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National Treasury
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Dear National Treasury and Ms Collins

SUBMISSION - ANNEXURE C 2025 BUDGET REVIEW

1. We herewith present our written submission on the request for Annexure C 2025 issues on behalf of the South African Institute of Chartered Accountants' (SAICA) National Tax Committee (NTC), as set out in Annexure A.

2. Our submission includes a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification or suggestions for potentially ambiguous provisions, in relation to either **existing sections or the latest proposed amendments** to various sections of the Income Tax Act, No. 58 of 1962 (the ITA), the Value Added Tax Act, No 89 of 1991 (the VAT Act), the Employment Tax Incentive Act, No. 26 of 2013 (the ETI Act) and the Tax Administration Act, No. 28 of 2011 (the TAA), as contained in the Taxation Laws Amendment Bill, 2024 (TLAB2024) and the Taxation Administration Laws Amendment Bill, 2024 (TALAB2024), respectively.

3. **Where a previous public or formal response has been provided by National Treasury**, we have noted and considered National Treasury's responses on our **prior year submissions**. Where no response has been provided or the consideration by National Treasury was still unclear or we still believe it to be in the public interest, we have included such matter again.

4. To make it easier for National Treasury to navigate the document, we have indicated **NEW** submissions not previously raised in the table of contents.

5. We welcome any engagement with National Treasury on why we believes the relevant proposals would be in the interests of South African fiscal policy or in creating alignment between tax policy and legislation/practice.

6. There are however **numerous matters previously raised that were not addressed** at the 3 November 2022 engagement which unfortunately was held as an once off engagement rather than being incorporated as part of the public consultation process.

7. We would like to encourage National Treasury and propose, as Parliament did in 2022, to consider expanding its engagement on the Annexure C submissions and policy matters not considered for a particular fiscal year to an annual and regular process.

8. As always, we thank National Treasury and SARS for the on-going opportunity to participate in the development of the South African tax law and policy.

Should any further clarification be required, on any of the matters raised please do not hesitate to contact us.

Yours sincerely

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CHAIRPERSON: NATIONAL TAX COMMITTEE

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The South African Institute of Chartered Accountants

ANNEXURE A

Table of Contents

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

Section 30B(2)(b)(ix) – Associations and Trade Unions *(submission originally made in 2022)*

Legal Nature

9. Section 30B(2)(b)(ix) of the ITA requires that substantially the whole of any association's funding must be derived from its annual or other long-term members or from an appropriation by the government.

10. "Funds" are referred to in section 30B(2)(b)(iv). This sub-section states that the entity is required to utilise substantially the whole of its funds for the sole or principal object for which it has been established.

11. SARS' interpretation of 'funding' creates a legal anomaly as it implies that the extent of the receipt of non-taxable amounts (such as donations, grants etc) could put the exemption of the entity at risk when the exemption in context was not created for such purpose.

12. Thus, the exemption provision would not integrate with the administrative provision in the legislation in terms of SARS' interpretation as section 30B seems to supersede section 10(1)(d)(iii) and (iv) instead of section 30B being read in the context of section 10(1)(d)(iii) and (iv), the latter being the actual exemption provision as relates to amounts of income received and accrued.

13. The section 30B concept of "funding" is interpreted to go beyond the confines of section 10(1)(d)(iv) which is the actual exemption.

Factual Description

14. Funding: SARS issued the final version of Interpretation Note 125 (IN 125) on "Associations: Funding Requirements" that provided guidance on the interpretation and application of the "funding" requirement.

15. IN 125 contains various concerns that might jeopardise many associations' tax-exempt status. SAICA raised these concerns in its submission on the draft version of IN 125, dated 5 November 2021. One of the concerns relates to SARS' interpretation of the term "funding".

16. SARS' interpretation of "funding" includes items such as loan capital and overdrafts received, other capital amounts and donations received – none of which would be included in 'gross income' as defined in section 1 of the ITA i.e. amounts that would ordinarily not be taxable and would ordinarily not require an exemption are now jeopardising an entity's tax exemption status.

17. Appropriations from government: SARS' interpretation is that the exemption should be interpreted narrowly and therefore "sphere of government" should also be interpreted

narrowly. For the legal reasons set out in our submission we do not agree with SARS' interpretation or that the case law they cite is applicable.

18. The absurdity created is for example, an entity that receives a significant donation that is capital in nature and not subject to tax, can now be at risk of losing its exemption status. Furthermore, receiving funds from government that are appropriated by national or provincial government but indirectly through a scheduled entity such as SARS or a SETA is now interpreted as being non-qualifying funding and again exposing the entity to its exemption being withdrawn by CSARS.

19. This mismatch would cause situations where entities would have to consider refusing to receive indirect government grants or capital receipts so as not to jeopardise their exemption status when the receipt of such amounts should not raise concern as it does not create trading or competition and it still must be aligned to the objectives of the entity. It also does not impinge on the organisations objective of not being for profit as it is not receiving these amounts in a scheme of profit making. This would purely be driven by the fact that the three spheres of government habitually use agencies and entities to disperse funds for service delivery.

20. It could never have been the intention of the legislature, in the context of the legislation as drafted, to prevent bodies from receiving funds that are not income and would not require an income exemption to start with whether from a sphere of government to perform a public good just because a sphere of government decided to appropriate the monies in a particular way through a particular state-controlled organ. Such an interpretation would result in a glaring absurdity.

21. Substantially the whole: Reference is made in the draft IN to Binding General Ruling (BGR) 20 and SARS notes that it will interpret "substantially the whole" as 90% or more but will accept 85% or more as meeting the criteria.

22. As mentioned in our previous submission, dated 30 April 2020, in our view the law does not allow SARS to take a position contrary to the promulgated law and SARS' own express interpretation of it and thus we consider the BGR position to be unlawful.

23. SAICA does, however, support the 85% threshold as a better interpretation of the law but is of the view that it should be included in law to avoid uncertainty and debate, especially should a dispute arise where SARS will invariably argue that 90% is its formal position on the interpretation.

24. Withdrawal of approval: SARS takes the position that if the non-compliance is not corrected after notice was given, the exemption is withdrawn from the year of first non-compliance and not from the current year of assessment.

25. The legislation is, however, not clear on this, and SARS' view would seem impracticable because if, for example, the entity failed the funding test 3 years ago, it would never be able to correct it and would at best be able to correct it from the current year when the notice was received.

26. It also would mean that, if the exemption is withdrawn retrospectively, there upon following years would be taxable and would have to be reassessed as a company with resubmission of an ITR14 from the first year of contravention which could be decades.

27. The law provides no leeway or discretion to the CSARS to resolve this impossibility to instruct the exempt body to correct its non-compliance going forward.

28. Exiting the regime: Many entities find themselves in a position where membership funding alone just can't sustain them financially. However the "exit charge" in s30B(9) is based on the market value of all the assets less liabilities as being included in taxable income. In most instances this would require the entity to sell off a material part of its assets and would not be a viable option either thus keeping them trapped. Many of these entities acquired their assets long before section 30B and its current administrative requirements came into being.

