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National Treasury / South African Revenue Service

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Dear Ms Majola and Ms Collins

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2020

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 (DTLAB20) and Tax Administration Laws Amendment Bill 2020 (DTALAB20). Our submission has been divided into four parts, namely matters involving amendments to –

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

2. Estate Duty Act 45 of 1955, as amended (the ED Act)

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

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

We have set out our comments in detail in ***Annexure A***.

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

Yours sincerely

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Chairperson: National Tax Committee
The South African Institute of Chartered Accountants

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ANNEXURE A

DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL 2020

Clauses 8(a), 21 and 34 / Paragraph 30 of the Fourth Schedule to the Act, Section 58 of the VAT Act, Section 234 of the TAA

The standard required before a person can be found guilty of a criminal offence

1. The proposal made by NT is to remove the requirement for **"wilful conduct"** (i.e. intent) in relation to tax criminal offences.

2. The justification provided in the Explanatory Memorandum (EM) is that the National Prosecuting Authority (the NPA) has found it difficult to convict taxpayers for criminal tax offences due to is its inability to prove "wilful conduct" in relation to these offences.

3. The basic tenant of blameworthiness and criminal liability is set out in the unanimous judgment in the Constitutional Court case of *MoJ & NDPP v Masangili and others [2013] ZACC 41* at [36-38]:

> *"In our common law it is generally accepted that culpability (also known as fault or mens rea) is a requirement for criminal liability. "There must be grounds upon which [an accused] may, in the eyes of the law, personally be blamed for [his or her] unlawful conduct." The focus is thus on the actor's personal ability and knowledge, or lack thereof (as opposed to the conduct and unlawfulness requirements, where it is on the act). Once it is accepted that an accused has the mental ability required to establish criminal capacity, the conduct must be either intentional or negligent. For most crimes dolus (intent) is required. The accused must "will" the realisation of the conduct knowing that the conduct is unlawful (dolus directus), or know and accept it even if it is not "willed" (dolus indirectus), or must foresee the possibility of the conduct and its unlawfulness but nevertheless proceed (dolus eventualis).*
>
> *The requirement of culpability encapsulates an accused person's blameworthiness. Much of our criminal law is predicated on imposing legal liability on accused persons who perpetrate acts for which they are culpable; it is a general principle that criminal liability should broadly match personal culpability.*
>
> *The corollary to the idea that individuals should be held accountable for the choices they make is that ordinarily, individuals should not be held accountable for choices they did not make. The dolus required is the ground for an accused's personal blameworthiness arising from his or her unlawful conduct. Not only the fact of an accused's blameworthiness but also its degree, is relevant. The relative gravity of punishment must reflect the gravity of the offence."*

4. In *S v Coetzee and Others [1997] ZACC 2 at [162]* Judge O'Regan states:

> *"The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the actus reus and mens rea). This principle is ordinarily expressed in the Latin maxims actus non facit reum nisi mens sit rea and nulla poena sine culpa. At common law, the fault requirement is generally met by proof of intent (dolus) in one of its recognised forms, and,* ***in rare circumstances, by the objective requirement of negligence (culpa).*** *. . . This requirement is not an incidental aspect of our law relating to crime and punishment, it lies at its heart. The State's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment."*

5. Judge O'Regan goes on to elaborate on the general rejection of strict liability (i.e. culpability without blameworthiness) by courts in many countries[1] even when legislatures seem to have an increased fondness for it, in essentially ***"making it easier to convict"***.

6. She makes an interesting observation as follows:

> *[169] The approach in Sherras's case has been adopted in several of the countries of the Commonwealth. In Australia, in addition to the presumption against strict liability, the courts have developed a defence of reasonable mistake of fact. Thus an accused, who could show that he or she held an honest and reasonable belief in the existence of circumstances, which if true would render the accused innocent of the charge, will be acquitted.*

7. This emphasises the point that many other jurisdictions have noted that "**reasonable mistake**" (i.e. negligence as opposed to gross negligence) should be a defence and not result in criminal culpability.

8. In recognising the lack of fairness and lack of justice for extending criminal liability under the legislative banner of "ensuring compliance" prior to a Constitutional democracy in South Africa, Judge O'Regan states:

> *"The most important justification for these new forms of criminal offence is that their purpose is to ensure compliance with regulatory norms which may not otherwise be observed. Until 1994, because of the doctrine of parliamentary sovereignty, it was plain that the courts had no choice but to enforce these criminal provisions."*

9. Negligence as *mens rea* for criminal liability in South Africa is reserved for matters where death occurs such as, for example, culpable homicide in cases of doctors,

[1] [168] Other jurisdictions, too, have experienced the growth of legislatively imposed strict and absolute liability. Their courts, too, have displayed hesitance in interpreting statutory provisions as imposing absolute or even strict liability.

engineers or directors for corporate criminal liability (e.g. negligence for death by faulty products).

10. South Africa does not have a tiered form of negligence for such culpability but many countries such as the UK do, and require a higher form of negligence such as gross negligence in order to attach criminal liability.

11. The court reiterates in *Masangili* that section 12(1)(a) of the Constitution prescribes the deprivation of someone's freedom when the deprivation *is either arbitrary or without just cause*.

12. Citing with approval *S v Dodo [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para [37]* :

> *"Section 12(1)(a) guarantees, amongst others, the right 'not to be deprived of freedom . . . without just cause'. The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence."*

13. The Court in the *Masangili case* states as to the recognition of the common law:

> "*This Court has thus recognised the common-law requirement of dolus for criminal liability. According to Coetzee, it lies at the heart of our law relating to crime and punishment. Dodo identifies the cause justifying imprisonment under section 12(1)(a) as the offence (consisting of all factors relevant to the nature and seriousness of the act) as well as all relevant personal and other circumstances.*

14. O'Regan J stated in the *Coetzee* case as to when the legislature has gone too far:

> *"[L]eeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge."*

15. The standard required before a person can be found guilty of a criminal offence and imprisoned as a limitation to the section 12 Constitutional rights is justifiably high. It

should require the presence of wilful intent on the part of the perpetrator that should have to be proved by the State before the perpetrator is found guilty.

16. Section 234 of the TAA, for instance, includes minor administrative transgressions like not notifying SARS of a change of address, failing to appoint a representative taxpayer, submitting an erroneous or incomplete document and neglecting to make a document available.

17. The proposal would thus have the effect of criminalizing simple cases of negligence. This is unjustifiably broad and draconian in its reach.

18. Furthermore, it is not true, as stated in the justification for the amendment, that the forms of negligence envisaged in the affected sections of the Acts always have a negative character in that they imply that the person did not will or know or foresee something and therefore that there is a conflict with the 'wilful intent' requirement which implies that (positive) intention be present. The forms of negligence envisaged in the above sections of the Act have an objective character in that they are simply lists of (objectively determined) instances in which a person failed to comply with various provisions of the Acts. They do not require that a person did not will or know or foresee something. For example, paragraph 30(1) of the Fourth Schedule as currently worded states that:

19. 'Any person who wilfully and without just cause. makes or becomes liable to make any payment of remuneration and who fails to deduct or withhold therefrom any amount of employees' tax or pay such amount to the Commissioner as and when required…' shall be guilty of an offence.

20. The requirement for criminal culpability presently is therefore that the person must have intended, without just cause, not to have deducted or withheld employees tax or to not pay it to the Commissioner and to have carried his or her intended course of action out.

21. We are not convinced that the proposed amendments to the tax Acts are the appropriate mechanism to address the deficiency in the NPA's ability to prosecute tax criminals.

22. Whilst we support the intention of SARS to more effectively deal with serious tax offences, in our view, the unintended consequence is that even normally compliant taxpayers will now be technically considered 'criminal' for minor administrative, unintentional errors.

