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Legal update 6/2011

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DIVORCE ISSUES UPDATED

1. DIVORCE ACT

1.1 Section 7(7)

This section provides that the pension interests of a member will be considered to be part of their assets in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. This amount has to be reduced by previous awards involving the pension interest. This does not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

1.2 Pension interest

"Pension interest" is defined as follows:

- (a) in respect of a member of a pension fund - the benefits to which the member would have been entitled in terms of the rules of the fund if their membership of the fund would have been terminated on the date of the divorce on account of their resignation from their office;
- (b) in respect of a member of a retirement annuity fund - the total amount of the member's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975. The current prescribed interest rate is 15,5%.

Looking at this definition regarding a pension fund, it appears to apply only when the member *is* a member of the fund at the date of divorce and means the benefit to which the member . . . *would have been entitled* . . . "if their membership of the fund would have been terminated on the date of the divorce on account of their resignation from their office". Where the member has already become entitled to the benefits and has already left their employment before the date of the divorce, the formula based on benefits to which they "would have been entitled" in the event of a resignation, can strictly speaking no longer apply. The hypothetical event upon which this formula was intended to be based is a resignation "on the date of the divorce" and the calculation was intended to be made on this basis when the pension benefits eventually accrued to the member at some time after the divorce. See in this regard *Elesang v PPC Lime Ltd & others* [2007] JOL 18998 (NC), par 9 and 11.

A distinction must be drawn between a pension *interest* which has not yet accrued and one which has accrued and has in the process been converted into a pension *benefit*. In the case of a pension benefit the accrued right would form part of the joint estate (see *De Kock v Jacobson & another* 1999 (4) SA 346 (W), at 349H, *Sempapalele v Sempapalele & another*, 2001 (2) SA 306 (O), at 311C and *Maharaj v Maharaj & others*, 2002 (2) SA 648 (D), at 650–651).

1.3 Section 7(8)

This section provides as follows:

- “(8) Notwithstanding the provisions of any other law or of the rules of any pension fund—
- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that—
 - (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
 - (ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;
 - (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.”

2. PENSION FUNDS ACT

2.1 Section 37D

Section 37D of the Pension Funds Act provides as follows with regards to divorce:

“37D. Fund may make certain deductions from pension benefits.

- (1) A registered fund may—
 -
 - (d) deduct from a member’s benefit or minimum individual reserve, as the case may be—
 - (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979);
 - (iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No. 99 of 1998); and
 - (ii) employees’ tax required to be deducted or withheld in terms of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of the deduction referred to in subparagraph (i) or (iA);
- (2)
- (3) (a) Any amount that may be deducted in terms of subsection (1) (d) may only be deducted after the amount of pension interest available has been reduced by any loan amount or guarantee amount referred to in subsection (1) (a), where such a loan or guarantee was granted prior to the granting of

the court orders, irrespective of the fact that that amount is due and payable or not: Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed the member's pension interest available at any given time.

- (b) In the event that more than one of the court orders referred to in subsection (1) (d) provides for the deduction of amounts from a member's benefit or minimum individual reserve, as the case may be, at the same time, the court orders must be dealt with in accordance with the following hierarchy—
 - (i) any maintenance order referred to in subsection (1) (d) (iA);
 - (ii) any decrees of divorce or for the dissolution of a customary marriage.
- (4) (a) For purposes of section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse—
 - (i) must be deducted by –
 - (aa) the pension fund or pension funds named in or identifiable from the decree;
 - (bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;
 - (ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b) (i), the date on which that period expires; and
 - (iii) must reduce the member's accrued benefits or minimum individual reserve at the date of the decree.
- (b) (i) The pension fund must, within 45 days of the submission of the court order by the non-member spouse, request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her, or if it must be transferred to a pension fund on his or her behalf.
- (ii) The non-member spouse must within 120 days of being requested to make an election—
 - (aa) inform the pension fund of how the amount referred to in subparagraph (i) must be dealt with; and
 - (bb) if he or she elects that the amount must be paid to him or her directly, provide the pension fund with the details of how that payment must be effected; or
 - (cc) if he or she elects that the amount must be transferred to a pension fund on his or her behalf, provide the pension fund with the details of that pension fund.
- (iii) The pension fund must pay or transfer the amount within 60 days of being informed of how the amount must be dealt with in accordance with the non-member spouse's election.
- (iv) In the event that the non-member spouse fails to make an election or identify the pension fund to which the amount should be transferred within the period referred to in subparagraph (ii), the pension fund must pay the amount directly to the non-member spouse within 30 days of the expiry of that period.

