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National Treasury
Ms Adele Collins (South African Revenue Service)

Per email: 2019AnnexCProp@treasury.gov.za
acollins@sars.gov.za

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 in point 3 above pertaining to the TAA Act. We also set out in **Annexure B** additional matters that in our view should also be considered.

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

Yours sincerely

David Warneke
Chairperson: National Tax Committee

Pieter Faber
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The South African Institute of Chartered Accountants

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ANNEXURE A

TAX ADMINISTRATION

The Income Tax Act –

Amendment of section 49E and 50E (Clauses 2 and 3)

1 The amendments to both sections do not mention that the declarations and written undertakings need only be done once where more than one payment is made to the same foreign person within a period of two years as set out in the Explanatory Memorandum (EM). It is also not clear from the proposed amendments that the declarations and written undertakings need to be submitted before the first payment is made.

2 Subsections 49E(4) and 50E(4) should clarify that the declaration or written undertaking will become invalid after a period of two years calculated from the date when the declaration or written undertaking was submitted.

3 Submission: Subsections 49E(2), s49E(3), 50E(2) and 50E(3) should be amended to reflect the intentions as set out in the EM.

4 Subsections 49E(4) and 50E(4) should be amended to provide clarity from when the two year period is calculated. That is, that the declaration and written undertakings will no longer be valid after a period of two years from date of submission (ie. two years after the date the declaration and written undertakings were submitted – which is *before* the *first* payment was made to that foreign person).

Amendment of section 60(5) (Clause 4)

5 The repeal of section 60(5) is regarded as a technical correction to bring the assessment of donations tax under Chapter 8 of the TAA. However, section 60(5) does not only deal with assessment, but also with the payment of donations tax as is evident from the heading of the section: “Payment and assessment of tax”.

6 Section 60(5) currently reads as follows:

7 “*The Commissioner may at any time assess either the donor or the donee or both the donor or the donee for the amount of donations tax payable or, where the Commissioner is satisfied that the tax payable under this Part has not been paid in full, for the difference between the amount of tax payable and the tax amount paid, but the payment by either of the said parties of the amount payable under such assessment shall discharge the joint obligation*.”

8 Chapter 8 of the Tax Administration Act (TAA) does not specifically provide for the Commissioner to assess either the donor and donee or both as is catered for in section 60(5).

9	Submission: The section should not be deleted in its entirety as the section deals with both the payment and assessment of donations tax. The nuances of the assessment for donations tax for a donor and done as currently set out in section 60(5) should be specifically catered for in the TAA.

Amendment of section 64G (Clause 5)

10 It is not clear why the amendments to sections 49E and 50E regarding the declarations and written undertakings that need only be done once (before the first payment is made) where more than one payment is made to the same foreign person within a period of two years are not also applied to section 64G (however please note our concerns with the current wording the proposed amendments to sections 49E and 50E as mentioned in paragraph 1 above).

11 Subsection 64G(4) also does not clarify that the declaration or written undertaking referred to in section 64G(2) and 64G(3) will become invalid after a period of two years from the date when the declaration or written undertaking were submitted.

12	Submission: Subsection 64G(4) should be amended to reflect the intentions as set out in the EM.

Amendment to paragraph 14 of the Fourth Schedule (clause 7)

13 The amendment proposes to extend the penalty in terms of this paragraph to instances where an employer submits a return that is not in the "prescribed form and manner ie. an incomplete return".

14 It first needs to be pointed out that form and manner have nothing to do with completeness. Furthermore, as the proposal is worded, any mistake or omission on the form submitted, no matter how insignificant, could be argued to render the employer liable for the penalty. This is overly punitive.

15	Submission: The penalty should be limited to cases in which there are material omissions or inaccuracies on the form, or if the form is not submitted at all by the due date.

The VAT Act –

Amendment to section 20 (clause 18)

16 The amendment delegates the authority to prescribe particulars to be contained on a tax invoice issued by a foreign supplier of electronic services, from the Minister to the Commissioner.

