

<sup>208</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

amendment would be to secure human capital and extend the life of the employee and employer and society as a whole.

It is important to specify the benefit as it could otherwise be seen as medical care and will be taxed according to paragraph 2(i) or 12A.<sup>209</sup>The Commissioner of Inland Revenue might in fact interpret it as such and it is therefore necessary to look at this paragraph in more depth to secure the tax relief.

The changes to this paragraph will result in all employees opting for this option and no deductions will be taken through paragraph 2(i)<sup>210</sup>. This is not a negative aspect as it will preserve the benefits in medical aids in general as there will be no pressure on medical aids as a result of the pandemic to increase their premiums excessively and thereby making it more affordable for employees to subscribe to medical aids.

#### **ii) Paragraph 12A (1) of the Seventh Schedule<sup>211</sup>**

The concession for medical aid contributions (paragraph 2(i))<sup>212</sup> only relates to contributions made towards a Friendly Society and a scheme registered in terms of the Medical Schemes Act. Benefits and assistance granted outside of a medical scheme will not qualify for the two thirds concession; “...*payment to any fund contemplated in paragraph (b) of the definition of a benefit fund ...*”. Paragraph (b) of section 1 describes “...*any medical scheme registered under the provisions of the Medical schemes Act, 1998 (Act 131 of 1998)*”..

Paragraph 2(i)<sup>213</sup> taxes the contribution to a benefit fund in the hands of an employee to the extent that it exceeds two thirds of the total contribution. One third of a medical benefit contribution is thus taxable in the hands of the employee as a taxable benefit. Any other medical expenses incurred by the employee outside of the medical aid for example excesses paid that are not covered by the medical fund can be deducted from the

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<sup>209</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>210</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>211</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>212</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>213</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

employee's income once a tax return is remitted at the end of the financial year. This deduction is limited to the excess over 5% of income before the deduction of the medical benefit in arriving at taxable income. This benefit tend to favour lower income earners unless one assumes that a higher income earner, say earning R250 000 p.a. has personal Disease Management expenses of R33 000 then the first R12 500 will not be tax deductible.

As a solution to anonymity it would possibly be a solution to get an external accountant or tax practitioner that assists employees with the registration of tax, filling out of tax returns or applications for re-direction of SITE (section 9 c above of this article)<sup>214</sup> instead of relying on the employer's pay roll clerk or human resource manager. Often the employees are uneducated on the complex issues regarding tax and need to be made aware of how to interpret the Income Tax Act very much like an Awareness of HIV/AIDS. In this instance their anonymity will be secured especially if the service is available to all employees for tax matters in general and the consultant is "on-site". The only disadvantages possibly of such an exercise is that their will not be a full tax benefit for the employees and their cash flow will be impeded until they get a refund from SARS.

Employing a tax practitioner to assist the employees with their personal tax affairs, will result in a further tax benefit to the employees but once again if the service is offered at the place of work, the benefit will not be taxable in terms of the first portion of paragraph 10(1)( c) of the Seventh Schedule.<sup>215</sup>

### **iii) A limited outsourced payroll**

In the absence of a potential change to paragraph 10(2) ( c)<sup>216</sup>, the HIV/AIDS benefit received "off-site" is taxable and as such impacts on the confidentiality of the employees' HIV status as the benefit enjoyed has to be disclosed on an employees' IRP 5 certificates at year end (section 7.c. above of this article).

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<sup>214</sup> Jacqueline Arendse and Magda Turner, HIV/AIDS in South Africa: is a change of tax policy required? SAICA and School for Accountancy, University of Witwatersrand

<sup>215</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>216</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

A potential solution to this could be that the payroll is outsourced and the IRP 5 certificates are issued by an outside consultant, but that would mean that all employees' payroll records will have to be kept off-site. The repercussions of such an exercise does not warrant the outsourcing because not only do the Directors have to take responsibility for all accounting records, assets, liabilities, income and expenditure, they also need the payroll information for budgeting purposes and other cost and management exercises.

The responsibility of recordkeeping, tax liabilities etcetera will not be able to be delegated to a third party without someone at the employer's office having access to the records and as such an outsourced payroll will not be practical in the light of all statutory requirements on Directors and Public Officers. Once an official is earmarked at the work place the whole exercise of protection of anonymity is defeated.