- (v) Despite subparagraph (iv), in the event that the pension fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, the pension fund must retain the amount and any fund return referred to in paragraph (c) (ii) in the pension fund until such time as details of how that payment must be effected is made available to the pension fund by the member, the non-member spouse or any other person.
- (c) A non-member spouse—
 - (i) is not a member or beneficiary in relation to the pension fund; and
 - (ii) is entitled to the accrual of fund return on the amount referred to in paragraph (a) at fund return from the expiry of the period referred to in paragraph (b) (ii) until payment or transfer thereof, but not to any other interest or growth.
- (d) Any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted prior to 13 September 2007 are for purposes of any law other than the Income Tax Act, 1962, including, but not limited to, section 7 (8) (a) of the Divorce Act, 1979, deemed to have accrued to the member on 13 September 2007 and must be paid or transferred in accordance with paragraphs (a) and (b).
- (5) Despite paragraph (b) of the definition of “pension interest” in section 1 (1) of the Divorce Act, 1979, the total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to the non-member spouse in terms of a decree granted in terms of section 7 (8) (a) of the Divorce Act, 1979.
- (6) Despite paragraph (b) of the definition of “pension interest” in section 1 (1) of the Divorce Act, 1979, the portion of the pension interest of a member of a pension preservation fund or provident preservation fund (as defined in the Income Tax Act, 1962), that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated on the date on which the decree was granted.”

2.2 Order of deductions

Section 37D(3) of the Pension Funds Act provides for the following order of deductions where there are more than one possible deduction to be made against a member’s benefit at the same time:

1. Home loan / guarantee
2. Maintenance order
3. Divorce order.

2.3 Time periods applicable with regards to divorce orders

Section 37D(4)(b) of the Pension Funds Act stipulates the following time periods applicable to divorce orders:

1. Within **45 days** of the submission of the court order to the fund, the fund must request the non-member spouse to elect if the amount to be deducted must be paid directly to them or if it must be transferred to a pension fund on their behalf.
2. Within **120 days** of being requested to make an election, the non-member spouse must inform the fund of their election. If they elect that the amount must be paid to them directly, they must provide the fund with the details of how payment must be made. If they elect that

the amount must be transferred to a pension fund on their behalf, they must provide the fund with the details of that pension fund.

3. If the non-member spouse makes an election, the fund must within **60 days** of being informed of how the amount must be dealt with, pay or transfer the amount.
4. If the non-member spouse does not make an election, the fund must within **30 days** of the expiry of the 120 day period, pay the amount directly to the non-member spouse.
5. If the fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, it must retain the amount and the fund return on the amount in the fund until details of how the payment must be effected is provided to the fund by the member, the non-member spouse or any other person.

2.4 Interest payable to non-member spouse

Section 37D(4)(c) of the Pension Funds Act clearly states that the non-member spouse is not a member or beneficiary in relation to the fund and will only be entitled to fund return from the expiry of the 120 day period until payment or transfer, but not to any other interest or growth.

The Pension Funds Adjudicator's has confirmed that the non-member spouse is not entitled to any investment returns or growth on their portion of the pension interest after the date of the divorce. Looking at the definition of pension interest above, it is clear that it does not include any amount which accrues to a member spouse after the divorce.