The nature of taxpayers impacted

29. Associations and trade unions wanting to or that have already applied for exemption under section 10(1)(d)(iii) & (iv) read with section 30B.

Proposal

30. Funding: The purpose of section 30B is to regulate the operations of entities for the exemption of taxable amounts under section 10(1)(d)(iii) & (iv) and it should integrate with and be interpreted in context with section 10(1)(d). "Funding" should thus not include all amounts received.

31. Section 30B should deal only with taxable amounts that need to be exempted, like member fees and other incidental trading income. All other receipts (such as investment income (defined), donations, capital amounts etc) should be excluded from "funding". Therefore, amounts that are not included in gross income should not be seen as a source of funding.

32. The definition of "funding" should thus be amended and it is proposed that the requirement should rather be that the income from trading with non-members should be limited to a certain percentage.

33. Appropriations from government: The legislation should be amended to clarify and properly reflect the expanded interpretation of "sphere of government" that includes other government entities or organs of state as this would still be in line with the purpose and intention of the ITA.

34. Substantially the whole: The legislation should be amended to reflect 85% as the threshold.

35. Withdrawal of approval: We accept that if the withdrawal is applicable only after notice provided by SARS, compliant taxpayers are at a disadvantage as many taxpayers will now "ride the system" till caught, but similarly if SARS is compelled by the current

legislation to compel the association or union to correct historical positions that they cannot, that is also impractical. The legislation should thus be amended to make it clear from what date the withdrawal of approval is effective – preferably from the period after the notice is provided by SARS.

36. It is also suggested that the legislation is amended so that the sanction for non-compliance is not only withdrawal (not retrospective), but that other sanctions such as penalties based on a percentage of impermissible trading income be introduced. This would ensure a balance between SARS's ability to regulate the industry and also sanction historical non-compliance without creating an incentive for non-compliance.

37. Exiting the regime: Where an organisation finds itself unable to suitably fund itself from membership fees cannot exit the regime, it is proposed that a mechanism be introduced to enable such an exit. This can be achieved by either reducing the exit charge to a more reasonable fixed % and/or introducing a temporary measure similar to par 51A Eighth Schedule to enable exits.

Section 89*quat* – Interest on under/overpayment of provisional tax *(submission originally made in 2022)*

Legal Nature

38. Section 89*quat* makes provision for the imposition of interest on underpayments and overpayments of provisional tax. Interest in terms of this section is either levied on an underpayment of tax or paid on an overpayment of tax from the 'effective date'.

39. In terms of section 89*quat*(4), interest is payable to a *provisional taxpayer* if the 'credit amount' exceeds the normal tax payable for that year of assessment and:

- The amount exceeds R10 000; or
- The taxable income for the year exceeds R20 000 (company); or
- The taxable income for the year of assessment exceeds R50 000 (for any other person).

Factual description

40. There is no provision in the ITA or the TAA that grants individuals who are *not provisional taxpayers*, interest on PAYE withheld in excess of the tax due for the year. Once SARS has assessed such a taxpayer, SARS can keep the taxpayer's money for a lengthy period without having to pay any interest.

41. This is clearly unfair and a questionable practice.

42. An example of how this can (and has) occurred is where a DTA applies to an individual in respect of tax on a provident fund lumpsum, where South Africa has no taxing rights but PAYE was incorrectly paid over to SARS on this amount. Despite a lengthy dispute process to which SARS eventually conceded, SARS did not have to pay interest.

The nature of taxpayers impacted

43. Individuals that are not provisional taxpayers and that have had excessive PAYE deducted from their remuneration by their employers.

Proposal

Provision should be made in the Act for the payment by SARS of interest to individuals when PAYE has been over-deducted by their employers, from the date of assessment to the date of eventual payment of the refund by SARS, with the interest accruing from date of assessment till date of payment of the refund by SARS.

Fourth Schedule: Paragraph 1 and 9(1) – Standard Employment *(submission originally made in 2022)*

Legal Nature

44. Paragraph 9(1) of the Fourth Schedules states that the Commissioner may, *inter alia*, prescribe the amount of employees' tax to be deducted from any amount of remuneration.

45. According to the SARS Guide for Employers in respect of Employees' Tax for 2022, the weekly, fortnightly and monthly tables, as published each year after the Budget Speech, must be used to determine the amount of employees' tax to be withheld from the balance of remuneration for each pay period. The annual table must be used at the end of the tax period or year of assessment to determine the final amount of employees' tax payable for the full year or period of assessment.

Factual Description

46. The SARS Guide for Employers in respect of Employees' Tax for 2022 also includes the following:

Employees' tax

- **Standard Employment income**
  - The weekly, fortnightly and monthly tables, as published each year after the Budget Speech must be used to determine the amount of employees' tax to be withheld from the balance of remuneration for each pay period. The annual table must be used at the end of the tax period or year of assessment to determine the final amount of employees' tax payable for the full year or period of assessment,.
- **Non-standard employment income**
  - The Commissioner prescribes tax deduction tables for such classes of employees as the Commissioner may determine and also prescribe the manner in which they may be applied.
  - Employees' tax must be calculated and deducted at 25% on the balance of remuneration.
- **Tax Directive**
  - Where the employer is in possession of a tax directive in respect of an employee who is in non-standard employment, employees' tax must be deducted in accordance with the directive.

Summary

Scenario	Employees' tax
Employee is required to work at least 22 hours a week (standard employment) and earns remuneration which exceeds the annual tax threshold (R87 300 if less than 65 years old / R135 150 if 65 years or older /R151 100 if 75 years or older)	Use tax deduction tables
Employee is required to work at least 22 hours a week (standard employment) and earns remuneration which does not exceed the annual tax threshold (R87 300 if less than 65 years old / R135 150 if 65 years or older / R151 100 if 75 years or older)	No employees' tax to be deducted
Employee is in non-standard employment, required to work at least 5 hours per day and earns less than R349 for that day	No employees' tax to be deducted
Employee is in non-standard employment, required to work at least 5 hours per day and earns more than R349 for that day	25% deduction
Employee is in non-standard employment, required to work less than 5 hours per day and earns less than R349 for that day	25% deduction

47. The SARS Guide for Employers in respect of Employees' Tax for 2025 uses deleted concepts such as "standard employment". This term was relevant when SITE was still applicable.

48. Individuals who are in single employment and who only work for a few hours a day, according to the above table, should be taxed at 25%. The actual normal tax payable on assessment, will generally be less than the 25% required to be withheld by employers in terms of the table above.

49. This 25% is however not in the law anymore nor the relief under the repealed clause (b) of para 11B Fourth Schedule, definition of Standard Employment.

The nature of taxpayers impacted

50. All taxpayers who have single employment and who only work for a few hours a day and any employee, who derives the daily amounts from more than one employer, but the aggregate is below the upper limit where the 18% rate no longer applies.

Proposal

51. It is proposed that a regime similar to the repealed para 11B Fourth Schedule be reinserted.

52. This should enable (a) that the Commissioner can direct that 25% PAYE be withheld where the employee receives remuneration from more than one employer as is the current practice and as was enabled in the repealed para 11B and (b) that the employer

is entitled to apply the tax tables where the employee submits a written declaration similar to what was contained in the repealed definition of Standard Employment.