**b) New Proposed Initiatives**

**i) Section 25B of the Income Tax Act<sup>217</sup> in terms of distributions or donations from Trusts.**

According to the author and SILKE<sup>218</sup>; a trust in essence is a contract between a settlor, trustees and beneficiaries and is defined as consisting of cash or other assets and these assets are administered in a fiduciary capacity by a trustee or trustees. The trustees are appointed by a deed of trust or agreement and the trust is registered with the Master of the High Court. The assets are managed on behalf of the beneficiaries by the trustees. The beneficiaries have no right to these assets or income unless so described in the trust deed by virtue of vesting rights or in the case of a discretionary trust, unless a benefit is requested by the trustees to the beneficiaries.

In terms of the Income Tax Act the trust is defined as a "person other than companies"<sup>219</sup> and if no distributions are made to beneficiaries the income is taxed at 40%<sup>220</sup>. Where a

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<sup>217</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>218</sup> Silke on South African Income Tax, 2004, (electronic copy)

<sup>219</sup> Meyerowitz SC, 2003-2004, Meyerowitz on Income Tax, Cape Town: The Taxpayer,

<sup>220</sup> Schedule 1, section 8 1(b), Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

trust is created by way of donation, settlement or other disposition (donation) from a living person which includes a company, the trust income is governed by the provisions stipulated in section 25B and subject to the provisions of section 7<sup>221</sup>.

Two types of trusts exist, a discretionary trust or inter vivos trust or a vesting trust. An Inter Vivos trust can be set-up as a Public Benefit Organisation (PBO) in terms of section 30<sup>222</sup> for the benefit of the employees and their spouses and children, diseased retired or ex-employees' direct family and living partners, provided the funds are also available for the general public at large. In order to qualify as a PBO in terms of section 30<sup>223</sup> the benefits must be available to the "general public at large".

A Public Benefit Organisation is defined in section 30<sup>224</sup> for various benefits to the public. These benefits or purposes are defined in the Ninth Schedule<sup>225</sup>, Part 1, dealing specifically with PBO's. The object of a PBO is to have tax exempt status, and to therefore receive donations exempt of tax and apply the donations for the benefit of the general public at large. Paragraph 2 (c)<sup>226</sup> allows for one such purpose; the prevention of HIV infection and the preventative measures by way of educational programmes relating to HIV/AIDS. Paragraph 2 (d)<sup>227</sup> allows for another such purpose; the care, treatment and counselling of persons afflicted with HIV/AIDS, including the same care for their families and dependents.

If the Trust is registered as a non-profit organisation or a private benefit organisation the receipts from the trust will not be taxable. As the PBO trust has no specific beneficiaries listed, but rather makes donations available to a class or classes of beneficiaries these donations will be tax free in the hands of the individuals or organisations that benefit as the donation will be of a capital nature, because the awards are of a fortuitous nature.

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<sup>221</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>222</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>223</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>224</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>225</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>226</sup> Ninth Schedule, Part 1, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>227</sup> Ninth Schedule, Part 1, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

It could be argued that Capital Gains Tax should be paid by the Trust in terms of The Eight Schedule<sup>228</sup> on the donations made to recipients as donations of an asset is seen as a disposal in terms of paragraph 11 of the Eighth Schedule. Although 50 % of the capital gain relating to such is included in the taxable income of the PBO, the PBO does not pay any tax on it as the statutory tax rate applicable to PBO's is 0%.

The income received by the recipient as a voluntary award, must not be included in his gross income in terms of the extension of paragraph (ii)<sup>229</sup> of the definition of gross income: “..excluding receipts and accruals of a capital nature..”. Care should be taken that the receipts granted by the Trust to the recipients are not received on a regular or repetitive basis, because such receipts can be contemplated as an annuity according to paragraph (a) of the definition of gross income in section 1, and will then specifically included in gross income.

The donor company receives a section 18A exemption certificate for donations received by the PBO trust. A deduction for a taxpayer is limited to 5% of taxable income.

If the employer, were to donate funds to the PBO trust as a donation with the intention of accommodating their employees only in terms of HIV/AIDS Disease Management:

- the PBO's action will be against the intention of the Income Tax Act<sup>230</sup> as it must be available to the general public at large and the trust will lose its exempt status and will then have to pay tax at the prescribed rate.
- The trust will be an associated institution and a taxable benefit will have to be taxed in the recipients' hands.