The effect of the above is that the non-member spouse is entitled to fund return (as defined in section 1) on their benefit from the expiry of the 120 day period referred to in the section until date of payment.

2.5 Preservation funds

The Pension Funds Act has been amended with effect from 1 November 2008 to provide in section 37D(6) that the division of pension interest also applies in respect of preservation funds. For this purpose, pension interest refers to the benefit the member would have received if their membership of the preservation fund terminated on the date of the divorce.

2.6 Subsequent transfer to another fund prior to giving effect to a divorce order

The provisions of section 37D(4)(a)(i)(bb) allows for the deduction of pension interest in terms of a binding divorce order by *the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree*. This will apply in circumstances where the order is made against Fund A and then the member transfers to Fund B, without Fund A effecting the deduction. Fund B must then deduct the pension interest and make payment to the non-member spouse. This would apply to both section 14 transfers and a transfer based on a recognition of transfer (ROT).

2.7 Foreign divorcee must seek SA court order

A member who has emigrated and subsequently divorces in that country must apply to a South African court to have the divorce order recognised and enforced in South Africa. This is particularly true if the non-member wants to claim a share of the former spouse's retirement savings.

In the case of *Edgar v Momentum Retirement Annuity Fund and others* the Adjudicator ruled that the place of residence plays an important role in deciding whether or not to recognise the judgement of the foreign court. This is because the "common" law procedure to have such a judgement recognised and enforced in South Africa is to bring an action in a South African court to make the foreign judgement its own.

3. DIVORCE ORDER BINDING ON THE FUND

The divorce order is binding on the fund if **all three** the following requirements are met.

3.1 Division of pension interest

It must be clear what **percentage of the pension interest** or what **amount** is due or assigned to the non-member spouse.

If the divorce order states that the non-member spouse is entitled to 50% of the member's pension interest, this requirement will be met. However, if the order states that the non-member spouse is entitled to 50% of the member's *provident* interest or 50% of their pension *fund*, this requirement will not be met.

Where the divorce order entitles the non-member spouse to "50% of the member's pension interest, less the tax thereon", the fund must first obtain a tax directive on 50% of the member's pension interest and then deduct the amount on the tax directive from 50% of the member's pension interest. This is then the amount the non-member spouse is entitled to. The first tax directive (which was only obtained for purposes of the calculation of the non-member spouse's entitlement) can then be cancelled. A tax directive should then be obtained on the amount due to the non-member spouse.

Where a divorce order entitles a non-member spouse to 100% of a member's pension interest, the suggestion is that the fund must first obtain a tax directive for that amount and then pay the non-member spouse the difference between 100% of pension interest and the tax payable on that amount. The non-member spouse will then have a claim against the member for the balance of the amount due to them.

With regard to retirement annuity funds, in the case of *Edgar v Momentum Retirement Annuity Fund* and others the Adjudicator ruled the term "maturity value" (instead of "pension interest") does not meet the requirements of the Divorce Act. This is because "it is clear from the definition of "pension interest" that a non-member spouse is only entitled to a pension interest calculated as at the date of divorce, rather than on maturity".

3.2 Identification of Fund

The fund must be **named in or be identifiable from** the order.

Where reference is made to "the funds to which the member belongs", this requirement will not be met. If however the divorce order refers to "the fund to which the member belongs as a result of their employment with ABC", then the fund may be identifiable. Where the member belongs to more than one fund as a result of their employment with ABC, albeit a hybrid, it is suggested that the fund asks the member to confirm in writing which funds were intended.

3.3 Fund ordered to pay

It must be **specifically ordered** that the fund should pay the amount concerned to the non-member spouse.

This requirement is the one that is most problematic.

Where the member is ordered to make payment to the non-member spouse, the fund is not in a position to make a deduction in favour of the non-member spouse.

Where no reference is made to payment, or no party is specifically ordered to make payment, one cannot make the deduction that it is implied that the fund has to effect payment.