Fourth Schedule: Paragraph 13(2)(b) – Issuing of employees' tax certificates *(submission originally made in 2022)*

Legal Nature

53. Paragraph 13(2)(b) of the Fourth Schedule provides that where an employer has ceased to be an employer in relation to an employee but has continued to be an employer in relation to other employees, then the employer must issue an employees' tax certificate to the former employee within 14 days of the date on which the employer ceased to be an employer to that employee.

Factual Description

54. The SARS guide and legislation requires the IRP5 certificates to be issued 14 days after an employee resigns, dies or retires. Although this provision makes sense for manual IRP5 processes, as were in effect at the time this paragraph was inserted into the legislation, these processes are now automated and the provision does not take into account the changes in the IRP5 process or the technological advances made in the submission process.

55. However, payroll systems require periodical close off and are not open to close out and issue IRP 5 outside these cycles to protect the integrity of the data.

56. It is not feasible for employers to issue IRP5 certificates during the year for each employee to which one of these events relates. It is further not clear what the purpose is of issuing these mid-cycle IRP5 certificates to an employee, except in the case of death where an estate needs to be managed and the deceased tax year ends on death.

57. There are also now 2 PAYE reporting cycles in a year which did not exist historically and taxpayers are not dependent on their "tax info" from employers as it is now on SARS eFiling.

The nature of taxpayers impacted

58. Employees who resign or retire during a year of assessment.

Proposal

59. The requirement to issue IRP5 certificates on resignation or retrenchment within 14 days should be removed as it is unclear why this is necessary, but it is also not practically feasible to issue these certificates to employees within this time period.

60. It is proposed that this requirement be aligned to the normal annual IRP 5 issuance cycle for employees.

Paragraph 14(6) - Penalty for late submission on the EMP501 reconciliation *(submission originally made in 2022)*

Legal Nature

61. Paragraph 14(6) of the Fourth Schedule of the Act imposes a percentage-based penalty under Chapter 15 of the TAA for each month that the employer fails to submit a complete return (i.e. an EMP501 reconciliation). Such penalty may not exceed 10 per cent of the total amount of employees' tax deducted or withheld, or which should have been deducted or withheld by the employer from the remuneration of employees for the period described in that subparagraph.

Factual Description

62. On review of the administrative non-compliance penalties in Chapter 15, it appears that the penalty referred to is in terms of section 213 of the TAA, which provides for the imposition of a percentage-based penalty, as is envisaged by paragraph 14(6).

63. Section 213 does not empower SARS to impose a penalty on the late submission of the EMP501 reconciliation unless there is simultaneous late payment or 'underpayment' by the due date. The penalty referred to in paragraph 14(6) is thus not applicable in the circumstances and cannot be construed to be applicable.

64. The more appropriate penalty section would, in our view, be section 210 of the TAA which provides for a fixed amount penalty for the late or non-submission of returns.

The nature of taxpayers impacted

65. All employers

Proposal

66. An amendment to paragraph 14(6) to refer to a fixed amount penalty for the late or non-submission of returns per section 210 of the TAA, instead of a percentage-based penalty as is currently the case.

67. SARS can furthermore then amend this notice to prescribe a fair penalty for this administrative non-compliance that applies per month which matches the degree of non-compliance with the penalty, as envisaged by the legislature.

Fourth Schedule: Paragraph 30(1)(b) – Criminal offence in respect of the use of funds *(submission originally made in 2021)*

Legal Nature

68. In terms of paragraph 30(1)(b) of the Fourth Schedule a person who wilfully and without just cause uses or applies any amount deducted or withheld as employees' tax for a purpose other than paying such amount to SARS commits an offence rendering that person liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

Factual Description

69. In the *Peri Formwork Scaffolding Engineering (Pty) Ltd v CSARS* ((A67/2020) [2021] ZAWCHC 165 (23 August 2021)) case, the core of SARS's argument was that the relationship between the taxpayer and SARS is "akin to a fiduciary relationship in that the taxpayer is required to act for the benefit of SARS". It further argued that the taxpayer had failed in its fiduciary duty, which required the taxpayer to "observe the highest degree of care" in relation to the employees' tax (PAYE) deducted, insulate this amount, not mix it with other business income, and not subject this money to "risks associated with non-payments by third parties". Further, SARS contended that the taxpayer shouldn't have to borrow money from third parties to pay SARS.

70. Thus, SARS argued that the money collected on behalf of SARS cannot be utilised as cash flow, and that such money should be ring-fenced from all other money.

71. The Judge, however, held that she was not in agreement that the relationship between an employer and SARS is akin to a fiduciary relationship which would elevate the obligation by an employer to pay over monies that is collected on behalf of it to SARS, to that of, for example, a principal and agent relationship.

72. Taxpayers are thus not precluded from utilising the PAYE money, mixing it with other monies or paying it into a credit or overdraft facility i.e. are not legally obliged to ring-fence the money by putting it into a separate account for instance as the legal relationship between SARS and taxpayer is one of a debtor/creditor and not a fiduciary.

73. Despite the above judgment, it is still a criminal offence to **use or apply** any amount deducted or withheld as employees' tax for a purpose other than paying such amount to SARS.

74. By law, even though there is no fiduciary relationship, it is thus still a criminal offence to use the money that has been withheld for PAYE for any other purpose. The scope of this criminal offence is, however, uncertain.

75. For example, would a taxpayer be guilty if it used one bank account to collect its trade income and pay all its debts i.e. they are mixing their funds even though the available balance remains more that the taxes due? A further uncertainty is where such money is paid into an overdraft or credit facility and then used to pay any PAYE liabilities, as legally the overdraft money does not belong to the taxpayer, it belongs to the bank and any the taxpayer would be using the money incidentally to reduce his or her interest exposure. Would this sort of payment be considered as using the PAYE money for another purpose?

The nature of taxpayers impacted

76. All employers.

Proposal

77. Further clarity on the scope of this criminal offence should be provided but in light of the Peri Scaffolding case again affirming that the relationship between SARS and taxpayers being debtor/creditor and not fiduciary, it is proposed that the criminal offence in paragraph 30 should be removed as it seems ill conceived and impractical under the current law.

Seventh Schedule: Paragraph 2(d) – Residential accommodation fringe benefit *(submission originally made in 2020)*

Legal Nature

78. Paragraph 2(d) of the Seventh Schedule to the ITA states that a taxable benefit is deemed to have been granted where the employer has provided the employee with residential accommodation either free of charge or for a rental consideration which is less than the value of such accommodation.

79. The value of the fringe benefit is the rental value of such accommodation (generally calculated using a formula as set out in paragraph 9(3)) less any rental consideration given by the employee for such accommodation in respect of such year.

80. Furthermore, paragraph 9(9) of the Seventh Schedule provides that where the employee has been provided with residential accommodation by his employer or any associated institution in relation to the employer and such employee has an interest in the accommodation in question and the accommodation has been let to the employer or to any associated institution in relation to the employer, the rental shall for the purposes of this Act (excluding this subparagraph) be deemed not to have been received by or to have accrued to the employee or any connected person in relation to the employee.