17	Submission: Changes made to these invoices should generally not happen very often but could have profound effects for the foreign suppliers should they be required as generally changes to taxpayer ERP systems would be both costly and time consuming. We would thus like to understand the reasoning behind why the delegation of a matter, that could have profound implications for taxpayers, has changed from the Minister to the Commissioner.

The Skills Development Act –

Amendment to section 7 (clause 21)

18 The EM states that the proposed amendment aims to align the refund provisions of the Skills Development Levy Act with the provisions of the TAA (section 190(4)), in that the refund must be claimed by the employer within 5 years from the date the levy was paid.

19 It is not clear what constitutes "claimed" as section 190(4) of the TAA does not require a refund to be claimed, it merely states that SARS must pay a refund if a person is entitled to the refund and sets out the prescription periods for the refund.

20	Submission: The term "claimed" should be clarified or the TAA should be amended to align with the proposed amendment.

The Unemployment Insurance Contribution Act –

Amendment to section 9 (clause 24)

21 The EM states that the proposed amendment aims to align the refund provisions of the Skills Development Levy Act with the provisions of the TAA (section 190(4)), in that the refund must be claimed by the employer within 5 years from the date the levy was paid.

22 It is not clear what constitutes "claimed" as section 190(4) of the TAA does not require a refund to be claimed, it merely states that SARS must pay a refund if a person is entitled to the refund and sets out the prescription periods for the refund.

23	Submission: The term "claimed" should be clarified or the TAA should be amended to align with the proposed amendment.

The Tax Administration Act –

Amendment to section 11 (clause 25)

24 The proposal seeks to extend the notice period that is required to be provided, by a taxpayer to SARS, to inform SARS that legal proceedings will be instituted against the Commissioner in the High Court.

25 The EM justifies this extension by comparing it to the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, in which, according to the EM, it is stated that no legal proceedings for the recovery of debt may be instituted unless six months' written notice, from the date the debt became due, is provided to the organ of state.

26 Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, however, states that a notice must be served within six months from the date on which the debt became due. Hence this section merely limits the time in which a notice can be served and does not state that six months' notice must be given before proceedings for the recovery of a debt may be instituted.

27 Submission: The misstatement in the EM in relation to the notice period contained in the Institution of Legal Proceedings Against Certain Organs of State Act should be removed or corrected to reflect the correct context.

28 The reason provided in the EM for the extension of the notice period to be provided to SARS, is in order to allow SARS an opportunity to investigate the matter further so as to avoid or minimise litigation at the public's expense. However, most proceedings instituted by taxpayers in these instances are to compel SARS to comply with its obligations as set out in the provisions of the TAA, which SARS fails to do. Taxpayers attempting to recover debts arising from a delict or from a breach of contract are rarely the cause for applications to the High Court.

29 Submission: Extending the pre-emptory notice period from seven calendar days to twenty-one business days, effectively means that a taxpayer will need to wait a period of nearly a month before it can approach the High Court for relief. In most instances, these applications are made to compel SARS to fulfil its obligations in terms of the various Acts. The extension of the time period for SARS to reply will be to the detriment of taxpayers' rights, and could result in a surge of urgent applications against SARS and will put even further pressure on the already overburdened State Attorney's offices.

30 We are therefore of the view that one week is sufficient time to resolve the majority of issues and there is no need to amend section 11(4) to extend SARS' time period to reply.

Amendment to section 12 (clause 26)

31 The reference, in section 12(2)(b) to "an advocate duly admitted under a law providing for the admission of advocates in an area in the Republic which remained in force by virtue of paragraph 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996" appears to be superfluous as the Legal Practices Act makes provision for all legal practitioners (which includes advocates) to appear in the tax court or High Court irrespective of how they became an advocate.

32 Submission: Section 12(2)(b) can be deleted as it is superfluous.

Amendment to section 191 (clause 36)

33 The proposed amendment to section 191 aims to clarify that SARS may set-off refunds against the outstanding tax debt of the taxpayer as well as amounts outstanding in terms of customs and excise legislation, even if there is no outstanding tax debt. In such instances the full amount is then utilised towards the customs and excise debt.