However, if the divorce order has a reference to the effect that payment has to be made in terms of the provisions of section 37D of the Pension Funds Act or section 7(8)(a) of the Divorce Act, or the fund is ordered to make an endorsement in its records in accordance with section 7(8)(a) of the Divorce Act, and provided the other two requirements referred to above have been met,

the fund can make a deduction in favour of the non-member spouse. Refer in this regard to the determination of the Pension Funds Adjudicator in the matter of Gericke RB v Billiton Pension Fund & Sentinel Mining Industry Retirement Fund.

If the order is not binding to the fund, the member and / or the non-member spouse have to be advised accordingly. A defective court order cannot be amended by an agreement between the parties – they will have to go back to court to get an amended court order. The date of the amended order will not have an influence on the amount due to the non-member spouse, but will determine when the benefit accrues to the non-member spouse. For example, if the parties got divorced on 22 September 2008, but the divorce order was defective and an amended order that is binding on the fund is only obtained on 1 May 2009, the pension interest to be divided will still be the member's resignation benefit as at 22 September 2008. Because the accrual date is only 1 May 2009 though, the non-member spouse will be liable for the tax on that amount.

4. ELESANG V PPC LIME LTD & OTHERS

In the case of *Elesang v PPC Lime Ltd & others* [2007] JOL 18998 (NC), the member (M) left his employment after summons for a divorce were issued. He had not been paying maintenance for his one minor child. The couple were married in community of property and his wife (N) feared that her husband would squander the pension benefit which he was entitled to from his pension fund.

N applied for an order, pending finalisation of the divorce action, that the fund should pay half of M's "pension interest" into the trust account with her attorneys. The fund opposed on the grounds that M would no longer be a member of the fund on the day of his divorce and therefore N would not be entitled to claim under sections 7(7) and (8) of the Divorce Act.

Also, section 37A(1) of the Pension Funds Act did not allow for payment of any part of the member's benefit to a party "other than the member spouse".

It was held that section 7 of the Divorce Act referred to a "pension interest" which had not yet accrued and which belonged to a party who was still a member of the fund as at the date of the divorce. It went further by saying: "This did not mean that the [non-member spouse] would not be entitled to any part of the "pension benefits" which had already accrued to her husband. The fact that the accrued right, the pension benefit, was going to be part of the joint estate, entitled her, in principle, to one half of the net value of that estate. Even if she was not going to be able to claim payment of half of the pension benefit on the basis of section 7(7) of the [Divorce] Act, she had a right to secure at least half of the pension benefit to protect her half interest in the joint estate".

As far as the provisions of section 37A(1) of the Pension Funds Act is concerned, it was held that this section contains the proviso that the fund may pay a member's benefit or any part thereof to the member's dependants. It was stated that any other interpretation of the provision would have rendered the provisions of section 7(7) and (8) of the Divorce Act meaningless.

The fund was accordingly ordered to pay the amount concerned into the attorney's trust account, and to pay the cost of the application.

5. R BUDHOO V SASOL PENSION FUND AND ALEXANDER FORBES FINANCIAL SERVICES PTY (LTD)

The non-member spouse (Mrs E Budhoo) was married to Mr R Budoo until their divorce in July of 2009. Upon their divorce the settlement agreement did not make provision for the non-member spouse's entitlement to a pension interest from the pension fund, nor did it specifically state the pension fund as the fund responsible for the payment of the pension interest.

It merely provided that *R68 000 be paid to Rishi's account after Elaine receives the pension fund money.*

The fund administrator refused to effect the necessary endorsement and subsequent payment to the non-member spouse. They contended that the decree of divorce did not comply with section 7(8) of the Divorce Act.