Factual Description

81. Many individuals rent their private houses to their employers who in turn provide the use of the house back to these individual employees. The employee is taxed on this fringe benefit using the formula, however, the rental payments received by the employee are not subject to income tax in the employee's hands.

82. In many instances, the fringe benefit value as calculated in terms of the Seventh Schedule, is lower than the rental amount received by the employee from his/her employer. In addition to this, the rental received by the employee is not taxable in his/her hands, creating a tax avoidance situation.

83. To illustrate this point by way of an example, let's assume that an employee owns a four-bedroom house that is then rented to the employee's employer for R20 000 per month. The use of the house is then provided back to the employee by the employer. A fringe benefit would thus arise and it should be calculated in terms of the formula included in paragraph 9(3) of the Seventh Schedule. The employee's remuneration proxy is R800 000 for the purpose of this example and it is assumed that the employer does not pay for the power or fuel.

84. In terms of the formula in paragraph 9(3), the monthly taxable fringe benefit would be R10 753,50. This is amount calculated as follows:

(R800 000 – R83 100) x 18% x 1/12 = R10 754.

85. The tax that the person would pay on this amount would be R4 839 (R10 754 x 45%).

86. From a cash flow perspective, the employee would have received a cash flow benefit of R15 161, being the rental income received of R20 000 (which is not taxable) less the tax payable on the fringe benefit of R4 839. This amounts to a yearly cash flow benefit of R181 932.

The nature of taxpayers impacted

87. All employees who lease their private houses out to their employers, who in turn provide the use of the house back to these employees, where the value calculated in terms of paragraph 9(3) is lower than the rental received by the employee.

Proposal

88. This tax avoidance gap should be addressed in paragraph 9(9) by taking into consideration the market value of the property and by ensuring that there is a correlation between the value of the fringe benefit calculated and the rental income received by the employee.

Seventh Schedule: Paragraph 2(e) – Employee wellness programmes *(submission originally made in 2022)*

Legal Nature

89. Paragraph 2(e) of the Seventh Schedule to the Income Tax Act prescribes that a taxable benefit shall be deemed to have been granted to an employee, if any service has at the expense of the employer been rendered to the employee and that service has been utilised by the employee for private or domestic purposes and no payment, or an inadequate payment, has been given by the employee for the service.

90. This benefit is valued as the cost to the employer in rendering the service or having such service rendered, less any amount paid by the employee for the service (paragraph 10(1)(b) of the Seventh Schedule).

91. Subparagraph (2) provides that no value is placed on certain types of services provided by an employer. Item (c) of subparagraph (2) provides that any service rendered to all employees, in general, for the better performance of their duties at their place of work, or a place of recreation provided by the employer, will have no value for tax purposes. Accordingly, benefits falling within this provision may be provided tax-free.

92. Many employers offer participation in “employee wellness programmes” to their employees to provide them with support and to ensure that they are better equipped to

overcome challenges they may face including, for example, financial and mental health issues.

93. The service is offered to all employees in general but for practical reasons, including confidentiality as well as the nature of the service that may be required (for example, after hours trauma counselling), cannot be rendered at the employee's place of work. Some of the services are telephonic, and others are face-to-face and often provided at the premises of the service-provider for that particular service.

94. Employee wellness programmes are operated on the basis that confidentiality will be guaranteed for the employee and accordingly, the employer is not provided with the names of employees who utilise the service. The employer is only aware of the number of employees who utilised the service in a particular month. The employer usually pays the service provider a fixed amount per month for the service, which is based on the number of individuals employed by the company, and not by the number of employees who utilise the service.

95. In view of the above, to the extent that it is determined that there should be a taxable benefit, as a result of the fact that the service is not offered at the premises of the employer, and would not be defined as "recreation" as intended by subparagraph (2) above, the employer is unable to include the value of a taxable benefit in the taxable income of employees who utilise the service and report this on their IRP5/IT3(a) Employees' Tax Certificates. It is important to note that the cost to the employer of having the service available to employees is typically as low as R20 per month, per employee.

Factual Description

96. Employee wellness programmes include the services of skilled professionals who are able to offer telephonic assistance, face-to-face and telephonic counselling services, legal and financial advice, trauma support as well as managerial support to employees. The services are generally available 24 hours a day, 365 days per year.

97. The support provided through these programmes results in healthier and happier employees, which translates into reduced absenteeism and higher levels of productivity.

98. Due to the confidential nature of the issues that employees wishing to utilise this service may want to discuss with a professional service provider, as well as the fact that after-hours support may be required by an employee, it is not feasible for the services to be provided at the employee's place of work. In addition, as the services cannot be said to be recreational in nature, the requirements of paragraph 10(2)(c) are difficult to meet, resulting in a potential taxable fringe benefit in the hands of the employees.

99. As mentioned above, this creates practical problems for the employer, as the employee wellness programme is set up in such a way as to guarantee confidentiality to the employee. The employer is therefore not provided with the names of the employees who utilised the service and is therefore unable to determine who has utilised the potentially taxable benefit and to include the value of the service in the employee's taxable income.

The nature of taxpayers impacted

100. Employees of any employer that offers an employee wellness programme.

Proposal

101. Paragraph 10(2)(c) of the Seventh Schedule should be amended to accommodate employee wellness programmes by expanding item (c) to include such services utilised by employees while they are away from their place of work but generally available to all employees.

Seventh Schedule: Paragraph 7 – Right of use of motor vehicle *(submission originally made in 2021)*

Legal Nature

102. Where an employer provides an employee with the right of use of a motor vehicle, a taxable fringe benefit arises in the hands of the employee and is included in gross income in terms of paragraph (i) of the gross income definition in the ITA).

103. The taxable benefit is quantified in terms of paragraph 2(b) and 7 of the Seventh Schedule to the ITA.

104. Paragraph 7 of the Seventh Schedule stipulates that where an asset has been acquired by an employee, the value of the taxable benefit shall be the difference between the value of the asset less any consideration given by the employee.

Factual Description

105. As a cost saving measure it is fairly common practice for an employer to provide the use of a company motor vehicle to a group of expatriate employees working temporarily in South Africa, rather than providing a different motor vehicle to each employee.

106. In terms of paragraph 2(b) of the Seventh Schedule to the ITA, a taxable benefit will be deemed to have been granted to an employee where the employer has provided the employee with the right of use of any motor vehicle for private or domestic purposes, either free of charge or for a consideration which is less than the value of such use.

107. Paragraph 7(2) of the Seventh Schedule to the ITA provides that the cash equivalent of the value of the taxable benefit, is the value of the private use of the vehicle, less any consideration given by the employee for the use thereof.

108. The legislation does not currently provide for the apportionment of the taxable benefit arising from the private use of the vehicle in the hands of each employee who has the use of the vehicle.

109. Consequently, the full value of the taxable benefit is taxed in the hands of each employee. Tax is therefore collected by SARS from each employee on the private use

of the same vehicle, regardless of the fact that the access that each employee has to the vehicle for private use is limited to its availability of the vehicle at the time.