23. This is an even bigger concern given that SARS is moving more and more towards prepopulating as much information as possible on tax returns and the average taxpayer may simply assume the prepopulated information to be correct, or as noted above, be completely unaware of an obligation to update it.

24. An organisation may, as a result of changes in staff, fail to update details of the representative taxpayer within the specified time periods and this would be considered a crime, if the proposal were legislated.

25. Whilst SARS may choose not to prosecute for administrative 'mistakes', amending the legislation as proposed would give SARS the power to do so, should it so wish.

26. Given the time taken to finalise criminal matters, this will have further consequences for the individual 'accused' as it would, for example, impact job applications, current employment and/or the ability to visit other countries. It may be that the individual is eventually not prosecuted, but he/she could already have been 'punished' in other ways.

27. In this regard, criminalising administrative errors does not appear to be proportionate in relation to the transgression, using the example of a taxpayer not updating registered details timeously.

28. Submission: We submit that no proper legal justification or Constitutional limitation under section 36 has been provided by either NT or the NPA to deviate from the common law position of *dolus* as the standard for criminal culpability. This proposal should be withdrawn.

29. We note that the inability of the NPA to prosecute criminals for transgressions of various Acts, including for state corruption, does not result from ineffective legislation but has other causes, as is widely reported on in the media. Should the NPA be of the view that *dolus* is a stumbling block for criminal conviction, we propose that they table a general proposal to the Department of Justice for constitutional review.

30. Finally, we note that we have previously presented to Parliament our concern with a proposed incorporation of minor matters as criminal offences in the TAA. What was of equal concern was the response from SARS that they have never had anyone convicted for not updating personal details, even though there are thousands of transgressors.

31. This is concerning since this statement appears to imply that SARS applies selective prosecution, in that SARS officials are the ones selecting who gets reported for criminal prosecution and not the NPA. SARS appears to be selecting from taxpayers who have committed the same offence, which are to be criminally prosecuted and which are to receive civil sanction.

32. Submission: We reiterate our view that the overlap between the civil and criminal sanctions contained in the TAA and in other tax Acts is bad in principle and that minor offences should be subject exclusively to civil sanction and major offences to criminal sanction. The latter should be subject to mandatory reporting by SARS to

the SAPS for investigation and NPA for prosecution where the facts on a *bona fide* basis allude to criminality.

33. In our view, our suggestions above align with the SARS Commissioner's strategy of treating voluntary taxpayers significantly differently from those who have the intent not to comply. The proposal undermines that strategy.

TAX ADMINISTRATION ACT

Amendment to section 93 of the TAA (Clause 28)

34. The reference in clause 28(b) to section 95(5)(c) appears to be incorrect and should refer to section 95(6).

35. Submission: We propose that the wording be amended to reflect the correct reference.

Amendment to section 95 of the TAA (Clause 29)

36. In terms of clause 29(a), SARS is seeking to legislate the issuing of an estimated assessment if a taxpayer fails to respond to a request for material in terms of section 46 of the TAA, after more than one request.

37. We have concerns regarding what SARS would view as a 'request for information'. We have seen many examples where taxpayers were not aware of requests for information, as the method of communication was uploading a letter on the taxpayer's or tax practitioner's eFiling profile, without notification that the correspondence had been uploaded.

38. Whilst technically this may constitute 'delivery', where the taxpayer or tax practitioner is unaware that new correspondence has been uploaded they will obviously not take action. In many cases, the only time a taxpayer becomes aware that documents have been 'requested' is when SARS' debt management starts calling the taxpayer to remind them to pay their outstanding debt which has arisen due to an additional assessment being issued as a result of non-response to an information request.

39. In RCB stakeholder engagements with SARS, SARS has confirmed that it would endeavour to issue notifications via SMS or email in all instances where correspondence is sent via eFiling. There was also agreement that if a person did not respond to a request for information issued on eFiling, this would be followed up with a call before an assessment is issued.

40. The principle of notifying the taxpayer using a channel he or she elects for delivery was also contained in the 2014 Section 255 draft regulations which were never finalised. These regulations would have compelled SARS to allow taxpayers to elect an email address at which SARS was compelled to notify of documents "delivered" on eFiling.

41. However, there are instances where the above approach has not been applied.

42. There have also been instances where there have appeared to be discrepancies between contact details on eFiling and such details on the SARS database.

43. In a recent court case, *SIP Project Managers (Pty) Ltd v CSARS (Case No: 11521/2020)* - it was evident that the correspondence SARS claimed had been delivered via uploading on eFiling, was not actually uploaded on the taxpayer's profile and therefore had not been delivered.

44. Submission: Requests for information must be sent via multiple communication platforms and where a tax practitioner is the preferred contact, the correspondence should be sent both to the taxpayer and tax practitioner using the contact details on the taxpayer's RAV01 form.

45. To give effect to the above, we propose that sections 251 and 252 of the TAA be amended to provide for the proposed multiple methods of communication to ensure delivery.

Amendment to Section 190(2) of the TAA (Clause 33)

46. The TAA currently provides that SARS may not authorise a refund until such time that a verification, inspection or audit of the refund is finalised. It is proposed that this provision be extended to also include "criminal investigations".

47. In some cases, these verifications, inspections, audits and "criminal investigations" by SARS takes months or years to finalise.

48. However, it remains unclear what the term "criminal investigation" entails and whether it will be applied per taxpayer or include entire industries etc.

49. The legislation must clarify whether "criminal investigation" referred to is in respect of a person against whom there is confirmed evidence of a crime committed and whether this crime was reported to the South African Police Service (SAPS) and a SAPS case number been obtained.

50. As SARS seeks to impact taxpayer rights by withholding refunds, unclear positions like investigating an entire industry and then blanketly withholding refunds, like in 2019 in the agriculture sector is not fair administrative process.

51. This change indicates and confirms that SARS will withhold all refunds until the audit / investigation has been completed, which is not according to the wording of this sub-section. The verification, inspection, audit or criminal investigation refers to the specific refund and not any refund.

52. As was evidenced in the Tax Ombud's prior year report on Systemic Issues at SARS, one of the issues identified was that refunds for one period were being withheld whilst an audit/verification was in progress for another period. Withholding of the refund should be relevant to the period under audit or investigation and not to unrelated periods. This mostly applies to VAT refunds.

53. A taxpayer currently has no recourse against this administrative decision made by SARS and SARS is also not compelled to provide reasons for the decision to withhold the refund.

54. Though not part of this specific matter, we have also previously raised concern with SARS' entwinement in the criminal justice system and how constitutional rights are protected and how powers are given within the constitutional mandate. This ranges from search and seizure, sanction, overlap of civil and criminal investigations, who decides on criminal investigation and prosecution if not SAPS and the NPA and who is overseeing the legality of all these processes as given it is outside of the jurisdiction of the Independent Police Investigative Directorate.

55. In regard to criminal intelligence gathering which is part and parcel of criminal investigations, we note in the 2017 OECD report SARS claims it conducts none at a covert level[2]. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially puts SARS on equal footing to the historical Scorpions unit.

56. Whether this is a good or bad thing is a policy and political decision, but should then be fully aligned one way or another.

57. Submission: "Criminal investigation" for the purposes of withholding refunds should be defined and limited to a particular taxpayer and a reasonable timeline of 30 days in which SARS must finalise the verification, inspection, audit and criminal investigation relating to the specific refund should be included.

58. The administrative decision made by SARS should be subject to objection and appeal.

[2] http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf

DRAFT TAXATION LAWS AMENDMENT BILL

ESTATE DUTY ACT

Amendments to sections 3(2)(bA) and 3(3)(e) of the ED Act (Clause 1)

59. The proposal in the DTLAB20:

Property which is deemed to be property of the deceased includes -

"(e) *so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was allowed as a deduction in terms of paragraph 5 of the Second Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), to determine the taxable portion of the lump sum benefit that is deemed to have accrued to the deceased immediately prior to his or her death*."