Mr Budhoo submitted that he had no issue with the non-member spouse's claim for pension interest and on this basis, did not understand why they had to approach the court for amendment of the court order. He was therefore seeking an order that directed the fund to endorse its records to reflect that the non-member spouse was entitled to a pension interest and that the fund pay such pension interest to her. The administrator refused to endorse its records because the decree of divorce did not make provision for the payment of the pension interest, and stated that because the fund was not named therein the order was unenforceable for purposes of the Divorce Act.

Although Mr Budhoo stated that he had no "issues" with the non-member spouse receiving 50% of his pension interest, the Adjudicator ruled that consent cannot be substituted for the unenforceability of the order. The Adjudicator therefore ruled that the fund that has to deduct the pension interest must be named in or identifiable from the order [section 37D(4)(a)(i)(aa)]. The Adjudicator also dismissed the complaint based on the court order not providing for the non-member spouse's entitlement to any pension interest.

6. SUGGESTED SIMPLIFIED WORDING FOR BINDING DIVORCE ORDER

Instead of the long-winded provisions often found in divorce orders, it is suggested that where a member, non-member spouse or an attorney acting on behalf of either party requests assistance with the wording of a divorce order that is intended to be binding on the fund, the following wording be suggested to them:

The non-member spouse is entitled to 50% of the member's pension interest in the ABC Provident Fund. The ABC Provident Fund is ordered to pay this amount to the non-member spouse.

7. PROVISION OF MEMBER INFORMATION TO A THIRD PARTY

A board of a fund owes a fiduciary duty not only towards the members of the fund, but also to its beneficiaries. Where a divorce order grants a non-member spouse a right to share in the member's pension interest, that non-member spouse is entitled to know the value of the total pension interest at a specific date. It would then be fair and reasonable to oblige the fund, in fulfilling its duty of good faith, to disclose to the non-member spouse such information as is reasonably required by them for the exercise or protection of any right. The failure or refusal to do so without appropriate justification, will amount to an improper exercise of the fund's powers and / or maladministration by the board of the fund. However, a non-member spouse is not entitled to other information such as the value of the member's entire benefit (if that is different from the pension interest) or the member's insurance cover or contribution rate. That still remains confidential.

In establishing whether a non-member spouse is entitled to the information requested, the following questions must be answered:

- Does the non-member spouse have an antecedent right which they wish to exercise or protect?
- Is the information sought by the non-member spouse reasonably required by them in order to exercise or protect their rights?
- Has the fund provided any grounds to justify its refusal of the information sought?

The non-member spouse will have an antecedent right arising from a court order where they have a right conferred upon them by a divorce order to share in their former spouse's pension benefit.

An administrator should be careful not to divulge more information than that required to protect the non-member spouse's right. Where for instance the divorce order refers to a specific fund but the member is also a member of other funds administered by that administrator, the non-member spouse does not have a right to information in respect of any other fund and this should accordingly not be divulged by the administrator.

As far as other third parties are concerned, a member's personal information, which includes their pension benefit, is confidential and will not be provided to a third party without the member's prior written consent. This can be obtained directly from the member, or could be presented to the administrator in the form of a power of attorney by the third party. The administrator should be careful though not to divulge more information than that authorised by the member. Where the member gives

permission for all information regarding all benefits that they may be entitled to under any fund administered by the administrator, the administrator may divulge any and all such information. Where however the member specifically refers to information pertaining to one fund only, no information in respect of any other fund may be given out. This implies that the administrator is not even allowed to hint at other funds that the member may have membership of.