110. The taxable benefit for each month that the motor vehicle is used by the employee (other than a vehicle acquired in terms of an operating lease) is calculated by multiplying the determined value of the motor vehicle, as determined by the Minister by Regulation by a percentage (3.5% or 3.25%) depending upon whether or not the vehicle was acquired with a maintenance plan.

111. The legislation appears to assume that the use of a motor vehicle will be allocated by an employer to a single employee, rather than to a group of employees to use collectively. Consequently, the legislation does not provide for the apportionment of the taxable benefit where the use of a company motor vehicle is provided to a group of employees and to ensure that the full value of the vehicle is only taxed in full as a taxable benefit once in total.

The nature of taxpayers impacted

112. Employees receiving the collective right to use a company vehicle including employees of multinationals seconded to render services in South Africa temporarily.

Proposal

113. A paragraph, similar to paragraph 9(5) should be included under paragraph 7 allowing the Commissioner to make an equitable determination in this regard.

Seventh Schedule: Paragraph 9(3) – Remuneration proxy *(submission originally made in 2021)*

Legal Nature

114. Employees who receive residential accommodation from their employer are taxed on this benefit as a fringe benefit. The cash equivalent of the fringe benefit is referred to as the "rental value" and is determined in accordance with paragraph 9 of the Seventh Schedule to the Income Tax Act less any consideration given by the employee for the benefit.

115. Where the employer secures the residential accommodation through an arms' length lease agreement, the "rental value" for the employee is the lower of the cost to the employer in providing the accommodation and the value as determined in accordance with a formula set out in paragraph 9(3) of the Seventh Schedule ("the formula value"). In circumstances where the employer (or an associated institution to the employer) owns the accommodation, it is mandatory to use the formula value as the "rental value", unless a tax directive is applied for in terms of paragraph 9(5) of the Seventh Schedule.

116. The formula value is a function of "remuneration proxy" which is defined in section 1 of the Act as follows:

…in relation to a year of assessment, means the remuneration, as defined in paragraph 1 of the Fourth Schedule, derived by an employee from an employer during the year of

assessment immediately preceding that year of assessment, other than the cash equivalent of the value of a taxable benefit derived from the occupation of residential accommodation as contemplated in subparagraph (3) of paragraph 9 of the Seventh Schedule in the application of that subparagraph…

Factual Description

117. With effect from 1 March 2016, paragraph 2(l) of the Seventh Schedule was introduced which included employer contributions to retirement funds as a taxable fringe benefit, therefore increasing employees' overall "remuneration" by the value of these contributions. The ultimate tax effect of this change was largely described as tax neutral because employees would be allowed an equal amount as a tax deduction. It was only if the employee's actual and deemed retirement fund contributions exceeded R350,000 per year or 27.5% of remuneration (or taxable income) that there would be an impact on net take home pay, as the allowable tax deduction for retirement fund contributions would be limited in these circumstances. This limitation was justified by the Treasury because it only impacted the higher earners and that it was in line with one of the aims of the retirement fund reform to prevent wealthy individuals from claiming excessive tax deductions and therefore promoting equity amongst taxpayers.

118. However, as "remuneration proxy" is defined with reference to "remuneration" and not the balance of remuneration (i.e., the amount remaining after allowable tax deductions), employees whose accommodation fringe benefits were determined with reference to the formula in paragraph 9(3) of the Seventh Schedule arbitrarily had their accommodation fringe benefit value increased without there being any relevant change in their circumstances. This could not have been the intention of the Legislature as the accommodation fringe benefit was completely unrelated to the retirement fund tax reform. In fact, this would have been contrary to the intention of promoting equity amongst taxpayers.

119. Although we note the remedy provided by the paragraph 9(5) (obtaining a tax directive if the rental value is lower than the formula value) is available, this is an administratively burdensome process as a new tax directive per year, per employee is required. These directive applications must also be supported by two independent valuations which are extremely costly for an employer with large numbers of employees residing in employer owned accommodation.

The nature of taxpayers impacted

120. Employees who are provided with employer provided accommodation (e.g. in the agriculture, hospitality, education, mining etc sectors as well as at various state-owned entities).

Proposal

121. The remuneration proxy in the formula value in paragraph 9(3) should exclude the employer contributions to retirement funds that are taxed as a fringe benefit.

CATEGORY – DOMESTIC BUSINESS TAXES

Sections 7C and 56 – Loans to a trust by a connected person and donations tax *(submission originally made in 2020)*

Legal Nature

122. Section 7C generally applies where a natural person makes an interest-free loan to a trust. The non-charging of interest is regarded as a donation subject to donations tax at the rate of 20%. The donation is regarded as having been made to the trust by the natural person on the last day of the year of assessment of the trust and donations tax is payable by the end of the month following the month during which the donation takes effect.

Factual Description

123. The financial accounts of most trusts are only prepared a while after the year end and thus the actual levels of the loan and corresponding interest can only be determined then. The reason for this is that it is often uneconomical for the trust to have a full-time accounting function, as the limited transactions will not financially justify such an expense.

The nature of businesses impacted

124. All natural persons or companies who are subject to section 7C.

Proposal

125. A grace period of a minimum of 3 months, preferably 7 months, should be granted in respect of payment of the donations tax. 7 months would align with the top-up payment of provisional tax. This will assist in ensuring more accurate calculations of the donations tax payable.

Section 8F – Interest on hybrid debt instruments – Registered Auditors *(submission originally made in 2023)*

Legal Nature

126. Section 8F of the Income Tax Act deems interest in respect of a hybrid debt instrument or hybrid interest to be treated in a similar manner to the yields of an equity instrument. These rules disallow the deduction of interest paid and deem this interest to be an *in specie* dividend for the issuer of the instrument and an *in specie* dividend for the recipient.

127. Section 8F(3)(f) stipulates that an exclusion to the deeming rule is triggered when a registered auditor has certified the payment by a company of an amount owed in respect of that instrument that had been or was to be deferred by reason of the market value of assets being less than the amount of the liabilities.

Factual Description

128. In a prior submission, we requested that National Treasury engage with IRBA on the proposed wording of the exclusion so that it aligns with the auditing standards framework

and also as to what a registered auditor can do in such capacity as opposed to what is expected from management to do and verify which remains exclusive to them.

129. Our basis for this was as follows:

130. The work to be performed by an auditor in section 8F(3)(f) does not in our view currently fall within the Auditing Standards and Procedures. Though registered auditors commonly use Agreed Upon Procedures (AUP), these do not technically accommodate the legislative requirement. The reasons for this are discussed next.

131. The purpose of an audit is to enhance the degree of confidence of intended users in the financial statements. This is achieved by the expression of an opinion by the auditor on whether the financial statements are prepared, in all material respects, in accordance with an applicable financial reporting framework. In the case of most general purpose frameworks, that opinion is on whether the financial statements are presented fairly, in all material respects, or give a true and fair view in accordance with the framework. An audit conducted in accordance with ISAs and relevant ethical requirements enables the auditor to form that opinion. (Ref: Para. A1) (ISA 200. 3.)