60. NT / SARS explained the original reason for its introduction into the ED Act, in the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015 (4 December 2015), as follows:

"To limit the practice of avoiding estate duty through retirement contributions it is proposed that contributions that were made on or after 1 March 2015 to a retirement fund that did not receive a deduction should be included in the dutiable part of the estate for estate duty purposes."

"Contributions that did not receive a deduction which have been included as part of any lump sums payouts to the retirement fund member or that have been used to offset the tax liability for annuity payments to the retirement fund member will not be included in the dutiable value of the estate (to avoid any potential double counting)."

61. In the subsequent amendment by Act No. 17 of 2017, the Taxation Laws Amendment Act, 2017 it merely added the underlined parts:

"… of section 11 (k) ***[or]****,* <u>*section 11(n)*</u> *or* <u>*section 11F*</u> *…"*

62. The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2019 - 21 January 2020 stated:

"In 2015, changes were made in section 3(2) of the Estate Duty Act by inserting a new paragraph (bA). The main aim of the amendments was to prevent individuals from avoiding estate duty by making a large contribution into a retirement annuity fund in the year the individual dies. Consequently, this paragraph makes provision for inclusion in the estate any amounts that have not been allowed as a deduction in terms of sections 11(k), 11(n) or 11F of the Income Tax Act (essentially the excess non-deductible contributions created by the large contributions made to the

retirement annuity fund). However, section 3(2) (bA) erroneously includes not only excess contributions in terms of sections 11(k), 11(n) or 11F, but also amounts which are not taken into consideration in terms of the Second Schedule of the Income Tax Act."

"In order to close this loophole, it is proposed that retrospective changes be made to section 3(2)(bA) of the Estate Duty Act. The proposed changes should be deemed to have come into effect in respect of the estate of a person who died on or after 30 October 2019 and also applies to any contributions made on or after 1 March 2016."

63. It is agreed that section 3(2)(bA) be deleted and that the provision is moved to deemed property, or section 3(3). It originally was incorrectly included in property.

64. It solves a practical problem as well, as the REV267 was not amended and executors included these amounts as deemed property together with a "benefit due and payable from a fund" (see Account 2 - Property deemed to be property of the deceased as at the date of death (continued) on page 5-8). This of course was not correct, but was the only way to include this in the value of property in the estate.

65. Submission: SARS should amend the REV267. The return must allow the executor to separately declare these amounts as deemed property.

66. The 2019 amendment stated that the purpose of the provision was "to prevent individuals from avoiding estate duty by making a large contribution into a retirement annuity fund in the year the individual dies".

67. Submission: It was not the intention to only include the excess contributions made in the year of assessment of death as deemed property in the estate.

68. What the previous amendments missed, is the way the deduction is determined when the taxpayer is assessed for normal tax purposes.

69. Where a lump sum benefit accrues to a taxpayer during a year of assessment, paragraph 5 and, or, paragraph 6 provides for a deduction to be made. It reduces the lump sum benefit and it is only the net amount that is then included in the gross income of the taxpayer (under paragraph (e) of that definition in section 1(1) of the Act).

70. The deduction:

The deduction to be allowed, both for the purposes of paragraph 2(1)(a) and also for purposes of paragraph 2(1)(a)(ii) or (b) is an amount equal to so much of the person's own contributions that did not rank for a deduction against the person's income in terms of section 11F to any pension fund, pension preservation fund,

provident fund, provident preservation fund and retirement annuity fund of which he or she is or previously was a member;

71. See paragraph 5(1)(a) and paragraph 6(1)(b)(i) of the Second Schedule to the Act.

72. Where no lump sum benefit accrued to the taxpayer, during a year of assessment, or a section 10C exemption applied, the 'excess contributions' carried forward from previous years of assessment, is added to the contributions made by the taxpayer in the current year of assessment. In this instance, the year of assessment during which the taxpayer died. This is in terms of section 11F(3)(c):

Any amount contributed to a pension fund, provident fund or retirement annuity fund in any previous year of assessment which has been disallowed solely by reason of the fact that the amount that was contributed exceeds the amount of the deduction allowable in respect of that year of assessment is deemed to be an amount contributed in the current year of assessment, except to the extent that the amount contributed has been—

(a) allowed as a deduction against income in any year of assessment;
(b) accounted for under paragraph 5(1)(a) or 6(1)(b)(i) of the Second Schedule; or

(c) *taken into account in determining the amounts exempt under section 10C*.

73. This resulting amount, being the excess contributions carried forward plus the contributions in the current year, qualifies for deduction when the taxpayer's taxable income is determined for the year of assessment (period in the year of death of the taxpayer). This excess is then deemed to be a contribution made in that year.

74. This deduction is then limited by section 11F(2)(a) – the R350 000; 27,5% and taxable income limit.

75. This begs the question, does the section 11F deduction, with respect to the excess contributions, work on first in first out basis? This is relevant where there was an excess amount on 1 March 2016.

76. Submission: It should be clarified that the section applies to actual contributions made after 1 March 2016 and does not include deemed contributions (under section 11F).

77. The principle, relevant to the draft amendment, is that it is only once SARS issued an assessment (for the period of assessment until date of death), that the amount that did not rank for a deduction against the person's income in terms of section 11F will become known.

78. When the fund makes application for the tax to be withheld, SARS will only take the excess amount as reflected on the latest IT34 into account as a deduction. The same applies on assessment. The contributions made during the year that exceeds the limits, is not taken into account.

79. It is possible that where the executor submits a return of income and the election, by the nominees is then made thereafter, that SARS may take the excess amount as determined on the first assessment into account as a deduction.

80. When the nominees make an election to take an annuity, there is no lump sum. The excess contributions are not carried forward to the estate or nominee and, whilst it is lost to the nominee (for purposes of section 10C), it would then also not be added to property in the estate.

81. The same would apply where the amount elected by the nominee as a lump sum is less than the excess contributions.

82. The original version stated as follows:

2. (1) Section 3 of the Estate Duty Act, 1955, is hereby amended by the insertion in subsection (2) after paragraph (b) of the following paragraph:

> *"(bA) so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was not allowed as a deduction in terms of section 11(k) or (n) of the Income Tax Act, 1962 (Act No. 58 of 1962), or paragraph 2 of the Second Schedule to that Act or, as was not exempt in terms of section 10C of that Act in determining the taxable income as defined in section 1 of that Act, of the deceased;".*

(2) Subsection (1) comes into operation on 1 January 2016 and applies in respect of the estate of a person who dies on or after that date in respect of contributions made on or after 1 March 2015.

83. We agree that this wording forced, in a sense, the nominees to elect to take a lump sum, at least to the value of the excess contributions carried forward (if possible).

84. However, where a nominee elects to use the total retirement interest to buy an annuity, there will be no deduction allowed under the Second Schedule. This is in terms of paragraph (iv) of the proviso to paragraph 3A of the Second Schedule - no lump sum benefit shall be deemed to have so accrued to the extent that the lump sum benefit was utilised to purchase or provide the annuity. As there is then no deduction, there will be no deemed property under the proposal.

85. Submission: The above may well be the intention, but then it is not clear why section 10C has been left out. It would reduce the annuity, or living annuity, taken in the

period 1 March to date of death and as such, reduces the excess contributions at the beginning of the period of assessment.

INCOME TAX ACT

Withdrawing retirement funds upon emigration (Clause 1.4)

[Applicable provisions: Section 1 of the Act, the definitions of “Pension Preservation Fund”, “Provident Preservation Fund” and “Retirement Annuity Fund”]

86. The proposed amendment reads:

The definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” in section 1 of the Income Tax Act currently allow members to take pre-retirement lump sum withdrawals from such retirement funds if the member has emigrated and that emigration is recognised by the South African Reserve Bank (SARB). However, the Minister of Finance announced in this year's budget that the current foreign exchange control regime will be modernised and that 'emigration' will be phased out.