8. TAXATION OF DIVORCE ORDER AMOUNTS

Paragraph 2(b) of the Second Schedule to the Act provides as follows:

Subject to the provisions of section 9(1)(g) and paragraph 2A, 2B and 2C, the amount to be included in the gross income of any person in terms of paragraph (e) of the definition of "gross income" in section 1 shall be –

"(b) any amount –

(iA) *assigned in terms of a divorce order granted on or after 13 September 2007 under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), to the extent that the amount so assigned is deducted from the minimum individual reserve of that person's former spouse in terms of section 37D(1)(d)(i) of the Pension Funds Act, 1956 (Act No. 24 of 1956), or is so deducted in terms of section 37D(1)(d)(ii) of that Act as a result of the deduction contemplated in section 37D(1)(d)(i) of that Act."*

8.1 Divorce order granted before 13 September 2007

The Financial Services Laws General Amendment Act No. 22 of 2008 amended section 37D of the Pension Funds Act to make it clear that any portion of a member's pension interest allocated to a non-member spouse in terms of a divorce order granted before 13 September 2007 is deemed to accrue to that non-member spouse on 13 September 2007. This provision came into effect on 1 November 2008.

Accrual takes place on the date that the non-member spouse makes an election as to whether the amount concerned should be paid directly to them or transferred on their behalf to another retirement fund in terms of section **37D(4)(b)(ii)** of the Pension Funds Act, or on the date the amount is payable in terms of section **37D(4)(b)(iv)** of that Act.

Section 37D(4)(b)(ii) of the Pension Funds provides that the non-member spouse must make an election within 120 days of being requested to do so.

Section 37D(4)(b)(iv) provides that in the event of no election by the non-member spouse, the fund must pay the amount directly to the non-member spouse within 30 days of the expiry of the 120 day period within which the non-member spouse should have made an election.

The accrual dates for divorce orders granted prior to 13 September 2007 is either the date on which the non-member spouse **makes an election** (provided that it is within the 120 day period) or **30 days after the expiry of the 120 day period**.

If the accrual takes place before 1 March 2009, the amount concerned will be taxed at the highest average rate of tax of the current or previous tax year.

Paragraph 2(1)(b)(iA) of the Second Schedule to the Income Tax Act has been amended to now only require a divorce order amount granted on or after 13 September 2007 accruing after 1 March 2009 to form part of a person's gross income, to be taxed in accordance with the withdrawal / resignation table.

By implication, a divorce order amount granted before 13 September 2007 accruing after 1 March 2009 does not form part of a person's gross income. This gives effect to the letter sent by SARS to ASISA on 4 November 2009, which referred to National Treasury's intention to exclude both the member and non-member spouse from taxation on a pre-13 September 2007 divorce order payment with an accrual date on or after 1 March 2009.

To put it simply, if a non-member spouse only claims payment from a fund in respect of a divorce order granted before 13 September 2007 after 1 March 2009, neither party will pay tax on that amount.

The **current** position in respect of divorce order granted **prior to 13 September 2007** is as follows:

When is accrual?	If non-member spouse makes an election within the 120 day period	Date of election
	If non-member spouse does not make an election within the 120 day period	30 days after expiry of the 120 day period
Who pays the tax?	Member	
At what rate?	If accrual before 1 March 2009	Highest average tax rate
	If accrual after 1 March 2009	No tax

8.2 Divorce order granted from 13 September 2007 to 31 October 2008

The Taxation Laws Amendment Act No. 3 of 2008 amended paragraph 2 of the Second Schedule to the Income Tax Act to provide that accrual takes place on the date of the deduction of the amount concerned.

The Pension Funds Act provided for deduction on the date of receipt of the court order.

The **current** position in respect of divorce order granted **from 13 September 2007 to 31 October 2008** is as follows:

When is accrual?	Date of deduction = date of receipt of court order	
Who pays the tax?	If accrual before 1 March 2009	Member
	If accrual after 1 March 2009	Non-member spouse
At what rate?	If accrual before 1 March 2009	Highest average tax rate
	If accrual after 1 March 2009	Withdrawal tax table

8.3 Divorce order granted from 1 November 2008 to 28 February 2009

The Taxation Laws Amendment Act No. 3 of 2008 amended paragraph 2 of the Second Schedule to the Income Tax Act to provide that accrual takes place on the date of the deduction of the amount concerned.