A VCT programme conducted by a company such as AfriSIDA identifies the HIV positive employees on-site; the employer gets a section 11(a)<sup>231</sup> deduction for the VCT programme. In terms of Disease Management the employer has the following options:

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<sup>228</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>229</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>230</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>231</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

- Pay for Disease Management and tax the benefit in the hands of the recipient of the benefits and the employee suffers as a result of the burden of tax and the stigma attached to the fact that his HIV status might be made known to all and sundry
- Pay for the VCT and get a section 11(a)<sup>232</sup> deduction and give a section 18A<sup>233</sup> donation to a PBO registered for HIV/AIDS care with the hope that the employees might benefit when applying for grants or donations from the trust.

The funding process could thus be as follows:

- The PBO trust is managed by the same bona fide HIV/AIDS work place managers and Disease Managers employed in the VCT process, the employer can have some assurance that his employees could possibly apply to such a fund for a donation to pay for the necessary care.
- The donor employer receives a section 18A donation certificate for tax purposes and
- a process is then embarked on where the employees are encouraged to apply for funding for Disease Management from the PBO Trust.
- Immediately spouses and live-in partners can also apply for funding.
- In collaboration with the specific medical aid of the donor company benefits can be quantified and managed on behalf of those employees who belong to a medical fund.
- All other non-medical aid employees apply for full funding from this trust.
- AfriSIDA approaches the next designated work place for a VCT programme and the same process is followed to try and secure Disease Management to employees that form part of the “general public at large”
- and they continue approaching employers
- and employees and spouses continue applying for funding.

With this solution a situation is created where the anonymity of the “employees’ are protected, the benefit is tax free in the hands of the “employee” and the donor employee gets a section 18A<sup>234</sup> donation deduction limited to a donation free deduction.

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<sup>232</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>233</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>234</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

However many companies as potential donors to such a PBO, (although administered by experts in their fields) would feel that the donations will not benefit their employees and their loved ones directly. There could be a general reluctance also from potential donors as they could feel that such a fund will have to donate money to institutions that would normally qualify for Government funding. If a PBO is registered as described it will have to be well managed, probably audited with results published in the media etcetera and marketed as such to get “buy-in” from potential donors in terms of their respective Corporate Social Investment Programmes.

**ii) Paragraph 12(A) (2)<sup>235</sup> as a mechanism to calculate the taxable benefit in the hands of all employees as interpreted as a deemed taxable benefit according to paragraph 16(1) of the Seventh Schedule**

Business Unit South Africa (BUSAs)’s AIDS committee (section 9(a) of this article above) seeks to use deeming provisions to drive a change in legislation.

This section of this article seeks to find a way to tax a benefit in the hands of all employees based on the fact that a causal relationship exists between the benefit of Disease Management that HIV positive employees receive and the services of each employee.

Paragraphs 2(e), 2(h) and 2(i)<sup>236</sup> make it impossible for an employee to have Disease Management paid by the employer to a Medical Practitioner, Disease Management Company or to supply Anti-retroviral drugs when the Disease Management takes place away from the employee’s place of work for the employee, his spouse or other person. It will either be taxed as cheap services, debts paid on behalf of an employee or as a medical benefit.

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<sup>235</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>236</sup> Seventh Schedule Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003



An employee however **will be deemed** to have been granted a taxable benefit in respect of his employment with an employer when certain other persons enjoy a benefit or advantage that would have constituted a taxable benefit contemplated in paragraph 2 and paragraph 16(1)<sup>237</sup> had it been granted directly by the employer to the employee. The taxable benefit so deemed to be granted is then treated as if it had in fact been granted to the employee, and the provisions of the Seventh Schedule apply to it on this basis. The intention of this paragraph is to tax benefits received by spouses or others by virtue of the employee's employment in the hands of the employee.

This paragraph however grants a benefit to the employee or deems a benefit if certain other persons also enjoy a benefit, if the employee could have enjoyed it in his own right. It could therefore be argued that this interpretation of redirected benefits does not only apply to the benefits granted to spouses or children of the employee but also to **colleagues**<sup>238</sup> as paragraph 16(1) provides for a deeming allowance “*..an employee shall be deemed to have been granted...*”. This deeming allowance enjoyed is by virtue of the employee's holding of office or “*..services rendered or to be rendered...*”.