132. The financial statements subject to audit are those of the entity, prepared by management of the entity with oversight from those charged with governance. ISAs do not impose responsibilities on management or those charged with governance and do not override laws and regulations that govern their responsibilities. However, an audit in accordance with ISAs is conducted on the premise that management and, where appropriate, those charged with governance have acknowledged certain responsibilities that are fundamental to the conduct of the audit. **The audit of the financial statements does not relieve management or those charged with governance of their responsibilities.** (Ref: Para. A2–A11) (ISA 200.4.)

133. We also further refer to paragraph R950.6 of the IRBA Code of Professional Conduct which states that following:

> "***A firm shall not assume a management responsibility related to the subject matter or subject matter information of an assurance engagement provided by the firm****. If the firm assumes a management responsibility as part of any other service provided to the assurance client, the firm shall ensure that the responsibility is not related to the subject matter or subject matter information of the assurance engagement provided by the firm*."

134. Based on the information above, it is clear that obtaining a subordination agreement would be the responsibility of management and not at the instance of the auditor.

135. In accordance with the terms of engagement, the auditor has a responsibility to express an audit opinion on the clients' financial statements. This responsibility does not extend to any other third parties unless agreed otherwise or required by law/regulation.

136. With this in mind, from an auditing point of view, management would generally only enter into a subordination agreement in the event of factual insolvency; an action that needs to be taken to, among other things, satisfy the auditor in his/her assessment of going concern (a requirement contained in ISA 570, Going Concern). Furthermore, these subordination agreements are generally entered into between related parties, for example loans from group companies or loans from shareholders.

137. IRBA has thus indicated that the process was outside of the auditing standard processes (certification was well beyond an agreed upon procedure) and had requested that the legislation be worded within the existing auditing standards framework.

138. We also note that the "carve-out" in terms of section 8F(3)(f) is not only applicable to entities that are subject to an audit hence the carve-out should apply to ALL taxpayers in the event that a subordination agreement is entered into for the purposes of satisfying the going concern requirement as mentioned above.

The nature of taxpayers impacted

139. Taxpayers entering into subordination agreements.

Proposal

140. Unfortunately, there has been no progress in this regard with regards to our submission.

141. Given the challenges of using a Registered Auditor to perform this function and at the same time providing SARS with sufficient comfort by an independent person, we make the below proposal.

142. Our proposal inserts an "Independent Registered Tax Practitioner" (as envisaged in section 223(3)(b) TAA) as the functionary to affirm the proposed objective criteria and who SARS are able to exercise regulatory control over.

143. The legislation be reworded as follows:

Insertion of a definition under section 8F(1) for "subordination agreement" as follows:

> **'subordination agreement'** means an agreement that is entered into in relation to an instrument which agreement defers the obligation to pay an amount so owed by a company on a date or dates falling within that year of assessment by reason of, inter alia but including, that obligation being conditional upon the market value of the assets of that company not being less than the amount of the liabilities of that company.

The proposed reword of the carve out for section 8F(3)(f) is as follows:

(f) that constitutes a hybrid debt instrument –

(i) solely in terms of paragraph (b) of the definition of hybrid debt instrument;

(ii) is subject to or will be subject to a subordination agreement; and

(iii) the taxpayer was in possession of a confirmation issued by an independent registered tax practitioner as envisaged in section 223(3)(b) of the Tax Administration Act 2011, that –

(aa) was issued by no later than the date the annual financial statements in respect of that year of assessment were signed;

(bb) confirms the existence of the subordination agreement in relation to that year of assessment; and

(cc) confirms that the subordination agreement came into existence subsequent to the end of that year of assessment or the end of any prior year of assessment.

Section 10 – Home-owners association exemption *(submission originally made in 2022)*

Legal Nature

Section 10(1)(e)(i) exempts any *levy received by or accrued to an association of persons from its members, where the Commissioner is satisfied that such association of persons has been formed solely for purposes of managing the collective interests common to all its members, which includes expenditure applicable to the common immovable property of such members and the collection of levies for which such members are liable.*

Factual Description

144. Many associations which are not Share Blocks or Body Corporates are still not aware of the fact that the exemption in s10(1)(e) only becomes available on approval/registration with SARS. When this is picked up, there is no legislative option for retrospective registration.

145. SARS is insisting that these entities submit “normal” income tax returns to get up-to-date and will not consider registration requests before this is done. This leaves many entities open to a large tax liability, particularly where the entity still has to build up reserves to comply with the Community Schemes Ombud’s requirements.

146. This is extremely punitive for what is merely administrative non-compliance due to a change in law and it was not the intention to be a revenue collection mechanism as there is no leakage, rather just regulation.

The nature of taxpayers impacted

147. Home-owners associations.

Proposal

148. To enable taxpayers to rectify their non-compliance but also enable SARS to properly address non-compliance, we propose that SARS be legislatively enabled retrospectively approve late registrations.

149. Tax returns submitted late can then be subjected to administrative penalties to ensure that non-compliance is not condoned, however a concession was provided to Bargaining Councils[1] with no penalties applying to correct their tax affairs.

150. This reason for the this tax relief, articulated in the Explanatory Memorandum on the 2017 Taxation Laws Amendment Bill, was that since the Bargaining Councils *would be at risk of closure or would suffer severe financial distress if high penalties and interest are imposed for non-compliance, and given the unique circumstances of this case, specific set of provisions is required to address the situation*.

151. Since home-owners associations face similar financial risks, we believe they should be given an opportunity to retrospectively regularise their tax affairs through retrospective exemption approval and registration with SARS to ensure their compliance.

152. As relates to backdated registration, a similar concession is made in section 30(3B) ITA for PBO's due to similar concerns regarding lack of awareness and impracticalities of penalising taxpayers for regulatory administrative non-compliance rather than tax evasion or avoidance and enabling them to become compliant.

Section 10(1)(cA)(i) – Exemptions for Institutions, Boards or Bodies *(submission originally made in 2021)*

Legal Nature

153. Section 10(1)(cA)(i) and (ii) respectively provide an absolute exemption from income tax of the receipts and accruals of any –

- institution, board or body established by or under any law engaged in specified prescribed activities; and
- association, corporation or company all the shares of which are held by any such institution, board or body.

154. The exemption under section 10(1)(cA)(i) will, however, apply only to the extent that such institution, board or body –

- has been approved by the Commissioner subject to any conditions deemed necessary to ensure that the activities of that institution, board or body are wholly or mainly directed to the furtherance of its sole or principal object; and
- complies by law or under its constitution with the prescribed requirements.

Factual Description

155. Section 10(1)(cA)(i) states that Commissioner may withdraw the exemption of any institution, board or body if satisfied that such institution, board or body has during any year of assessment failed to comply with section 10(1)(*c*A)(i). The exemption will be

[1] "Bargaining Council tax relief" in Part II of the 2017 Taxation Laws Amendment Act.

withdrawn with effect from the commencement of the year of assessment in which non-compliance or failure by an institution, board or body occurred.

156. Section 10(1)(cA)(i) does, however, not require SARS to provide the institute, board or body with adequate reasons relating to its withdrawal, before the exemption is withdrawn.

