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National Treasury

Ms Adele Collins (South African Revenue Service)

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Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2019

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill (DTLAB19) and Tax Administration Laws Amendment Bill 2019 (DTALAB19). As opposed to prior years, where a single submission has been made, our submission this year has been divided into three parts, namely matters involving amendments to –

1. The Income Tax Act, 58 of 1962, as amended (the Act);

2. The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and

3. The Tax Administration Act, 28 of 2011, as amended (the TAA Act).

We have set out in detail in **Annexure A,** our comments in relation to the matters referred to point 2 above pertaining to the VAT Act.

Please do not hesitate to contact us should you have any queries in relation to anything contained in this submission.

Yours sincerely

David Warneke **Pieter Faber**

Chairperson: National Tax Committee **Senior Executive: Tax**

The South African Institute of Chartered Accountants

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ANNEXURE A

CATEGORY – VALUED ADDED TAX

Financial Services to include the transfer of ownership of a long-term re-insurance policy

Amendment to section 2(1)(i) (Clause 65)

1 Section 2(1)(i) of the VAT Act is amended to specifically include the transfer of a long-term reinsurance policy as a "financial service". The proposed amendment removes the uncertainty that existed as to whether or not the transfer of long-term reinsurance policies is an exempt financial service.

2 Submission: We welcome the proposed amendment and have no further comment.

Refining the VAT corporate reorganisation rules in relation to VAT

Amendment to section 8(25) (Clause 66)

3 Section 8(25) of the VAT Act will be amended to include the supply of fixed property where the supplier and the recipient agree in writing that immediately after the supply, the supplier will lease the fixed property from the recipient.

4 The proposed amendment will include transactions where the only asset being transferred will be fixed property provided it will be leased back to the supplier once transfer of the property is completed. This amendment will address the adverse cash flow consequences of such fixed property transfers within a group of companies.

5 Submission: We welcome the proposed amendment but would suggest that this amendment be extended to include movable property.

Reviewing section 72 of the VAT Act

Amendment to section 72 (Clause 71)

6 The proposed amendment includes a requirement that a decision in terms of section 72 of the VAT Act may only be issued by the Commissioner if similar difficulties, anomalies or incongruities have arisen or may arise for any other vendor or class of vendors of the same kind or who make similar supplies of goods or services.

7 According to clause 72(2) of the draft Taxation Laws Amendment Bill (TLAB), the amendments to section 72 are deemed to have come into operation on 21 July 2019 and apply to all applications made on or after that date. The Explanatory Memorandum (EM), however, simply stipulates that the amendments are deemed to have come in operation on 21 July 2019.

8 The impact of the proposed amendment to the legislation on section 72 decisions already issued is not clear.

9 Decisions already issued by the Commissioner contain a proviso that the decision is only valid for as long as there is no change to the underlying legislation. This could have the undesirable effect that all decisions will no longer be valid from the date the proposed amendments to section 72 are promulgated. It is also our understanding that SARS' view is that the current ruling will in fact be withdrawn from date of release of the draft Bill namely 21 July 2019, making all such taxpayers non-compliant retrospectively.

10 Conflicting decisions may then simultaneously be in force in relation to the same issue.

11 It should also be borne in mind that costly and time-consuming system amendments would in many cases be required to comply with the amendments to the VAT Act, which also cannot be implemented overnight.

12 Submission: The proposal to withdraw the current rulings on date of announcement or promulgation is impractical. Explicit clarity should be provided on the status of existing section 72 decisions. Furthermore, we suggest that the amendments be brought into effect from a future date in order to provide vendors or classes of vendors with current section 72 arrangements with sufficient prior notice as to whether their arrangement will be renewed or not, and they should be allowed sufficient time to implement system amendments.

13 It seems that vendors will be required to demonstrate that similar difficulties, anomalies or incongruities exist for other vendors or class of vendors of the same kind or who are making similar supplies of goods or services before a section 72 arrangement will be made.

14 It is not clear how narrowly "similar" or "of the same kind" should be interpreted and this will give rise to practical difficulties.

15 Furthermore, the business operations of vendors are confidential, and so are the underlying agreements between the parties. A vendor will not have insight into the contractual arrangements of another vendor's operations. If a vendor has a unique operation or a unique business model, then it is quite likely that the specific VAT Act provisions may cause difficulties for such vendors and this would also apply to vendors in monopoly positions, such as certain State Owned Enterprises, who would all be prejudiced as SARS will not be able to make an arrangement to accommodate the vendor.