The benefit conferred upon the employee has to be:

- As result of a benefit of the employee's employment with the employer or
- As an advantage of the employee's employment with the employer or
- By virtue of the employee's employment with the employer

Paragraph 16(1) (b) states therefore that anything done by the employer, under any agreement, transaction or arrangement, that confers such a benefit or advantage upon any person other than the employee, whether directly or indirectly will be seen as been granted directly to the employee.

If the employer therefore stipulates in the employment contract that Disease Management is available to all employees and that the total contribution of the Disease Management

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<sup>237</sup> Seventh Schedule Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>238</sup> Silke on South African Income Tax, 2004, (electronic copy)

will form part of their cost to company on a capitation basis, it will be seen as a benefit conferred upon any other person and as such is a taxable benefit in the hands of all the employees.

The benefit conferred upon other persons needs to be granted in respect of a specific employee's employment before it can be taxable in that employee's hands. As such if an employer grants a benefit to all employees as a result of their employment and some of the employees make use of the benefits and others not and they would only have enjoyed the benefit as a result of the specific employment it can be argued that the intention of this section on redirected benefits includes colleagues.

*“The employer/employee relationship is also expanded in the other direction, that is, on the employee's side, since, for the purposes of the Seventh Schedule and para (i)<sup>239</sup> of the definition of the term ‘gross income’, an employee will be deemed to have been granted a **taxable benefit in respect of his employment with an employer when certain other persons enjoy a benefit or advantage that would have constituted a taxable benefit** (bold inserted) contemplated in para 2 had it been granted directly by the employer to the employee. This result will ensue if, as a benefit or advantage of his employment with his employer, by virtue of his employment with his employer or as a reward for services rendered or to be rendered by him*

- *the employer has directly or indirectly granted a benefit or advantage to the employee's relative or*
- *anything is done by the employer under an agreement, a transaction or an arrangement so as directly or indirectly to confer any benefit or advantage **upon any person other than the employee** (bold inserted).”<sup>240</sup>*

The taxable benefit so deemed to be granted is then treated as if it had in fact been granted to the employee, and the provisions of the Seventh Schedule apply to it on this basis.<sup>241</sup>

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<sup>239</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>240</sup> Silke on South African Income Tax, 2004, (electronic copy)

In order to argue that a taxable benefit exists in the hands of all employees, if the benefit is available to all employees, the definition of causal relationship between the employees' employment or services and the Disease Management benefit should be looked at. The terms "as result of", "as an advantage of", "by virtue of" the employee's employment confers the causal relationship. "By virtue of" would have the same meaning as "in respect of" and case law gives a meaning to it with the case of CIR v Crown Mines<sup>242</sup> in which CJ Innes had said the tax could not be imposed "in respect of a particular subject matter, unless it has a direct relationship to that matter". In ITC 1683<sup>243</sup> it was held that this phrase means "causal relationship". In CIR v Cowley<sup>244</sup> it is stated that the phrase "in respect of" "...connotes a direct relationship of cause and effect, or origin and product...". In terms of the interpretation of case law there has to be a direct relationship between the specific employees' employment; the cause and the benefit received for Disease Management; the effect.

The employer through a series of employment contracts with the employees, where it is stipulated that Disease Management is made available to all employees whether the employees make use of the benefit or not now imposes a causal relationship between the employees' employment contracts and the benefit available for Disease Management of HIV positive employees.

A similar situation had arisen in English cases<sup>245</sup> where the taxing Act had made a profit that had accrued to a person "by reason of his office"<sup>246</sup>. The interpretation of this English case by the judge in De Villiers v CIR<sup>247</sup> is: "But if any principle was to be extracted from these decisions it was simply that when dual considerations were in play it

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<sup>241</sup> (Paragraph 16 (1) (b)), Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>242</sup> CIR v Crown Mines Ltd (1923 AD 121)

<sup>243</sup> ITC 1683 (62 SATC 406)

<sup>244</sup> CIR v Cowley (23 SATC 276)

<sup>245</sup> De Villiers v CIR (4 SATC 86)

<sup>246</sup> Blakiston v Cooper (1909, A.C. 104)

<sup>247</sup> De Villiers v CIR (4 SATC 86)

was necessary to look to the dominant one as affording the true reason for the payment.”<sup>248</sup>

The dominant consideration here or true reason for the taxable benefit is the Disease Management that will secure employment and as such will be the true reason of the employee’s office.