The nature of taxpayers impacted

157. All institutes, boards or bodies that are tax exempt in terms of section 10(1)(cA)(i).

Proposal

158. Given that the spirit of the law in regards to tax exempt entities is to provide such entities an opportunity to correct, given their public interest mandate, rather than just withdraw the exemption status (e.g. section 30(5), 30A(5), 30B(5) & 30C(2) of the ITA), it is recommended that this be incorporated into this section as well, aligning the law and policy.

159. This will ensure that the relevant taxpayer receives a notice explaining what it has done wrong, what the Commissioner expects them to do to correct and by when. Following it not complying with such a request it would then be administratively fair to withdraw its exemption.

Section 11G – Deduction of expenses incurred in production of interest *(NEW)*

Legal nature of problem

160. The recently introduced section 11G, effective 1 January 2025, allows companies that are not trading to deduct interest or charges similar to interest, against interest income received, up to the amount of interest received.

161. Section 11G is intended to replace Practice Note 31 to address the real or perceived abuse of practice note 31. PN 31 allows non-trading taxpayers to deduct expenditure incurred in the production of the interest to the extent that it does not exceed such income, despite the fact that one of the requirements of both section 11(*a*) and section 24J being that the taxpayer must be trading.

162. It is submitted that section 11G is too restrictive. For example, many companies that are not trading that are earning interest income, do not incur interest or similar charges in earning that interest income, but do incur expenses like bank charges. Often these companies are in the process of being wound down either through deregistration or liquidation. The process of winding down a company can be delayed for years for several reasons, including for example obtaining old refunds from SARS, which often is a very administratively burdensome process.

Factual description

163. There are many dormant companies that only earn interest, often an immaterial amount, and pay a small amount of bank charges. The bank charges are only incurred

because the bank account has to remain open as the company's winding down is held up due to some administrative or legislative issue.

164. The bank costs are incurred because the company has a bank account which gives rise to the interest and the bank account cannot be closed until, for example all tax matters has been resolved.

165. There is a direct link between the bank account, the interest received, and the bank costs incurred as although the bank charges don't produce the interest, it is incurred as part of the performance of a business operation (i.e. holding a transactional bank account) and is a necessary expense to earn the interest income (i.e. taxpayer cannot hold bank account or transact without incurring the bank charges).

166. Section 11G as it currently stands, will result in the interest being taxed, whilst the bank costs cannot be deducted.

The nature of taxpayers impacted

167. Groups of companies that have dormant companies, the winding down of which is being delayed by administrative or legal processes.

Proposal

168. We recommend that section 11G be amended by adding before in subsection 11G(2) "*interest and bank charges incurred by that person to the extent that the interest and bank charges* – (a) [is] are incurred in the production of interest …."

Section 12E – Deductions in respect of small business corporations *(NEW)*

Legal nature of problem

169. In order to stimulate economic growth and promote small businesses in South Africa, section 12E allows for greater capital allowances on plant or machinery and lower tax rates for businesses qualifying as 'small business corporations' ("SBCs").

170. Section 12E(1) provides for a 100% allowance of the cost of the asset in the year that it is brought into use for the first time, for new or used manufacturing plant and machinery owned by the taxpayer.

171. Unlike other capital allowance sections i.e.ss12C,11(e), 12B, 12BA, 12F, etc, section 12E does not contain a proviso, for plant or machinery, "… mounted on or affixed to any concreate or other foundation or supporting structure" which deems the foundation or supporting structure to be part of that plant or machinery.

172. Thus, small business corporations will not be able to claim any deduction, under section 12E on the **foundation or supporting structure** where plant or machinery is, "… mounted on or affixed to any concreate or other … structure" unlike section 12C. The same is true of improvements to an asset. This could not be the policy intent of section 12E and as such seems to be a legislative oversight.

173. An SBC can also not claim this separately under section 12C as proviso (a) to section 12C(1) only applies as relates to allowance claims in terms of that section. Furthermore, section 12C(3)(d) possibly would disqualify the SBC as the asset should have been claimed under the more specific section 12E as it is "granted" in terms of that provision.

174. Practice Note 16/1993 (now archived) gave a 'deduction' to foundations/supporting structures being claimed under s12C prior to the introduction of the proviso in 2011/2012 to section 12C. According to the Explanatory Memorandum supporting Clause 33(1)(d) of Taxation Laws Amendment Act 24/2011:

"Paragraph (d): The proposed amendment makes provision for foundations and supporting structures on which a plant is mounted (or to which it is fixed) to be deemed part of that plant and to be eligible for the same deductions as the plant. This situation is set out in Practice Note 16, dated 12 March 1993. SARS has embarked on a process of repealing all practice notes. It is now proposed that this position instead be codified in the Income Tax Act. A similar provision already exists in paragraph (iiA) of the proviso to section 11(e)."

Factual description

175. SBCs that are scoped into s12E(1), unlike in section 12C, will not be able to claim any deduction under section 12E on foundations or supporting structures where the plant or machinery is , "*… mounted on or affixed to any concrete or other ….structure*" .

176. This does not seem to be the policy intent of section 12E, and as such, it seems to be a legislative oversight.

The nature of taxpayers impacted

177. All small business corporations that are entitled to claim the section 12E deduction.

Proposal

178. Section 12E should be amended to include foundations and supporting structures in the same manner as provided for in other capital allowance provisions in the Act.

Sections 12R – Special Economic Zones (SEZs): Reduced corporate tax rate *(submission originally made in 2020)*

Legal Nature

179. Section 12R provides for reduced corporate tax rate of 15% for qualifying companies situated in SEZs.

Factual Description

180. Section 12R no longer specifies the reduced corporate tax rate of 15% within the section (this has been moved to section 3 of Schedule 1 of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2017).

The nature of businesses impacted

181. All qualifying companies operating in SEZs.

Proposal

182. We recommend that section 12R either make reference to where the reduced corporate tax rate percentage can be found, or such rate should be specified within the section itself.

Sections 12R – SEZs: Qualifying companies *(submission originally made in 2020)*

Legal Nature

183. Section 12R(1) defines a "qualifying company" that will be entitled to the tax benefits of operating in a SEZ.

Factual Description

184. "Qualifying companies" as defined in section 12R(1) do not require pre-approval in order to benefit from the reduced corporate tax rate of 15% (other than meeting the required qualifying criteria).

185. As such, should a company meet the definition of a "qualifying company", the question is whether the reduced corporate tax rate will automatically be applied to qualifying companies when completing their tax returns, or whether qualifying companies must specifically elect to be taxed at the reduced rates.

186. In addition, when utilising the SEZ tax benefits, it is unclear whether companies will require a letter from the SEZ operator as proof of meeting the "qualifying company" requirements, or if the onus of proof is on the individual company in this regard.

The nature of businesses impacted

187. All companies operating in an SEZ that potentially qualify as a "qualifying company".

Proposal

188. Clarification on the above issues is kindly requested and if necessary, section 12R should be amended accordingly.

Sections 12R – SEZs: Monitoring of the Department of Trade and Industry (DTI) *(submission originally made in 2020)*

Legal Nature

189. One of the requirements of a "qualifying company" as defined in section 12R(1) is that the company must carry on a trade in a special economic zone designated by the Minister of Trade and Industry in terms of the Special Economic Zones Act and approved by the Minister of Finance after consultation with the Minister of Trade and Industry for the purposes of this section by notice in the Gazette.