87. The DTLAB20 proposes that the 'emigration' provisions in the definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” be replaced with a 'residence' based test i.e. members will be able to take pre-retirement lump sum withdrawals if they are 'not a resident for an uninterrupted period of three years or longer'.

88. The proposed three year waiting period poses the following practical problems as set out below.

89. The definition of 'resident' for natural persons relies on whether a natural person is “ordinarily resident" in the Republic or whether they meet a time-based “physical presence” test. If a natural person does not meet either of the tests, that person will not be considered to be a resident. The test for whether a natural person is not a resident does not consequently require that status to endure for an 'uninterrupted period of three years or longer'. To arbitrarily require a three year waiting period for retirement fund members to access their pre-retirement lump sum withdrawal benefits is inconsistent with the definition of 'resident' and other existing provisions in the Act (such as sections 9H of the Act) which have immediate tax consequences when ceasing to be a resident.

90. The proposed three year waiting period does not take into consideration those retirement fund members who recently emigrated with SARB approval.

91. If these retirement fund members have not accessed their retirement benefit they will have to wait a period of three years before accessing their pre-retirement fund lump sum benefits, causing unnecessary financial hardship on tax/exchange control compliant emigrants and ignoring their legitimate 'non-resident' status.

92. The proposed three year waiting period has the effect of making an investment in a retirement annuity fund (in particular) less attractive than that of pension, provident and preservation funds. While members of pension and provident funds can take pre-retirement lump sum withdrawals when they terminate their employment relationship (and members of preservation funds can do so once prior to retirement), members of retirement annuity funds who become non-resident will have to wait three years to access their pre-retirement benefits.

93. Submission: The proposed three year waiting period is clearly at odds with the existing tax treatment of natural persons who cease to be resident for tax purposes. It also has the potential to cause financial hardship and an unnecessary distinction between different retirement funds. We propose it should be withdrawn

94. In order to ensure parity between emigrants and non-residents, it is suggested that the emigration requirement be retained (for those natural persons who have already emigrated) and a new requirement requiring a member's 'non-residence' status be added. SARS already recognises the emigration status of members (for preservation funds and retirement annuities) as well as the immediate non-resident status of members (for retirements from all retirement funds). SARS already has criteria which it considers as acceptable proof of a natural person's emigration and/or non-residence and there is consequently no reason that these same criteria cannot be applied to determine a preservation fund/retirement annuity fund member's non-resident status.

95. Submission: The following wording is proposed:

96. **Definition of Pension Preservation fund**

(v)(c)(ii) a member shall, prior to his or her retirement date, be entitled to the payment of a lump sum benefit contemplated in paragraph 2 (1) (b) (ii) of the Second Schedule where a member—
(*aa*) was a resident who emigrated from the Republic and that emigration was recognised by the South African Reserve Bank for the purposes of exchange control; or

(bb) ceased to be resident in the Republic ;

97. **Definition of Provident Preservation fund**

(v)(c)(ii) a member shall, prior to his or her retirement date, be entitled to the payment of a lump sum benefit contemplated in paragraph 2 (1) (b) (ii) of the Second Schedule where a member—
(*aa*) was a resident who emigrated from the Republic and that emigration was recognised by the South African Reserve Bank for the purposes of exchange control; or

(bb) ceased to be resident in the Republic ;

98. **Definition of Retirement Annuity Fund**

(x) that a member shall, prior to his or her retirement date, be entitled to

(dd) the payment of a lump sum benefit contemplated in

Paragraph 2 (1)(b)(ii) of the Second Schedule where a member—

(*A*) was a resident who emigrated from the Republic and that emigration was recognised by the South African Reserve Bank for the purposes of exchange control; or

(B) ceased to be resident in the Republic ;

Amendment to section 1 Definition of "living annuity" (Clause 2(f))

99. In terms of the proposed amendment, the right to a living annuity owned by a trust would constitute a living annuity if, on termination of that trust, the value of the assets stipulated in the annuity agreement (with reference to which the value of the annuity is determined) may be paid to the trust as a lump sum.

100. The lump sum may be paid to the trust prior to the termination of the trust and not necessarily 'on' termination. The wording is therefore overly restrictive.

101. Submission: We propose that the wording of sub-clause 2(f) be amended to read "on or before the termination of a trust, the value of the assets referred to in paragraph (a) may be paid to the trust as a lump sum".

Amendment to section 1 Definition of "REIT" (Clause 2(l))

102. The wording of the amendment has the effect that provided all the equity shares of a REIT are listed, preference shares may be issued by the REIT.

103. Submission: This appears to contradict the rationale for the amendment as referred to in 3.7 of the Draft EM.

Amendment to section 7C (Clause 3)

104. No definition of 'preference share' is provided and such a definition is required for the provision to be sensibly interpreted.

105. For example, if there is more than one class of shares in issue, it is normal for each class to have different rights. It is possible for the rights of each class to be 'preferential' to the rights of the other classes in one or other respect, for example in respect of the right to vote, participation rights or rights upon liquidation. In such a

situation it could be said that each class of shares is a preference share, unless a definition of preference share is provided.

106. Furthermore, a share could at a stage have preferential rights in relation to the other classes of shares, for example the right to vote or preferential rights to dividends, but such preferential rights could fall away. It would be anomalous in these in circumstances to continue to tax dividends as interest if the shares no longer enjoy preferential rights.

107. The proposed amendment will apply to preference shares issued by companies, the shares of which are held by trusts, and will force dividends to be declared annually at a rate at least equal to the 'official rate of interest'. This treatment will apply even if there was a genuine commercial reason for the issuing of preference shares by the company as a form of funding.

Amendment to section 8(4)(k) (Clause 4(b))

108. Section 8(4)(k) of the Act was amended by Taxation Laws Amendment Act No. 34 of 2019 by the addition of subparagraph (iv) – "commenced to hold any asset as trading stock which was previously not held as trading stock". The amendment became effective on date of publication in the Government Gazette, i.e. 15 January 2020 and applies to assets which commenced to be held as trading stock on or after 15 January 2020.

109. An amendment to section 8(4)(k) is proposed with reference to the words following subparagraph (iv), by adding the word "commencement" to align with the change set out above.

110. The amendment does not have a proposed effective date, which means it will become effective on promulgation of the 2020 Taxation Laws Amendment Act.

111. The draft EM determines that "the proposed amendment is a technical correction to 2019 amendments made to section 8(4)(k). This amendment clarifies that the deemed disposal of assets also applies in instances where a taxpayer commences to hold an asset as trading stock."

112. All taxpayers that commence holding assets as trading stock where the assets were not previously held as trading stock will be affected, effective from 15 January 2020.

113. Submission: It is recommended that the proposed effective date of the amendment be aligned with the effective date of the initial change enacted by the Taxation Laws Amendment Act No. 34 of 2019, of which the proposal only constitutes a technical correction, i.e. 15 January 2020.

Amendment to section 9(2)(k) (Clause 5)

114. It is proposed to have section 9(2)(k) of the Act amended by replacing the words "attributable to" with "effectively connected with".

115. Section 9(2)(b)(i), section 9(2)(c), section 9(2)(e), section 9(2)(l)(i)(aa) and section 9(2)(l)(ii) have the same reference of "attributable to". However, no similar changes have been proposed to these sections.

116. It is proposed to only have section 9(2)(k) amended by referring to amounts "effectively connected with" as opposed to "attributable to" with reference to a permanent establishment.

117. Section 9(2)(k) is not the only instance where the reference "attributable to a permanent establishment" is set out.