According to *Israelsohn v CIR*<sup>249</sup> that if in any doubt as to the phrase “in respect of”, the construction to be adopted is the one that is more favourable to the taxpayer.

As a deeming allowance exists in terms of paragraph 16 (1)<sup>250</sup> or a platform exists for a deeming allowance, a taxable benefit exists in respect of the direct or causal relationship between the individual employees’ employment and the benefit received by HIV positive employees for Disease Management as a result of an agreement by the employer. By virtue of the facts that “*other persons enjoy a benefit or advantage that would have constituted a taxable benefit*”.. had the employee received the benefit. If the employer provides this benefit or advantage to protect the company’s human capital and where the benefit is described in an HIV/AIDS policy or described as a benefit or advantage in an employment contract, whether directly or indirectly by the employer a taxable benefit will exist for each employee. This benefit can be directly from the employer or indirectly from an associated institution or fund. In terms of the last portion of paragraph 16(1)(b)<sup>251</sup> “*anything is done by the employer under an agreement, a transaction or an arrangement so as directly or indirectly to confer any benefit or advantage **upon any person other than the employee*** (bold inserted).”<sup>252</sup>

As the Commissioner for Inland Revenue expects the employer to calculate the correct employee’s tax in terms of taxable benefit, the employer then calculates a taxable benefit

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<sup>248</sup> *De Villiers v CIR* (4 SATC 86)

<sup>249</sup> *Israelsohn v CIR* 1952(3) S.A. at 540 (18 SATC 247)

<sup>250</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>251</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>252</sup> Silke on South African Income Tax, 2004, (electronic copy)

in all employees' hands in stead of the employee who benefits from the HIV/AIDS Disease Management.

The Disease Management funding of HIV positive employees can be paid directly to the Disease Management company and the amount apportioned to all employees or the employer can contribute to a fund on behalf of the employees from where the Disease Management can be funded. Each employee contributes to say an HIV/AIDS Disease Management Fund to be managed by designated trustees. This is based on paragraph 12(A) (1)<sup>253</sup> where a contribution or benefit “..to any fund contemplated in paragraph (h) of the definition of ' benefit fund'..”

The amount taxable in the hands of each employee can be quantified by the Fund Administrators in very much the same way as suggested in paragraph 12(A) (2) for unallocated contributions. In the case of employees belonging to a medical aid the calculation of the unallocated benefit can be calculated according to paragraph 12(A) (2) and in the case of non-medical aid employees a directive can be sought from SARS in terms of how the unallocated benefit should be taxed. It can be suggested to SARS that paragraph 12(A) (2) can be used a basis for such a calculation.

Paragraph 12(A) (2)<sup>254</sup> allows for the apportionment of an “unallocated contribution” (defined as “B” in the formula quoted below) to a medical fund to all employees if the cost cannot be allocated to a specific employee. This paragraph calculates the taxable benefit so accorded by using the formula:

$$A = \frac{B + C}{3 \times D} - E$$

A = taxable benefit

B = the total unallocated contribution to the fund for the benefit of the employees

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<sup>253</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>254</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

C = contributions by all employees to the fund

D = number of employees contemplated in B

E = the contribution of the specific employee

The individual contributions to the HIV/AIDS Disease Management Fund component therefore that is available to all employees, interpreted by SARS as a taxable benefit in terms of the Seventh Schedule should accordingly be taxed in every employee's hand.

This benefit to be taxed can be calculated quite comfortably, as a "cost-to-company" component already exists if the employer embarks on a VCT programme. The cost-to-company component in the books of the company is recorded as a capitation cost because of the fact that the VCT process is voluntary and different numbers of employees attend different stages of the programme (see below). The employer can elect to have the designated expense specified as VCT on the company's income statement or have it incorporated as cost-to-company. No taxable benefit exists for the employees if the process is "on-site" and therefore no direct taxable benefit is attributable to a specific employee and the confidentiality of the employees is protected.