16 Submission: Section 72 should not place the *onus* on the taxpayer to determine whether other vendors of the same kind are experiencing similar difficulties. Further,

section 72 should be applicable to and take into consideration the unique difficulties experienced by a vendor where there are no other vendors that make similar supplies or who operate similar business models.

17 It is not clear why it is proposed that the word "arrangement" be deleted in section 72(1). All the BGR's issued by the Commissioner under section 72 seem to be "an arrangement". If it is considered that "decision" and "arrangement" are synonymous in this context, then it would make sense to delete the words to avoid duplication.

18 Submission: National Treasury should provide more clarity with regard to the reason for and purpose of the deletion of the word "arrangement".

19 It is proposed that the words "substantially" and "ultimate" be deleted from par (i) of the first proviso. If the intended measurement is that the VAT liability of each vendor involved in a transaction is considered individually, then it is most likely that a section 72 decision will hardly ever be made in the case of a class of vendors.

20 However, if the VAT liability of such class of vendors is measured collectively, taking into account output tax and input tax that would otherwise have been payable and deductible, then the deletions would be in order.

21 Deleting these words may also render section 72 more or less superfluous (especially deleting the word "ultimate") which then requires a macro assessment instead of a micro-assessment, which increases the difficulty of interpretation and application.

22 Submission: National Treasury should provide guidance as to how they would consider the VAT liability to be measured for the purpose of par (i) of the proviso.

23 Alternatively, it should be proposed that proviso (i) be amended to read along the lines of: *(i) have the effect of reducing or increasing the tax payable by a vendor or class of vendors collectively, as calculated under section 16(3)*.

24 Our understanding of the proviso to section 72 is that either par (i) or par (ii) will prevent the Commissioner from making a decision or arrangement under section 72. Therefore, if a decision does not result in any reduction or increase in the VAT payable, but it is considered to be contrary to the construct of the VAT Act, then the Commissioner may not make the decision or arrangement. There are often disputes as to what exactly is "policy intent" and this can at times be confused with SARS' own internal administrative policies with regard to the interpretation of the VAT Act.

25 The wording of proviso (ii) to subsection 1 is ambiguous. It seems that it can be interpreted as follows:

(i) The decision shall not be contrary to the construct and policy intent of the VAT Act as a whole, or it shall not be contrary to any specific provision of the VAT Act; or

(ii) The decision shall not be contrary to the construct and policy intent of the VAT Act as a whole, or it shall not be contrary to the construct and policy intent of any specific provision of the VAT Act.

26 The Commissioner will not be required to make a decision under section 72 unless there is a difficulty or anomaly in the application of a specific provision of the VAT Act. If the proviso is to be interpreted as set out under (i) above, the Commissioner will, it appears in our view, never be allowed to make a section 72 decision.

27 If the proviso is to be interpreted as set out under (ii) above, then the difficulties with regard to the subjective interpretation and application of the "construct" and "policy intent" arise.

28 Submission: The reference to "construct" and "policy intent" do not seem to belong within the legislation, as these are embedded overarching principles applicable to the VAT Act as a whole and not only section 72. This could potentially also be contradictory to "the manner in which [any provisions of the VAT Act] shall be applied" and potentially render section 72 moot.

29 For example, the application of section 72 to the airline industry where foreign airline owners who lease aircraft to South Africa customers are absolved from the requirement to register for VAT, on the basis that any VAT which the foreign owner would charge the local recipient, could be claimed back as an input tax deduction by the local recipient.

30 This would presumably be contrary to the policy intent of s23(1) of the VAT Act, even though it may not necessarily be contrary to the policy intent of the VAT Act as a whole as the net position is the same.

31 On this basis, it appears that all such vendors would in future have to register for and charge VAT to their local recipients, including those who are currently in possession of section 72 approval, even though SARS has established a precedent in this regard.

32 It is unclear what the purpose of the proposed new section 72(2) is.

33 SARS is entitled to apply the provisions of section 72 without the requirement of an application by a vendor or class of vendors for a ruling. SARS has issued many section 72 rulings to overcome difficulties or anomalies where there was no prior application under Chapter 7 of the Tax Administration Act (TAA) by a vendor or class of vendors. Examples are BGR 12, 14, 34, 37, 39, 46 and 51.

34 Submission: We recommend that the proposed section 72(2) be deleted. Alternatively, it could simply state that any decision or arrangement made by the Commissioner under section 72 must be made in terms of a ruling as contemplated in

section 41B or Chapter 7 of the TAA. Such a ruling will then have a binding effect on SARS.