118. The draft EM determines that "the proposed amendment is a consequential amendment which deletes the words "attributable to" a permanent establishment and replaces them with the words "effectively connected with" a permanent establishment as a matter of consistency with the rest of the Act and brings the wording in line with the OECD Model Tax Treaty".

119. All taxpayers will be impacted when determining the source of income in terms of section 9 of the Act.

120. Submission: It is submitted that the term "effectively connected with" has also been amended in respect of the interest and royalty's articles of the OECD Model Tax Treaty. It would therefore make sense to also amend the sections as set out above in respect of interest and royalties to ensure alignment.

121. It is recommended to also amend section 9(2) to ensure alignment with the OECD Model Tax Treaty as it relates to interest and royalties.

Amendment to section 9D (Clause 6(1)(a))

122. In the circumstances envisaged by the amendment, the dividend would not have accrued to the person who is taxed in terms of section 9D; instead, the dividend would have accrued to the controlled foreign company.

123. Submission: The words 'to any person' in 'any exemption from normal tax in respect of dividends received by or accrued to any person as contemplated in section 10(1)(k)…' (underlining added) should be deleted, as they create uncertainty in interpretation.

Amendment to section 9D (Clause 6(1)(b))

124. The purpose of section 9D is to achieve parity in treatment, insofar as possible, with the position where the South African resident owned the passive offshore assets directly and not through a foreign company.

125. Had assets of a capital nature been held by an individual, special trust or insurer in respect of its individual policyholder fund, the inclusion rate upon disposal of the assets would not have been 100%.

126. Submission: Paragraph (f) of the proviso to subsection (2A) should be retained.

Amendment to section 9H (Clause 7)

127. The proposed amendment to section 9H introduces economic double taxation - i.e. there is taxation both at the level of the company that ceases to be South African tax resident and in respect of the South African tax resident shareholder.

128. Submission: We suggest that the proposed amendment be withdrawn.

Amendment to section 9K (Clause 9)

129. The mere transfer of the listing of a share to an exchange outside the Republic should not constitute a deemed disposal of the share.

130. In reality there has been no disposal of the share and the transfer of the listing would not be accompanied by the receipt of any proceeds which could be used to fund the resulting tax liability.

131. Upon cessation of an individual's tax residence in South Africa, a capital gains tax exit charge must be calculated and it is unclear why an exception to this rule must be made in the case of the transfer of the listing of a share, simply because the South African Reserve Bank will phase out the approvals process for the transfer of a listing abroad.

132. Submission: We propose that the proposed amendment be withdrawn.

Amendment to section 10(1)(q): Bursary (Clause 10)

133. The reason provided for amendment was to close down various abusive structures utilising salary sacrifice as the basis to render the income as exempt.

134. Section 10(1)(q) of the Act provides an exemption from tax, in respect of bona fide scholarships or bursaries granted to enable any person to study at a recognised educational or research institution, provided that certain conditions are satisfied.

135. A number of amendments have been proposed in order to close down abusive schemes that have become prevalent in the industry. These schemes are focused on the provisions of section 10(1)(qA) where bursaries are provided to relatives of employees and rely on salary sacrifices to fund school fees. The concern with these structures appears to be two-fold: the conversion of taxable remuneration to exempt remuneration and that these bursaries are not bona fide bursaries or scholarships.

136. Two of the proposed amendments seek to close down salary sacrifice structures by first removing the exemption in cases where salary sacrifices have funded the benefit and secondly, by disallowing the employer's deduction for the bursary in such case.

137. There are a large number of legitimate bursary schemes in place, which do have an element of salary sacrifice, which will be negatively impacted by the proposed changes.

138. These proposals cannot be evaluated in isolation and require a review against the backdrop of South Africa's current educational system. "The South African education system, characterised by crumbling infrastructure, overcrowded classrooms and relatively poor educational outcomes, is perpetuating inequality and as a result failing too many of its children, with the poor hardest hit". (https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/).

139. Similarly, the exemption in respect of bursaries/scholarships granted to relatives of employees is aimed at assisting lower income-earning employees.

140. Submission: It is entirely possible to have a valid and properly implemented salary sacrifice structure to fund bona fide bursaries to employees and to relatives of employees and the proposed amendment will close down these existing and valid bursary programmes. It appears from the proposed amendment that NT is seeking to ensure that bursaries are provided on an "on top of" package basis which is a highly desirable goal and an ideal to strive for, however, financially it may mean that fewer employees are able to benefit from bursaries going forward.

141. The third proposed amendment seeks to require employers to open their bursary programmes to the general public. The proposed amendment provides that with effect from 1 March 2021 the tax exemption for all "bona fide" bursaries or scholarships granted by employers to relatives of qualifying employees, subject to certain monetary limits and other requirements, will only apply if the bursary granted by the employer is not restricted to relatives of employees but is an open bursary scheme available to members of the public.

142. This amendment to the exemption in respect of bona fide bursaries or scholarships granted by employers to relatives of qualifying employees, amounts to a substantial

change in policy, that will have a severe impact on existing legitimate bursary agreements, entered into prior to this amendment, and even on those that do not have an element of salary sacrifice.

143. Submission: We would have expected that a policy change such as this would have been proposed and tabled for public engagement to ensure that all practical and operational implications of the proposed change were adequately considered, to correctly define the ambit of the amendment.

144. In communicating previous proposals for the increase of the monetary limit in respect of bursaries and scholarships granted by employers to employees or relatives of qualifying employees it was stated that the monetary limits associated with bursaries and scholarships granted to relatives were revised in order to support skills development and to encourage the private sector (employers) in the provision of education and training to employees and relatives of their employees.

145. Submission: This proposed amendment and policy change undermines these positive strategic policy positions and intentions previously adopted, tabled and communicated by Parliament and NT.

146. The most substantial and a seemingly unintended impact of this amendment will be to employer provided bursaries, in terms of which, employers assist their employees to further their studies, on a tax-free basis, provided the criteria, as defined, are satisfied.

147. The proposed change will have a negative impact on such bursaries in that employers will no longer be able to treat the cost of the bursary provided to relatives of their employees as tax free, and thus the value of such bursaries will be a taxable fringe benefit in the hands of the employee, unless the bursary granted by the employer to the relative is an open bursary scheme available to members of the public, which in most cases is not financially viable.

148. Noting that external bursary programmes already exist, in terms of which employers provide financial assistance to the public, in the form of bursaries and scholarships as many companies already offer open bursaries and scholarships in the tertiary education sector, in the specific industries in which they operate – engineering, law, accounting, banking etc.

149. The internal bursary programmes are to enable employees that would otherwise not be able to afford to further their studies or to provide for employees that are unable to fund their relatives' education and studies. Many companies also support other educational programmes via their CSI funding and initiatives.

150. Submission: This amendment will thus dissuade employers from continuing to provide bursaries to relatives of their employees, to enable them to further their

education due to the substantial financial implications of the amendment. The current economic outlook only indicates more financial strain to come and removing the employers' contribution to education will worsen this impact for many employees.

151. Consideration should be given to the substantial positive effect and contribution that legitimate employer provided bursaries to relatives of their employees has had in assisting such persons to further their studies. The private sector should be encouraged to continue the provision of education and training and not be dissuaded from doing so through the implementation of restrictive amendments such as the one proposed.

152. The proposed approach on salary sacrifices could be regarded as necessary, albeit too broad as the nuisance sought to be addressed can be effectively addressed without the need for such a drastic, unnecessary and unjustified amendment that has seemingly unintended consequences.

Amendment to section 11((j)(ii) (Clause 13(1)(d))

153. The proposed amendments do not take account of the fact that security in respect of a debt that is in arrear may not be good or may be impaired.