Had no taxable benefit been taxed in the hands of the employee the company would have included the Disease Management component as part of the VCT cost in the "cost-to-company" component of remuneration as a section 11(a)<sup>255</sup> deduction.

When the company contracts with an outside provider for the VCT or Disease Management component the trend is to quote the company a price for the different programmes based on the possible HIV/AIDS prevalence of the company and the statistical chance of AIDS prevalence. A typical quote would allow for say:

- 100% pre-test counselling
- 80% testing
- 75% post-test counselling
- 10% confirmatory laboratory testing
- 2% for Disease Management.

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<sup>255</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

(These percentages will differ depending on the province, race and gender demographics.)

The cost-to company component is determined and the VCT and Disease Management programmes are embarked on. Below is a hypothetical case using 100 employees, an HIV prevalence of 10% and AIDS sick of 2%. The value calculated is very much in line with statistics given in (this article section 2 above)<sup>256</sup>

**EXAMPLE: CALCULATION OF TAXABLE BENEFIT AS ENVISAGED BY PARAGRAPHS 12(A)(2)**

**Voluntary Counselling and Testing**

Description	number	%	cost/ employee/ Day	Total	
Pre-test counselling	100	100	35	R	3500
Testing	80	80	30	R	2400
Post-test counselling	75	75	200	R	15000
Confirmatory laboratory	10	10	75	R	750
				R	<u>21650</u>
Cost-to-company per annum (excluding Disease Management)	100			R	216.5
Disease Management	2	2	33000	R	<u>66000</u>
Cost-to-company per annum (excluding VCT)				R	660
<b>Total cost-to-company per annum</b>				R	876.5
<b>Formula according to paragraph 12(2)(b)</b>					
	$A = \frac{B + C}{3 \times D} - E$				
	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>
		<b>unallocated Benefit</b>	<b>Contributions by all Employees</b>	<b>number of Employees</b>	<b>contribution of specific employee</b>
Taxable benefit per employee per year including VCT	R 292.17	87650	0	100	0

<sup>256</sup> Financial Mail, Corporate AIDS awareness, 6 December 2002

Interpreting the example cited above, an amount of R292.17 will be taxed in the hands of the employees assuming no medical aid contributions are made by the employees. The calculation will be more favourable for the employees if they do belong to a medical aid. The taxable benefit can be attributed on a monthly basis, allowing for a cost-to-company per month per employee of say R20 each per month for VCT and Disease Management. The taxable benefit will be restricted to the Disease Management component alone and hence will generate R66 per year per employee, in the cited example, resulting in a capitation cost of just over R5 per employee per month and the taxable benefit will be negligible. Granted if more than 2% of the employees were to contract AIDS and go for Disease Management the benefit will increase.

Employees already belonging to a medical fund will now belong to a second fund that has to be set-up as contemplated by paragraph 2(i) as a medical fund or as a friendly society. Although outside the scope of this article opinions will have to be sought to determine whether this fund complies with the requirements of a friendly society and maybe even a medical fund. These employees will be taxed according to paragraph 12(B) if the contribution to the HIV/AIDS fund is seen as an unallocated benefit of the same medical fund. It is the author's opinion that the contribution can be seen as a second medical aid contribution and taxed as such akin to an employee contributing to a medical aid and a hospital plan.

Employees not belonging to another medical aid will be taxed as if though this HIV/AIDS fund is indeed a medical fund in terms of paragraph 2(i) if approved by SARS.

All employees will have the taxable benefit reflected on their IRP5's and hence no-one will be stigmatised and their anonymity will be secured.

It is the author's opinion that if all the employees feel that they are taxed on a benefit that only some utilise, it would motivate more employees to come forward to have their



HIV/AIDS status known. The taxable benefit will increase but it will secure a healthy work force with their HIV/AIDS status intact and monitored by an external HIV/AIDS Disease Management company.

Should the Commissioner of Inland Revenue still seek to tax specific employees at the time of a payroll audit by SARS, the employer will then be in a position to object to SARS' assessment of the taxable benefits given the fact that they had already attributed a taxable benefit based on the interpretation of paragraph 12(A) (2)<sup>257</sup>.

If SARS were to argue that this benefit only exists for employees belonging to a medical aid, it can be argued that paragraph 16(1)(b)<sup>258</sup> taxes a benefit available to "any person" as taxable in the hands of everyone that has an entitlement to the benefit. The interpretation will be the same as the cited example above other than that the medical aid contributions will have to be omitted from the example.