34 The current debt equalisation practices employed by SARS where PAYE, VAT and income tax debts can be set-off against refunds arising under any of these tax types are problematic as SARS's systems is not capable of informing the taxpayer of the amounts, taxes and periods affected by the debt equalisation. This, in turn, leads to interest, penalties and lost business as the taxpayer's tax compliance status is negatively affected. The resolution and reconciliation of these actions by SARS are consuming increasing resources of taxpayers. If customs debts are brought into the scope of debt equalisation, it may be near impossible to resolve these matters.

35 Submission: This amendment should only become effective once SARS's systems are capable of providing accurate and complete information on a timeous basis to taxpayers so that taxpayers are able to address these matters in an informed manner.

36 The proposal is to substitute subsection (4) of section 191. However, there is no subsection (4) of section 191 currently in the TAA. The reference should be to section 91.

37 Submission: The correct subsection that requires substitution is section 91(4).

Amendment to section 212 (clause 38)

38 The title of section 212 refers to "Reportable arrangement and mandatory disclosure penalty". The proposed amendment to section 212(1)(b) reads as follows ".....who fails to disclose the information required to be disclosed under the regulations."

39 Submission: As there is a difference between the terms "mandatory and "required" we suggest that the term "required" be deleted and the subsection be amended to

read as follows: "….who fails to disclose mandatory information under the regulations".

40 The regulations issued under section 257 should refer to the 'static' definition of "intermediary" i.e. as defined at a given date, in order to avoid problems similar to those that necessitated the proposed change to the definition of "permanent establishment" in Clause 2(1)(i) of the Taxation Laws Amendment Bill of 2019.

41 Submission: The regulations issued under section 257 should refer to the 'static' definition of "intermediary" i.e. as defined at a given date.

Amendment to section 234 (clause 40)

42 The EM states that a criminal sanction would now be imposed if any document required to be submitted to SARS is erroneous, incomplete or false. It fails to mention that this sanction is only relevant if the person wilfully and without just cause submits such documents.

43 Submission: The EM should be amended to clarify the true extent of the change.

44 A document could be erroneous due to a bona fide inadvertent error, or an immaterial error. In such circumstances, criminal sanctions would be inappropriate. This would also align with the fact that section 222(1) expressly excludes bona fide inadvertent errors from incurring understatement penalties.

45 Submission: It is imperative that the meaning of the terms "wilfully and without just cause" be clarified so as to ensure that bona fide inadvertent errors or immaterial errors are prevented from being subject to criminal sanctions.

Amendment to section 240A (clause 41)

46 As of 1 November 2018, the Legal Practice Council (LPC) replaced the four law societies and Bar councils as the statutory regulator of the legal profession with those bodies being relegated to mere member bodies.

47 In terms of the amendment to section 240A, the LPC must be recognised by SARS as a recognised controlling body and will thus be required to comply with all the necessary regulatory provisions attached to this, such as those stipulated in section 240A(3)(1) and section 243.

48 Submission: It should be ensured that the Legal Practices' Council has agreed to this and is in a position to comply with the necessary provisions.

49 Despite the above, it seems untenable to retain section 240A(1)(b).

50	Submission: It is submitted that section 240A(b) be deleted from a future date to enable such organisations to fully comply with section 240A(2) and transition to that regulatory regime in the next 12 months.

Amendment to section 256 (clause 43)

51 The wording of section 256(2) appears to exclude the possibility of a taxpayer applying for a TCC him/herself.

52	Submission: Section 256 should clearly distinguish and/or clarify what the procedures and implications are, for both a taxpayer or a taxpayer's client applying for a taxpayer's tax compliance status, should they be different.

53 Section 256(2) also suggests that SARS has 21 business days to provide/decline to provide access to a taxpayer's tax compliance status. The 21 business days appears excessive if it relates merely to third party access to a taxpayer's tax compliance status – and not to the actual confirmation of the tax compliance status as is alluded to in the latter part of the subsection.

54	Submission: A distinction should be made in the subsection between the provision of access to a taxpayer's compliance status and the actual confirmation (determination) of the taxpayer's compliance status as they are two distinct processes. We submit that 21 business days is far too long for providing access to a taxpayer's compliance status as this should be instantaneous once the status has been confirmed (determined).