154. Submission: We propose that the proposed amendments make allowance for the impairment of the security.

Amendment to section 12R (Clause 18)

155. The proposed amendment to section 12R will have the effect that allowances will no longer necessarily be available to investors for the full 10 years after they commenced to carry on a trade in a Special Economic Zone.

156. Relying on the promised duration of the incentive, business have validly invested in Special Economic Zones.

157. Submission: Shortening the period of which the incentive will be enjoyed will thus have the effect of undermining confidence in future incentives provided by the State and should be reconsidered

158. The provisions of sections 12R will cease to apply "in respect of any year of assessment commencing on or after 1 January 2028. The removal of the alternative "10 years after the commencement of the carrying on of a trade in a Special Economic Zone" from the sunset clause means that qualifying companies will no longer benefit from the SEZ tax incentive for a 10-year period, as was initially intended when the SEZ provisions were introduced in the Act.

159. Is it also unclear as to how taxpayers must treat buildings that would have qualified for the allowance under section 12S, but have not yet claimed the full value of the section 12R building allowance by the sunset clause date (i.e. whether the taxpayer would continue to claim the accelerated building allowance, or whether sections 13 or 13quin would apply to the remainder of the allowance once the section 12S provision ceases to apply).

160. Submission: We recommend that the sunset clause retains the alternative end date of 10 years after the commencement of the carrying on of a trade in a SEZ, to ensure that all taxpayers who qualify for the SEZ benefits would be on an equal footing. Alternatively, we request that it be clarified that the remaining building allowances would qualify under the other building allowance sections in the Act.

Amendment to section 15 - contract mining (Clause 22)

161. The proposed amendment seeks to address contract mining by limiting the allowances to only the taxpayer to whom the mining right was issued.

162. It is unclear whether NT is concerned both with which of the mining right holder or contract miner gets the tax allowances and the possibility of double dipping, as there only seems a problem with the latter.

163. Submission: Given the far-reaching impact of this proposal we would suggest that NT first consider the Davis Tax Committee findings on the matter and also find policy alignment to the Department of Mineral Resources. Properly consulting with the mining industry on the impact and solutions is also advised to limit further impact on an already strained and very important industry.

Amendment to section 23(s) (Clause 25)

164. The proposed wording is too vague and, it is submitted, would only catch limited salary sacrifice arrangements.

165. Unless the employee is actually given the choice of receiving an increase or other additional remuneration and chooses instead to take the amount in the form of a bursary or scholarship, there would be no amount to which an employee ‘might in the future become entitled’.

166. The proposed wording should not be an ‘all or nothing’ disallowance of the cost of any scholarship or bursary granted by the employer or associated institution to a relative of an employee if this resulted in the reduction or forfeiture of any remuneration to which the employee was entitled or might have become entitled to in the future.

167. Submission: We propose that the disallowance of the deduction for the cost of the scholarship or bursary in the hands of the employer or associated institution should only be to the extent to which the employee's remuneration has been reduced or forfeited.

Amendment to section 25B (Clause 28)

168. Section 25B of the Act, is hereby amended—

(a) by the substitution for the heading of the following heading: "[Income] Taxation of trusts and beneficiaries of trusts"; and (b) by the substitution for subsection (1) of the following subsection:

"(1) *Any amount (other than an amount of a capital nature which is not deemed to be included in gross income or an amount contemplated in paragraph 3B of the Second Schedule) received by or accrued to or in favour of any person during any year of assessment in his or her capacity as the trustee of a trust …*"

169. The Draft EM states:

… some commentators have contended that section 25B(1) also applies to amounts of a capital nature (for example, proceeds on disposal of a capital asset). There is no substance in this contention because the Eighth Schedule contains specific provisions dealing with such amounts, but for the purposes of clarity it is proposed to exclude amounts of a capital nature that are not deemed to be included in gross income from the ambit of section 25B(1).

170. It is not true that "*there is no substance*" in the contention that section 25B(1) does not apply to capital amounts as amounts not dealt with under the Eighth Schedule will have to be dealt with under section 25B. For example, RAF claims which are capital in nature (i.e. they are paid for loss of earning ability) have to be addressed in terms of section 25B as it not addressed in the Eighth Schedule.

171. It is, however, true that the provisions of the Eighth Schedule do not deal with all amounts of a capital nature only capital amounts from a disposal of an asset.

172. It is not clear why the word 'deemed' is included in the phrase *other than an amount of a capital nature which is not deemed to be included in gross income*. The definition of gross income uses the word 'deemed', as follows:

"… *deemed to have been received by or to have accrued to the taxpayer* …"

173. When it addresses capital amounts it does not deem them to gross income (ie change its nature) it merely includes these amounts which remain capital in nature into the definition of gross income.

174. Submission: We suggest that the "*other than an amount of a capital nature which is not deemed to be included in gross income"* be changed to reads as follows to ensure that all amounts dealt with in the Eighth Schedule (ie rather than the broader term of capital nature) is excluded from section 25B:

"… other than an amount received or accrued or deemed to have been received or accrued in consequence of the disposal of any asset envisaged in the Eighth Schedule or an amount contemplated in paragraph 3B of the Second Schedule)".

Amendment to section 45 (Clause 34)

175. The wording of the proposed subsection (3B)(a)(i) should be amended to align in various respects with the wording of other subsection sections to which it refers.

176. Submission: Instead of stating 'a debt or a share is used to directly or indirectly fund the acquisition of an asset…', the wording should be 'a debt or share is issued or used for purposes of directly or indirectly facilitating or funding the acquisition of an asset' in order to align with the wording used in subsection (3A)(a)(ii)(bb).

177. Submission: The wording of the proposed subsection (3B)(a)(ii)(bb) 'to form part of the same group of companies' should be amended to read 'to form part of any group of companies in relation to each other' in order to align with the wording used in subsection (4B).

178. Submission: The wording of the proposed subsection (3B)(b) should read 'Where the holder of a debt or the holder of a share acquired that debt or share, the holder of that debt or the holder of that share must, on the day on which the transferee company and the transferor company in relation to the acquisition of that asset cease or are deemed to have ceased to form part of any group of companies in relation to each other as contemplated in paragraph (a)(ii)…'

Amendment to section 46 (Clause 35)

179. The proposal affects 'live' transactions and not all transaction that will be impacted will be done with an avoidance intent as conceded. It is therefore unfair to treat them all the same with retrospective effect.

180. Submission: The amendment should apply to unbundling transactions that are entered into after the date of promulgation of the Taxation Laws Amendment Act or another date in the future given that it impacts legitimate transactions as well that do fall within the policy intent.

Amendment to section 64EB (Clause 37(1)(a))

181. Submission: The proposed change to the wording will have the effect that if there are multiple consecutive cessions of the right to dividends, all cedents will potentially be subject to dividends tax on the same dividend. This is economic double taxation.

Amendments to paragraphs 5 and 6 of the Second Schedule to the Act (Clauses 40 and 41)

182. Section 10C of the Act has not been amended to reflect the same wording that is proposed for paragraphs 5 and 6 of the Second Schedule.

183. Submission: We propose that section 10C(2) is amended by deleting the words indicated in square brackets:

"There shall be exempt from normal tax in respect of the aggregate of qualifying annuities payable to a person an amount equal to so much of the ***[person's own]*** *contributions to any pension fund, provident fund and retirement annuity fund that did not rank for a deduction against the person's income in terms of section 11F as has not previously been—*

(a) allowed to the person as a deduction in terms of the Second Schedule; or

(b) exempted from normal tax in terms of this section,

in respect of any prior year of assessment."

Amendment to paragraph 64B of the Eighth Schedule to the Act (**Clause 50)**

184. The proposed wording would appear to apply to the situation in which a controlled foreign company holds shares in a non-South African resident company listed on the Johannesburg Stock Exchange.

185. By virtue of their listing on the Johannesburg Stock Exchange, such shares may be said to be 'located, issued or registered' in South Africa.