For employees belonging to a medical aid paragraph 12(A)(2)<sup>259</sup> will apply and for employees without a medical aid paragraph 16(1)(b)<sup>260</sup> will apply as well as the deeming of paragraph 12(A)(2)<sup>261</sup>.

The interpretation of paragraph 16 of the Seventh Schedule therefore affords the employer the opportunity to tax the benefit of Disease Management available to all employees although not enjoyed by all employees in the hands of each employee. The rationale that drives this interpretation is that the employees' anonymity in terms of the Employment Equity Act has to be protected. Furthermore it subsidises the treatment for the small percentage of the work force that needs Disease Management without being stigmatised.

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<sup>257</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>258</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>259</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>260</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>261</sup> Seventh Schedule, Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

The solution proposed does not change the Income Tax Act nor does it remove tax completely from the equation, it does however propose an equitable solution for all.

## 11. CONCLUSION

There is to date no medical cure for HIV/AIDS and no vaccine exists.

There is no cure for sexual abstinence to safeguard HIV positive individuals from infecting HIV negative individuals.

There is no immediate solution for poverty and poverty drives HIV infection.

Government and Business however can make a difference by making individuals aware of HIV/AIDS and making it affordable to treat the disease.

There seems to be a burden shift away from Government to employers to foot the bill for HIV/AIDS Disease Management.

Government has a dissident view on HIV/AIDS and through their representatives at the SARS enforces the notion that HIV/AIDS should be seen as any other life threatening disease. The fact that the disease has the dimensions of a pandemic does not seem to change their view and employees receiving a Disease Management benefit from their employers are taxed on the benefit in terms of the Seventh Schedule of the Income Tax Act<sup>262</sup>. Through the imposition of this Act the employees lose their confidentiality as their status has to be known to their employer in order to gain a taxable benefit.

The Employment Equity Act<sup>263</sup> seeks to protect employees' rights in terms of confidentiality but alas it prescribes that 'any other law' can extract information from an

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<sup>262</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>263</sup> Employment Equity Act 55 of 1998

employer. This includes the Income Tax Act<sup>264</sup> and as such this Act is superior to the Employment Equity Act<sup>265</sup>. The employees' confidentiality in terms of the Income tax Act<sup>266</sup> is therefore not protected.

Business leaders have different opinions regarding the taxing of HIV/AIDS Disease Management; these vary from a "hands-off" approach, to ignoring the provisions of the Income Tax Act<sup>267</sup> to initiatives to change the Income Tax Act in order to protect the confidentiality of employees.

BUSA has proposed three options to Government to change the Income Tax Act in order to protect the anonymity of employees and make the treatment more affordable.

In this article comments were made on the various options proposed by Business Leaders and some initiatives with merit have been scrutinised and amended forms of some of the proposals were proposed.

Further initiatives were proposed of which one is to make use donations to a Public it Organisation where employees can receive donations from the PBO in line with the general public at large. This solutions give the necessary anonymity for the individuals and give the employer as well as the employee the necessary tax free deduction without having to change the Income Tax Act, but will not get the desired support from probable donor companies as a perception could exist that the donations will be received in a bottomless pit where their employees will never benefit from.

Another initiative offered by this article is the interpretation that if an employee has access to a benefit as a result of a general fund set up as an HIV/AIDS Disease Management Fund that all employees contribute to and hence receives a taxable benefit

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<sup>264</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>265</sup> Employment Equity Act 55 of 1998

<sup>266</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>267</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

for the capitation cost attributed to all the employees based on the Disease Management cost calculated for the HIV/AIDS infected employees and their spouses.

This interpretation of paragraph 16(1) of the Seventh Schedule of the Income Tax Act<sup>268</sup>,

- Complies with the Income Tax Act<sup>269</sup>
- Complies with the Employment Equity Act<sup>270</sup>
- Affords the employer a tax deduction
- Taxes a minimal taxable benefit in the hands of the employee
- Protects the anonymity of the recipient

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<sup>268</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>269</sup> Income Tax Act no. 58 of 1962 as amended up to and including Act 45 of 2003

<sup>270</sup> Employment Equity Act 55 of 1998

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