55 The requirements set out in subsection (3) that are essential in order to reflect if a taxpayer is tax compliant or not are as follows: a) whether he/she is registered for tax, b) whether he/she has no outstanding tax debt and c) whether he/she does not have any outstanding tax returns. Currently the section reads as if these three requirements are exclusive alternatives to each other as they are separated by the word "or".

56	Submission: As it is our understanding that all three requirements should be fulfilled before a taxpayer's tax compliance status can be reflected as compliant, the "or" at the end of subsection 3(b) should be changed to "and".

57 Subsection (3)(b) regards a taxpayer as fulfilling the requirement of 'having no outstanding tax debt' even if the taxpayer has debt, but only if the debt consists of the following types of debt: debts contemplated in sections 167 and 204 of the TAA (instalment payment agreement or a compromise of a tax debt), debt that has been suspended in terms of sections 164, debt that does not exceed R100 as stipulated in section 169(4) or any higher amount that the Commissioner may determine by public notice.

58 The EM stipulates that the purpose of this amendment is to insert a *de minimis* amount for the amount of outstanding tax debt that will contribute to a taxpayer's tax compliance status as being indicated as non-compliant. However, the word "or" is used to separate the different debts in the section, so the de minimis amount is not exclusionary.

59 Submission: The section should be amended so that the objective of inserting a *de minimis* as set out in the EM is met.

60 Subsection (4) lists items that must be included on a "verification" of the tax compliance status of a taxpayer. The use of the word "verification" in this context does not make grammatical sense as "verification" is a process.

61 Submission: The word "verification" should be removed and another alternative word (perhaps "confirmation") should be inserted in its place.

62 Subsection (5) now enables the Commissioner to provide access to a taxpayer's tax compliance status as at the date of the request or a previous date as prescribed by the Commissioner by public notice. This prescribed date had to previously be prescribed by the Minister.

63 Submission: Reasons as to why this authority has changed from the Minister to the Commissioner should be included in the EM.

64 It is unclear what the consequences would be in subsection (6) if the access provided was provided in error. Furthermore, the section refers to the revocation of the access on the basis of fraud, misrepresentation or non-disclosure of material facts. It is unclear by whom the fraud, misrepresentation or non-disclosure of material facts should have been perpetrated. It is also unclear what the process and implications would be if the taxpayer disproved the allegations.

65 Submission: The subsection should provide for instances where an error was made in providing access to a taxpayer's tax compliance status. The subsection should also make it clear that it is the taxpayer's fraud, misrepresentation or non-disclosure of material facts that may lead to the revocation of the access. The steps to be taken where the taxpayer disproves the allegations within the 14 days should also be covered in this subsection.

CUSTOMS & EXCISE

Amendment to section 114A in the Customs & Excise Act

Criminal sanctions in the TAA to apply (clause 16)

66 The proposed amendment makes provision for options for SARS, in addition to those dealt with in section 114 of the Customs and Excise Act, for the collection of debt owed to SARS in terms of that Act. This is achieved by making Part D of Chapter 11 of the Tax Administration Act, 2011, including any criminal and other sanctions contained in that Act, with the necessary changes as the context may require, applicable for purposes of the Customs and Excise Act.

67 Submission: Chapter XI of the Customs and Excise Act already has penal provisions for criminal procedures. The amendment results in a legal overlap, not options, and should be removed.

ANNEXURE B

ADDITIONAL MATTERS

Amendment to section 18A of the Income Tax Act (Clause 2.1)

68 There is currently an anomaly with regard to the practical requirements in terms of a section 18A(2B) and the guidance Interpretation Note 112 (Section 18A: Audit certificate) issued on 21 June 2019.

69 Section 18A(2B) requires that an audit certificate must be obtained, confirming that ALL the donations received in a year for which a receipt was issued in terms of section 18A(2), were utilised in the manner contemplated in section 18A(2A) I.e. 100% substantive testing.

70 The Interpretation Note, however, stipulates the following in section 4.3.1:

71 *"Strictly interpreted, confirmation regarding the use of all donations for which section 18A receipts were issued requires detailed testing of every flow of cash in respect of which a section 18A receipt was issued. SARS recognises this poses serious practical difficulties and therefore accepts that an independent person that is suitably qualified can do appropriate work involving less than 100% detailed testing*."