186. Submission: It is submitted that such shares be excluded from the proposed amendment.

187. Furthermore, the wording of section 9H(5) of the Act should be amended to cater for the 'to the extent' wording proposed by this amendment.

VALUE ADDED TAX ACT

Amendment to section 8(25) of the VAT Act (Clause 61)

188. The Draft EM on the DTLAB20 indicates that the proposed amendment to section 8(25) is aimed at permitting vendors to elect to agree in writing that the provisions of section 8(25) of the VAT Act will not apply to the transfers contemplated in section 42 or 45 of the Income Tax Act, and instead the provisions of section 11(1)(e) of the VAT Act will be applicable.

189. However, when read in its amended form, the proposed proviso (i)(bb) states that section 8(25) "*shall not apply to a supply contemplated in section 42 or 45 of the Income Tax Act, unless … the supplier and recipient have agreed in writing to the extent that the provisions of section 8(7) and section 11(1)(e) of this Act shall apply*" (Emphasis added).

190. The proposed amendment therefore has the effect that section 8(25) shall apply only if the parties have agreed in writing that the supply shall be zero rated as the sale of an enterprise as a going concern in terms of section 8(7) and section 11(1)(e), which is contrary to its intended purpose as set out in the Draft EM on the DTLAB20.

191. Submission: It is proposed that the amendment should be inserted as a further proviso to section 8(25) and state that-

"*Provided further that this subsection shall not apply to a supply contemplated in section 42 or 45 of the Income Tax Act where the supplier and recipient have agreed in writing that the provisions of section 8(7) and section 11(1)(e) of this Act shall apply*".

Insertion of new paragraph (y) to section 11(2) of the VAT Act (Clause 63)

192. The Draft EM on the DTLAB20 indicates that the proposed section 11(2)(y) provides for the zero rating of telecommunication services provided between telecommunication services providers and is aimed at complying with the requirements of the International Telecommunication Regulations concluded at the World Conference on International Telecommunication held in Dubai in 2012 (effective 2015) (Dubai ITR), to which South Africa is a signatory.

193. The current proposed wording of section 11(2)(y) is ambiguous as it is not clear whether the proposed zero rating applies to all services supplied to International Telecommunication Service Providers by Telecommunication Service Providers registered in the Republic of South Africa, or whether zero rating under this provision applies only to international telecommunication services as contemplated in Dubai, 2012.

194.	Submission: It is recommended that the wording of the proposed section 11(2)(y) should be amended to clarify the ambit of the services that would qualifying for zero rating under this provision.

MATTERS NOT ADDRESSED IN DRAFT TAX BILLS 2020

Chapter 5 TAA Information gathering - Verification process

195. Chapter 5 of the TAA addresses information gathering and in its title sets out 4 processes and states that the chapter covers the "General rules for inspection, verification, audit and criminal investigation"

196. However, on closer inspection of the Chapter 5 guidelines, no rules are set out for verification.

197. Procedurally this has become untenable as SARS practice has become to use verification as the catch all process from "desk audits, to verification to even forensic audits"

198. In practice and substance none of these procedures differ from "field audits" other than scope.

199. The primary reason why the practice is untenable is that SARS does not abide by any fair administrative practices and seem to make up the rules of these catch all processes as it goes.

200. SARS is a creature of statute and should operate within the confines of that statute while balancing its powers with the rights of taxpayers. Employing practices and tactics that have no defined empowering legislation seems to be outside that scope as merely relying on a single undefined word does not empower SARS to action.

201. However, it must be acknowledged that SARS do require various information gathering processes, but that such processes should be defined and set out fair administrative practices like is done for inspection, field audits and criminal investigations.

202. Submission: It is submitted that Chapter 5 of the TAA should be expanded and additional sections inserted that define what a "verification" is and what SARS processes fall thereunder. It should also identify and insert the relevant taxpayer rights and fair administrations provisions, similar to what occurs in the rest of Chapter 5. This includes notification and reason for commencement, reasonability of requests protection, compelled feedback after certain time periods and notification of completion or outcomes.

Section 172-176 TAA – Constitutionality of the Default judgment procedure

203. We have noted with concern the judgment in *Barnard Labuschagne Inc v CSARS & MoF CASE NO: 23141/2017 (15 May 2020)*.

204. Of much concern was both SARS and NT arguments that the tax default judgment procedure is one outside of judicial oversights and therefore is not subject to judicial review.

205. This concern is increased in that both SARS and NT at the inception of the TAA and subsequent to the *Stellenbosch Legal Aid Clinic* case[3] on garnishee orders dismissed concerns raised by the public, including at SCoF, that the provision 172 - 176 TAA were unconstitutional on the basis that it was subject to the very same judicial oversight it denied existed in the *Barnard case*.

206. What is very clear is that these sections are in fact falling short of the Constitutional requirements set out in by the Constitutional Court in the Stellenbosch case namely at:

"[63] The Constitutional Court has emphasised the general principle that there must be judicial oversight where an applicant seeks an order to execute against or seize control of the property of another person. This principle has been reiterated in a number of Constitutional Court judgments."

[108] Finally, I need to comment on the second judgment's revolutionary approach to execution. On that approach it means that from now onwards execution against movable and immovable property must involve judicial oversight.

[129] It has been established in the jurisprudence of this Court that execution of court orders is part of the judicial process.[58] It requires judicial oversight. Though previous cases dealt with debtors' homes,[59] the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable. Clearly then, the fundamental principles relating to the proscription against self-help flowing from the section 34 right of access to courts apply, with equal force, to the execution process. I would therefore affirm the breadth of the High Court's approach.

[132] The broader approach takes fuller account of the harsh effects in the absence of judicial oversight, acknowledging that they threaten the livelihood and dignity of low-income earners, a distinctly vulnerable group in our society.

207. It is a pity that the judge in the *Barnard* case did not subject his views and judgement to the principles of the Constitutional Court and merely narrowly focussed on the procedure at hand, notwithstanding that the taxpayer argued a constitutional point.

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[3] University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others (CCT127/15) [2016] ZACC 32; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC) (13 September 2016)

208.	Submission: It is submitted that NT and SARS review these provisions relating to default judgement to bring them within the scope of the constitution and add amendments to the current DTALAB20.
209.	Similarly, a review of the agency appointment process should be reviewed to ensure that the fair administrative principles can and are adhered to in line with this judgment.

Section 252 - 255: Electronic delivery of documents

210. Section 251 and 252 state that

(d) sent to the person's last known electronic address, which includes—

(i) the person's last known email address;

(ii) the person's last known telefax number; or

(iii) the person's electronic address as defined in the rules issued under section 255(1).

211. The section 255(1) rules at 3(2) state that delivery will occur for electronic filing communications when SARS correctly submits it on the users filing service.

212. We in this regard have also noted the judgment in *SIP Project Managers (Pty) Ltd v CSARS (Case No: 11521/2020)* clarifying the law that correctly submitted means when the user can access it.

213. This judgment is welcomed as it aligns the law of delivery for electronic filing pages to that of other electronic communications under the same rules.

214. Of concern was as held in the judgement that the applicant's version that the letters were not sent on the dates reflected therein remains accordingly unchallenged, and there can be no bona fide dispute of fact on this point.

215. This has been our members experience as well.

216. It is pertinent to note that in section 1 TAA "date of assessment" means -

(a) in the case of an assessment by SARS, the date of the issue of the notice of assessment; or

217. The law may be now clear that date of issue for the purpose of section 252-255 and the rules is not the "letter date" or even the date that SARS add something in the back end, but rather the date that the taxpayer can access it on his eFiling profile.

218. Submission: Though the law is now clear it remains a problem in practice that SARS' letters are dated before the taxpayer can access them and that SARS calculated the days from the date of the letter or when uploaded on the backend and not from date that the taxpayer is able to access it on eFiling.