35 Our understanding of the new proposed section 72(3) is that the Commissioner wants to publish a list of transactions or matters where a section 72 decision or arrangement will not be made, probably similar to the "no-rulings" list currently contained in Government Notice 748 of 24 June 2016.

36 If our understanding is correct, the Commissioner would then decide beforehand in which instances he will not make a section 72 decision or arrangement, without having to consider the merits of the applicant's case and whether the circumstances in fact do actually qualify for the application of section 72.

37 In this regard we do not believe this to be similar to the "no rulings list" as that seeks an interpretation of law, whereas this seeks a facts based practical solution where the law does not meet its intended purpose.

38 Submission: This may be contrary to the provisions of section 3 of the Promotion of Administrative Justice Act, 2000, which entitles every person to fair administrative action which is procedurally fair and the person must be afforded a reasonable opportunity to make representations. The Commissioner has a statutory duty to objectively consider such representations and thus the inclusion of this subsection should be reconsidered.

39 It is worth comparing the apparent vast use of wording in the proposed subsections (2) and (3) to the one-liner used in s17(1) i.e. "……as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or section 41B". The sections that have been specifically omitted from the proposed subsection (2) to section 72, could create ambiguity as to which section(s) of the TAA apply to any other ruling applications.

40 For example, in practice, an application for approval to use an alternative apportionment method is not subject to an application fee, however, given the use of the word "or" in section 17(1), presumably section 79(6) read with section 81 of the TAA applies to such an application as it has not been specifically removed as is the case with 41B(1)(i), or specifically applicable as is the case with the proposed subsection (2) to section 72.

41 Submission: It would be preferred if the proposed section 72 could follow a similar construct to that in s41B(1)(i) by only listing the sections that are not applicable. This will provide for more concise drafting, as well as an opportunity for the EM to explain why the particular sections are being omitted from section 72.

42 Section 72 is not currently a "rulings section", but section 41B is. It appears that section 72 is now being made into a "rulings section" in its own right and, on this

basis, the proposed subsections (2) and (3) appear to be largely duplicating what has already been provided for in section 41B (e.g. proposed subsection (3) vs s41B(1)(ii)(bb)). However, when comparing section 41B to the proposed amendments to section 72, it is important to note that -

43 Section 72 applications will henceforth be subject to an application fee as provided for in s79(6) read with s81 of the TAA, presumably to attract applications only when they are absolutely needed;

44 Section 72 rulings will likely not provide protection to vendors as section 82(1) of the TAA will not apply to require that SARS must interpret or apply the VAT Act to the person in accordance with the ruling;

45 Section 72 rulings may henceforth be cited in any proceedings, including court proceedings, as section 82 and section 88 of the TAA will not apply, whereas currently section 72 does not allow this.

46 Neither sections 72 nor section 41B of the VAT Act nor Chapter 7 of the TAA make provision for the time frame within which a person must re-apply for rulings subject to an expiration date.

47 Although in practice SARS in some cases allows the existing ruling to remain in force after the expiration date, provided the person has timeously submitted a re-application, no legislative provisions exist in this regard.

48 Submission: We recommend that provisions be incorporated into sections 72 and section 41B of the VAT Act and Chapter 7 of the TAA to the effect that the re-application of rulings subject to expiration dates must be made within a particular period prior to the expiration date of the ruling.

49 Further, we recommend that a provision be included to the effect that if the person submitted the re-application within the required period, the existing ruling will remain in force until the re-application has been confirmed, amended or declined by SARS.

50 Taking all the above comments into account, it would be useful to understand exactly what National Treasury's concerns are with this section, as the explanation in the EM is vague and does, unfortunately, not assist in this regard.

51 Submission: We have fundamental concerns regarding the proposed section 72 amendments, and we request a meeting with National Treasury and SARS to discuss this section specifically. The normal workshops in which all the proposed amendments are discussed will not be a suitable forum or allow sufficient time to discuss the concerns.

Refining the VAT treatment of foreign donor funded projects

Amendment to section 1 (Clauses 64, 66 and 70)

52 The proposed amendments clarify the uncertainty as to who must register a foreign donor funded project for VAT. The definition of a "foreign donor funded project" is amended to include a requirement that it "has been approved by the Minister of Finance as a foreign donor funded project for the purposes of the definition".