Section 37D(4)(a)(ii) of the Pension Funds Act was amended with effect from 1 November 2008 to provide for deduction on the date on which the non-member spouse makes an election, or, if no election is made within the 45 day period, the expiry of that 45 day period.

If the accrual takes place before 1 March 2009, the amount concerned will be taxed at the highest average rate of tax of the current or previous tax year, in the hands of the member. The member will have a right of recovery of the tax from the non-member spouse.

If it takes place after 1 March 2009, it will be taxed as a withdrawal benefit in accordance with the tax tables applicable then, in the hand of the non-member spouse.

The **current** position in respect of divorce order granted **from 1 November 2008 to 28 February 2009** is as follows is as follows:

When is accrual?	If non-member spouse makes an election within the 120 day period	Date of election
	If non-member spouse does not make an election within the 120 day period	After expiry of the 45 day period
Who pays the tax?	If accrual before 1 March 2009	Member
	If accrual after 1 March 2009	Non-member spouse
At what rate?	If accrual before 1 March 2009	Highest average tax rate
	If accrual after 1 March 2009	Withdrawal tax table

8.4 Divorce order granted from 1 March 2009

Paragraph 2(1)(b)(iA) of the Second Schedule to the Income Tax Act has been amended to now only require a divorce order amount granted on or after 13 September 2007 accruing after 1 March 2009 to form part of a person's gross income, to be taxed in accordance with the withdrawal / resignation table.

No specific accrual date is mentioned, which means that the normal principles applicable to accrual as established through case law applies. It also provides that where the non-member spouse transfers the amount concerned to a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund, this will be a tax free transfer.

The same principles as those applicable in respect of divorce orders granted between 13 September 2007 and 28 February 2009 are accordingly also applicable here.

The **current** position in respect of divorce order granted **from 1 March 2009** is as follows:

When is accrual?	If non-member spouse makes an election within the 120 day period	Date of election
	If non-member spouse does not make an election within the 120 day period	After expiry of the 45 day period
Who pays the tax?	Non-member spouse	
At what rate?	Withdrawal tax table	

8.5 Tax paid by the member spouse is recoverable

Paragraph 2B of the Second Schedule to the Income Tax Act currently provides that the member has an option to recover the tax payable from the non-member spouse in respect of the divorce award. The reason behind the enactment of paragraph 2B (as stated in the Explanatory Memorandum of the Revenue Laws Amendment Act of 1999) is *that provision be made for the right of recovery from the former spouse of any amount of tax paid due to the inclusion in the income of such member of any amount which is payable to such spouse to whom or in whose favour an endorsement has been made.*

In a recent case of **Russow v Reid [2011] JOL 26787** the court ruled that a right of recovery arises by operation of law. This is because, according to the court, the non-member spouse made an election in terms of section 37(4)(b)(i) of the Pension Funds Act. The moment such an election was made, the tax implications were triggered as a secondary consequence of the election. The court was of the view that had the non-member spouse not exercised an election, no tax liability would have arisen.

The effect of the above decision is that the right to recover the tax need not be created in the settlement agreement, as was previously understood to be the case.

9. FUND VALUE INSIGNIFICANT TO PAY TAX AND COURT ORDER

The deduction of tax is the fund's primary liability where the order provides for a 100% allocation of the pension interest, as the fund cannot give effect to both obligations of deducting the tax and deducting the amount allocated to the non-member spouse in terms of the court order. This is in terms of paragraph 3 of the Fourth Schedule to the Act. The court order will therefore refer to 100% of the pension interest that remains *after* the tax has been paid.

10. IT88's FROM SARS

Where an IT88 was issued for a divorce order granted after 13 September 2007 but prior to 1 March 2009 and the application was in the name of the member, the SARS Branch Office must provide the fund with a written confirmation that the stop order is no longer required and that SARS will no longer assign the fund as an agent. It is not necessary however to cancel the directive.

Where an IT88 was issued and the application is in the name of the non-member spouse (after 1 March 2009), it will remain applicable.