72 The guidance in the Interpretation Note, though more practical than the legislation, is in fact a transgression of the legislation.

73 We also express concern with the concept and proposal in the IN that "audit" work should be available to "all suitably qualified persons" where no such requirement is contained in law, though should be i.e. both set a very low standard and the law should define who is competent. Furthermore, should SARS merely want a declaration by the person issue the certificate then it should state that and what the declaration should confirm and how.

74 Submission: Section 18A(2B) should be amended so that it aligns with SARS' interpretation of the section as set out in Interpretation Note 112 at a minimum but rather be defined to ensure that it properly instructs who should be providing assurance, competency requirements and what they should be giving assurance. It should not be prescriptive on how unless that how has been properly determined to be practical and in fact contributes to the assurance sought.

Alignment of section 93(1)(d) and section 104 of the TAA Act

75 Both section 93(1)(d) and section 104 TAA provide a remedy where a taxpayer is not in agreement with an assessment and wish to dispute it.

76 Section 93(1)(d) merely provides for a less formal remedy based on a much narrower circumstance, namely a readily apparent undisputed error.

77 However, the law does not regulate the procedure and timelines for section 104 when a remedy is sought under section 93, resulting in taxpayers either losing the section 104 remedy should SARS not respond within 30 days from date of assessment, or it compels the taxpayer to make two separate submissions to two separate SARS channels and then withdraw the objection if section 93 is successful. Such double procedure is wasteful.

78 Submission: It is proposed that the taxpayer be allowed to submit an objection within 14 days after receipt of a response from SARS on the section 93 application. Given the narrow circumstance in which it applies this should not delay the objection process or provide much opportunity to abuse it to "win" time.

Clarification of section 223 of the TAA Act

79 Section 223 TAA imposes penalties for understatement in certain instances and in column 5 and 6 reduces such penalties depending on whether disclosure was made before or after "voluntary disclosure".

80 However, section 223 does not refer to "voluntary disclosure" in Part B of Chapter 16 and uncertainty remains whether it means that or just the normal grammatical meaning.

81 From SARS' website it seems that the SARS' position is that the taxpayer must have applied under PART B. However, in practice it seems that there are differing approaches followed by SARS and taxpayers – from the normal grammatical meaning, to applied under PART B, to qualifying under PART B to even the extreme of having a signed contract under PART B.

82 This difference in interpretation and practice by SARS and taxpayers makes it very difficult for taxpayers to understand and know their obligation for the relief.

83 Submission: It is requested that SARS clarify what is meant by "voluntary disclosure" in section 223 and we submit that at most it should involve having made an application as envisaged in section 226(1) TAA.

Amendment to section 125 of the TAA Act

84 The right of appearance in a tax court is currently regulated by section 12 and section 125 of the TAA. These sections set out when a senior SARS official may appear on behalf of SARS or the Commissioner in proceedings in any matter before the Tax Court or High Court.

85 Section 125(1) of the TAA provides that a senior SARS official, referred to in section 12 of the TTA, may appear at the hearing of an appeal in support of the assessment or 'decision'. It is noteworthy to mention that the - now deleted - section 125(2) of the TAA allowed clients to be represented by tax practitioners "… at the hearing of an appeal in support of the appeal".1 It is, therefore clear that the TAA originally envisaged clients of tax practitioners to be represented by tax practitioners at a hearing of an appeal, but this has right of appearance has since been removed from the TAA.

86 Submission: Given the importance of these matters within the Chartered Accountancy profession and specifically within the tax industry, right of appearance for tax practitioners is sought in respect of and only in the context of the process and proceedings involving a dispute between the taxpayer and SARS that is before the courts – that is, the right to appeal against an assessment/decision made by SARS in the Tax Court.

87 Section 125(2) should be reinstated into the TAA.

[1] The sub-section used to read as follows: "The 'appellant' or the 'appellant's' representative may appear at the hearing of an appeal in support of the appeal". It was deleted by s. 26 of Act, No. 13 of 2017.