53 Submission: We recommend that SARS regularly publishes an updated list of approved foreign donor funded projects.

54 The requirement in the definition of "foreign donor funded project" to **obtain prior approval from the Minister of Finance** seems to be problematic. The Explanatory Memorandum refers to a guideline to be issued by SARS outlining a streamlined process to be followed to obtain this required approval. As with any ministerial approval (despite any promised streamlined process), it is expected that significant delays will be experienced to obtain such approval. Any undue delays in obtaining approval will place the foreign donor funding and the project in jeopardy. The implementing agency will not be able to accept foreign donor funds prior to obtaining the ministerial approval, as the project must be free of income tax and VAT as a condition of the donor funding. If the ministerial approval is not granted for any reason or if it is delayed, then the recipient will be in breach of the donor funding conditions which may impact on all future donor funding.

55 Submission: We caution that this streamlined process should be in place before the effective date of the proposed amendment to avoid delays in the approval process given the importance of these projects. An amendment to section 8(23) was previously introduced to obtain ministerial approval for Housing Schemes that would fall within that section. It was later realised that such ministerial approval could not be provided or obtained, and this requirement was firstly postponed for two years and thereafter repealed.

56 In order to avoid a similar experience, clarity on the following should be provided before any amendment in this regard is implemented: exactly what is meant by a "streamlined process" to obtain approval, what would be required in order to obtain approval and how long such approval will take.

57 It would also not make any sense to implement such a requirement unless the process has been properly considered and tested beforehand.

58 In order to further avoid the expected delays in obtaining ministerial approval, we recommend that organs of foreign states, such the National Institute of Health, Centre for Disease Control and Prevention, USAID etc be pre-approved as qualifying foreign donors (as opposed to each projected funded by them), as all the donor funding

provided by all these institutions, will in any event qualify for approval as foreign donor funded projects. A streamlined approval process can then be implemented for any other donor organisations which are not "pre-approved".

59 There are certain foreign private donors (such as the Bill & Melinda Gates Foundation) which provide substantial amounts of donor funding, particularly for medical research projects to South African entities.

60 Submission: Consideration should be given to the inclusion of these foreign donors in relation to qualifying projects in the definition of "foreign donor funded project".

61 The definition of "enterprise" is amended to include the activities of an "implementing agency" as opposed to the activities of a foreign donor funded project. It is unclear as to how this will impact the current registrations of foreign donor funded projects when the amendments become effective, i.e. whether current registrations would need to be cancelled and a new VAT registration for the implementing agency would be required.

62 Submission: Clarity should be provided with regard to the registration status of uncompleted foreign donor funded projects as at 1 April 2020. The proposed amendments should preferably only apply to all foreign donor funded projects commencing on or after 1 April 2020.

63 As mentioned above, activities of an implementing agency are now included in the definition of "enterprise".

64 Submission: Clarity should be provided as to whether a single VAT registration for an implementing agency which manages and administers multiple foreign donor funded projects would be in order, or whether a separate registration for each foreign donor funded project managed by the implementing agency is required.

65 Paragraph (b) of the new definition of "implementing agency" includes an institution or body appointed by a foreign government, as contemplated in s 10(1)(bA)(ii) of the Income Tax Act.

66 Submission: Clarity should be provided as to why multinational organisations as contemplated in s 10(1)(bA)(iii) of the Income Tax Act are not also included in this definition.

67 Where a government department receives foreign donor funding for a project, and it in turn contracts with another person to implement, operate, administer or manage the project, it is not clear as to whether both the government department and the person who contracts with the government department, who are both "implementing agencies", are both required to register for VAT. Both could be considered to implement, operate, administer or manage a foreign donor funded project.

68	Submission: Clarity should be provided on the above matter.

69 Where the government department receives the foreign donor funding and pays it on to the implementing agency to implement the project, it is not clear as to whether such payment to the implementing agency will fall within the ambit of section 8(5B), being a payment received from an international donor.

70	Submission: Clarity should be provided on this matter.

71 It is not clear whether the words "to implement, operate, administer or manage a foreign donor funded project" only apply to paragraph (c) of the definition of "implementing agency" (and not also to paragraph (a) or (b)) in which case the words should follow directly after paragraph (c), or whether they apply also to paragraph (a) or (b) of the definition.

72	Submission: Clarity should be provided on this matter.

73 The term "Official Development Assistance Agreement" is currently not defined.

74	Submission: We recommend that this term be defined, potentially by adopting the OECD definition.

Goods supplied consist of sanitary towels (pads)

Amendment to section 11(1)(w) of the VAT Act (Clause 68)

75 The proposed insertion of section 11(1)(w) is to correctly capture the supply of sanitary towels which was incorrectly included under section 11(1)(j) of the VAT Act.

76	Submission: We welcome the proposed amendment to correct the legislation.
77	We recommend further that "tampons" also be afforded the benefit of the zero rate (per recommendation of the VAT Panel chaired by Prof Ingrid Woolard).