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PREVIOUS POSITION

		Before 13/09/07	13/09/07 – 31/10/08	01/11/08 – 28/02/09	From 01/03/09
Date of deemed accrual		Date of election [within 120 days] / date on which amount is payable [30 days after expiry of 120 days]	Date of deduction [= date of receipt of court order]	Date of deduction (s37D(4)(a)(ii) = date election is made [within 120 days] / if no election, date in (4)(b)(i) [45 day period]	Date of deduction (s37D(4)(a)(ii) = date election is made [within 120 days] / if no election, date in (4)(b)(i) [45 day period]
Who pays tax?	Accrual before 01/03/09	Non-member spouse	Member	Member	Non-member spouse
	Accrual after 01/03/09	Non-member spouse	Non-member spouse	Non-member spouse	
How much?	Accrual before 01/03/09	Highest average rate	Highest average rate	Highest average rate	Withdrawal tax table
	Accrual after 01/03/09	Withdrawal tax table	Withdrawal tax table	Withdrawal tax table	
Transfer to another approved fund		Where member already paid tax, transfer gross amount (without deduction of any tax) to new fund	Same as for period before 13/09/07	Same as for period before 13/09/07	Transfer to pension, pension preservation, provident, provident preservation and retirement annuity funds tax free, irrespective of where it came from
Non-member spouse withdrawal from new fund after 01/03/09		<ul style="list-style-type: none"> Where member paid tax, transferred amount = tax free Tax per applicable table on balance of lump sum, subject to 2nd schedule deductions Not aggregated with future lump sum benefits 	<ul style="list-style-type: none"> Where member paid tax, same as for period before 13/09/07 Where non-member spouse paid tax, full lump sum taxable per withdrawal / retirement table, depending on whether it is withdrawal or retirement/death benefit, subject to 2nd schedule deductions Lump sum aggregated with all lump sum benefits after 01/03/09 	<ul style="list-style-type: none"> Where member paid tax, same as for period before 13/09/07 Where non-member spouse paid tax, full lump sum taxable per withdrawal / retirement table, depending on whether it is withdrawal or retirement / death benefit, subject to 2nd schedule deductions Lump sum aggregated with all lump sum benefits after 01/03/09 	<ul style="list-style-type: none"> Full lump sum taxable per withdrawal / retirement table, depending on whether it is withdrawal or retirement / death benefit, subject to 2nd schedule deductions Lump sum aggregated with all lump sum benefits after 01/03/09
Effect on member's lump sum benefit		Aggregated with member's lump sum benefits on future withdrawals, retirement & death	<ul style="list-style-type: none"> Where member paid tax, aggregated with member's lump sum benefits on future withdrawals, retirement & death Where non-member paid tax, no effect 	<ul style="list-style-type: none"> Where member paid tax, aggregated with member's lump sum benefits on future withdrawals, retirement & death Where non-member paid tax, no effect 	No effect

CURRENT POSITION

Date of divorce order	Who bears the tax?		Accrual	
Prior to 13 September 2007	Member		Date of election (if within 120 day period) or date of payment (if no election; payment has to be made within 30 days of expiry of 120 days)	
13 September 2007 – 31 October 2008	Deduction prior to 1 March 2009	Member	Deduction prior to 1 March 2009	Date of deduction (= receipt of court order)
	Deduction on or after 1 March 2009	Non-member spouse	Deduction on or after 1 March 2009	Election / date of payment
1 November 2008 – 28 February 2009	Non-member spouse made election within 120 days	Member	Non-member spouse made election within 120 days	Date of election
	Non-member spouse did not make election within 120 days	Non-member spouse	Non-member spouse did not make election within 120 days	After expiry of the 45 day period
On or after 1 March 2009	Non-member spouse		Non-member spouse made election within 120 days	Date of election
			Non-member spouse did not make election within 120 days	After expiry of the 45 day period