219. It is submitted that the solution lies in the never implemented draft section 255 TAA rules that were issued in 2016 where it was proposed in a new clause 4(2)(a)(iii) that[4]:

(2) A SARS electronic filing service must—

(a) provide a registered user with the ability to—

(iii) nominate an alternative electronic address to which the SARS electronic filing service must deliver a notification of the submission of an electronic.

220. It will then be easy to align the "date of delivery" as when the date when the email notification entered the communicators system, which is again aligned to what the rule already states for other SARS electronic communications.

221. This will also address taxpayers' long held concern that eFiling is not a proper or appropriate notification method and will avoid taxpayers being subject to SARS' sporadic "other notifications", like sms etc. which only work in respect of certain products and services.

Section 3 TAA - Decisions subject to objection (Clause 3)

222. In *Barnard Labuschagne Inc v CSARS & MoF CASE NO: 23141/2017 (15 May 2020)* the judge states the following in his judgement at [70]:

"In my opinion, the fact that SARS allocated payments incorrectly and subsequently, made a decision to recover a debt based on an incorrect amount, was a legitimate reason for the applicant to have raised an objection. I find the applicant's contention opportunistic and mischievous as the applicant was bent over backwards to confer to itself its own jurisdiction to hear its dispute and thereby disregarding the dispute resolution mechanism as set out in the TAA."

[4] https://www.sars.gov.za/AllDocs/LegalDoclib/Drafts/LAPD-LPrep-Draft-2016-24%20-%20Draft%20Replacement%20Rules%20for%20Electronic%20Communication%20under%20Section%20255%20of%20the%20TAA%2015%20March%202016.pdf

223. We have reviewed the relevant provisions of the TAA including section 104 and section 3 of the Act and find no remedy of objection to SARS making incorrect account entries or allocations.

224. Submission: To effect the remedy that the honourable judge was of the impression exists in the TAA, we propose the insertion of a new section 104(2)(d) TAA which gives the taxpayer the right to object against any entry on the taxpayers account added by SARS which does not properly reflect an assessment or payment or other entry in law and for which SARS has refused to reverse.

Section 10(1)(o)(ii)

225. South Africa houses many multi-national Groups of companies, operating businesses across Africa and the rest of the world. Many South African tax resident employees are employed and paid by non-resident employers within these Groups of companies.

226. The exemption provided for under section 10(1)(o)(ii) of the Act applies to a South African tax resident individual who is an employee and renders services outside South Africa on behalf of an employer (South African or foreign) and in the course of rendering said service is outside of South Africa for periods exceeding 183 full days, of which more than 60 full days must be continuous, in any 12-month period beginning or ending in a year of assessment.

227. Effective from 1 March 2020, this exemption only applies to the first R1,25 million of foreign remuneration earned, where PAYE will be withheld from the remuneration of expats in excess of R1,25 million.

228. The announcement of the national lock down with effect from 26 March 2020 midnight in South Africa accompanied by the travel bans that were implemented world-wide, resulted in individuals being unable to leave South Africa to perform their duties in the country of residence of their foreign employers.

229. The lockdown and the travel bans that were implemented resulted in many employees having to fulfil their duties to their foreign employers while being physically present in South Africa. Through no fault of their own, these employees are unable to meet the requirements of section 10(1)(o)(ii).

230. Expatriate salary packages are often structured taking into account the tax implications in both the home and host countries. Affected employees and/or employers will be negatively impacted if the exemption provided for in section 10(1)(o)(ii) does not apply.

231. Submission: The Secretariat of the Organisation for Economic Co-operation and Development (OECD) has issued recommendations that encourage the tax

authorities to minimise or eliminate unduly burdensome compliance requirements for taxpayers in the context of the crisis.

232. We propose that a temporary relief measure be incorporated in section 10(1)(o)(ii) by removing or reducing the requirement for a person to be physically outside South Africa when rendering services to non-resident employers.

Section 31 – Refining the scope of the transfer pricing rules applying to controlled foreign companies (CFCs)

233. The proposed change to expand the current scope of transfer pricing rules to include a tax benefit that may be derived by any resident in relation to a CFC, whilst understood, significantly expands the scope of section 31.

234. This is particularly pertinent taking into consideration the previously proposed (but deferred) amendment relating to the insertion of the term "associated enterprise" in section 31 of the Act (as an alternative to the term "connected person" in the definition of "affected transaction") which would result in the inclusion of transactions between associated enterprises in the ambit of section 31.

235. It is concerning that both the amendments to section 31 and the term "associated enterprise" are effective at the same time – that is, January 2021. There are only four months before these sections become effective, yet no guidance as to the interpretation of the term "associated enterprise" has been forthcoming. Assuming that SARS intends such guidance to be issued for comment before legislating it, this leaves barely enough time before the sections become effective.

236. Submission: In order to provide certainty to taxpayers, it is imperative that clear guidance is given urgently in relation not only to the current proposed change to section 31, but also taking into account the proposed inclusion of the term "associated enterprise" in section 31 to ensure that all due legislative processes have been followed.

Scrap metal tax

237. The proposal is made to replace the exports guidelines under the Preferred Pricing Scheme, with a tax.

238. SAICA takes no policy position on the one or the other as to the impact on the industry and its various role players.

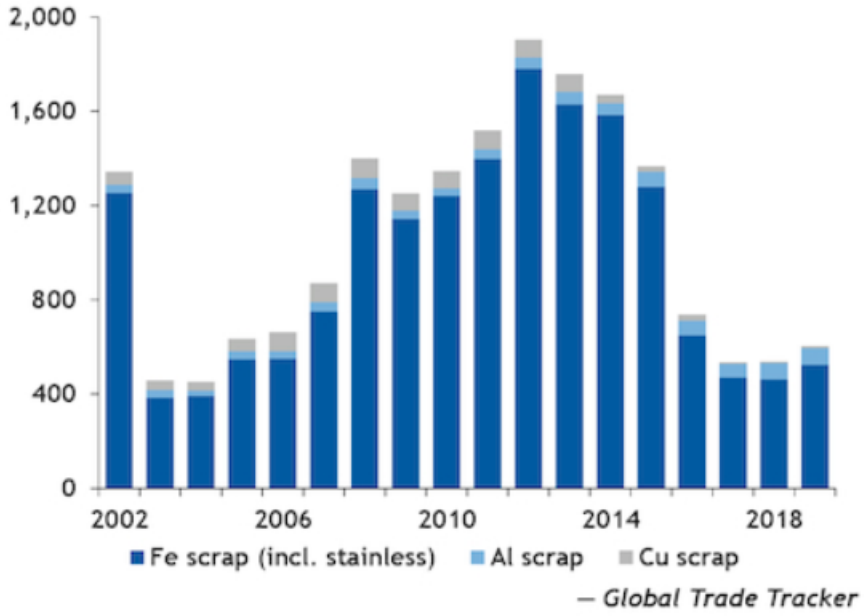
239. However, we would like to note that the problem of scrap metal in South Africa extends beyond producers and collectors in the industry.

240. The damage that stolen "scrap metal" does to the economy probably exceeds the benefits from sale and it is estimated that up to R7bn in copper alone is stolen

annually in South Africa, especially from Eskom, Transnet and Telkom. This does not even include the billions lost to the economy when electricity goes out or trains stop as a result.

241. It is interesting to note that since the introduction of the PPS in 2013, where scrap metal has to remain in country for longer before export and therefore increases risk of detection of stolen scrap metal by SAPS, legal "exports" have drastically declined. This could be just incidental and may require further analysis and investigation.

South African scrap metal exports '000t



242. Submission: We propose that NT look at the proposed tax or any other proposals regarding scrap metal holistically and include both the legal and illegal trade in scrap metal in its analysis.