190. The SEZ Act in section 7 sets out the functions of the Advisory Board, of which the DTI is a member.

Factual Description

191. While the SEZ Act sets out the duties of the DTI in relation to SEZs (in terms of acting on the Advisory Board and reporting to Parliament), policy clarification is required as to whether the DTI is intended to have any further involvement in terms of monitoring the performance of the individual companies located within the SEZ, or whether this performance will be monitored on an individual basis solely by the SEZ operators, with a consolidated performance/progress report being provided to the Advisory Board.

The nature of businesses impacted

192. All businesses operating in an SEZ.

Proposal

193. Clarification on the above policy issue is kindly requested.

Sections 12R – SEZs: Interaction of Income Tax Act and SEZ Act *(submission originally made in 2020)*

Legal Nature

194. The SEZ Act requires that a company obtain approval from the SEZ operator to locate itself in a SEZ. The Income Tax Act does not require any such approval.

Factual Description

195. It is therefore our understanding that it is only a requirement of the SEZ Act that companies should obtain approval if they are currently not located within a SEZ but wish to start operating in a SEZ. No further approvals or pre-approvals should have to be obtained in order for companies to access the SEZ tax benefits once they are operating within the SEZ.

The nature of businesses impacted

196. All businesses wishing to locate their operations in a SEZ as well as those currently operating in a SEZ.

Proposal

197. We would appreciate clarity on whether our understanding of the legislation currently in place is correct.

Sections 13 & 13 quin: Deduction in respect of buildings used in a process of manufacture and commercial buildings *(NEW)*

Legal Nature

198. Sections 13, 13*quin* and 13*quat* provide for allowances on buildings and improvements to buildings, provided the requirements contained in these sections are met.

199. The allowances are determined based on the "cost" of the buildings.

200. "Cost" of a building is not defined for purposes of section 13.

201. It is defined for purposes of section 13quin (allowance on commercial buildings) as the lesser of the actual cost to the taxpayer or the cost which a person would, if he had acquired, erected or improved the building under a cash transaction concluded at arm's length on the date on which the transaction for the acquisition, erection or improvement of the building was in fact concluded, have incurred in respect of the direct cost of the acquisition, erection or improvement of the building.

202. "Cost" is also defined for purposes of section 13quat, dealing with deductions in respect of **erection** or improvement of **buildings** in urban development zones, to include any costs incurred:

i. In demolishing any existing building or part thereof

ii. In excavating the land for purposes of that erection, extension, addition or improvement; and

iii. in respect of structures or works directly adjoining the building or part so erected, extended, added to or improved, for purposes of providing:

- water, power or parking with respect to that building or part;
- drainage or security for that building or part;
- means of waste disposal for that building or part; or
- access to that building or part, including the frontage thereof.

203. SARS has issued IN 107, which deals specifically with section 13quin and comments as follows in relation to the cost of the building:

The cost of a building for purposes of section 13*quin* does not, for example, include –

- the cost of the land on which the building is erected (the purchase of land and buildings will require an apportionment);
- the costs related to the preparation of the land for the erection of the building;[45]
- costs incurred to obtain a rezoning in order to permit a higher building height which are incurred in connection with the erection of the building but are not part of the cost of the building;[46] or
- interest incurred on any financial instrument used to fund the acquisition, erection or improvement of the building.[47]

Costs that are directly and closely connected with the erection of the building such as architect and civil engineering fees are included in the cost of the building.[48]

204. It is submitted that the costs incurred in relation to a building for purposes of tax allowances should be consistent. For purposes of section 13*quat*, the cost of excavating the land for purposes of that erection is allowed, whereas IN 107 does not allow the cost relating to the preparation of the land.

205. The absence of a definition of "cost" for purposes of section 13 is not helpful.

Factual Description

206. Many taxpayers erect buildings from which manufacturing activities are carried on or buildings that will be leased to tenants carrying on manufacturing activities or alternatively, commercial buildings as contemplated in section 13*quin*.

207. The apparently conflicting definitions in the sections in the Act dealing with the cost that forms the basis of tax allowances create uncertainty as to what should and should not form part of the cost of the building for purposes of said section.

208. In addition, it is not clear whether the expenditure incurred by taxpayers for bulk services provided by the municipality before building commences, qualify to be included in the cost of the building.

The nature of businesses impacted

209. Taxpayers who erect buildings or improvements to buildings to be used for manufacturing purposes or to let to tenants involved in manufacturing or similar purposes or to be used as commercial buildings.

Proposal

210. We recommend that a definition of "cost" is included in sections 13 and 13*quin* that is aligned to the definition in section 13*quat*.

Section 20 – Assessed losses *(submission originally made in 2021)*

Legal nature of problem

211. Section 20 allows for the set-off of the balance of assessed losses.

Factual description

212. In countries that operate on a worldwide/residence-based tax system, foreign losses are capable of being offset against local income. Sometimes foreign capital losses are quarantined or ring-fenced, but revenue losses are allowed to be deducted.

213. When South Africa moved to a worldwide tax system in 2001, foreign revenue losses were quarantined and could not be offset against local income. Tax practitioners who were involved in 2000 and 2001 and were engaging with SARS were told that this was being done because SARS did not know the extent of foreign losses, and they needed to protect the tax base until they got a handle of "what was out there", as it was put.

214. It is now 20 years later and the provision is still in section 20.

Business/Persons impacted

215. Companies with assessed and foreign losses.

Proposal

216. An update should be provided on whether the quarantining of foreign revenue losses is still necessary and if not, then the ring-fencing proviso should be removed.

Section 23M – Limitation of interest deduction – related interest *(submission originally made in 2021)*

Legal nature of problem

217. Section 23 restricts the interest deduction for a debtor and will apply if a “controlling relationship” exists between the debtor and the creditor and the creditor is not subject to tax in South Africa in respect of such interest or when a creditor, not subject to tax, sources the funding from a person who is in a controlling relationship with the debtor.

Factual description

218. While the Taxation Laws Amendment Act expands the definition of “interest” for purposes of section 23M, the new definition does not include the wording **“related interest”**. However, the wording “related interest” is used three times in the amended section 23M without any clarification as to its meaning. Presumably it refers to the new additions to the definition of interest. However, introducing undefined concepts will make interpretation and application exceedingly difficult and unintended non-compliance likely.

Business/Persons impacted

219. Taxpayers subject to section 23M.

Proposal

220. Clarification in the legislation on the meaning of "related interest" is required.

Section 23M and section 31 – The ordering of these sections *(submission originally made in 2022)*

Legal Nature

221. Section 31 and section 23M both seek to disallow interest deductions. The interaction between these two sections, as to which one takes priority, has caused many debates.

222. National Treasury and SARS have noted that in their view, section 31 should be applied prior to section 23M, i.e. "*Government proposes that companies first apply the arm's length test to financial transactions, followed by the interest limitation rules, i.e. the interest limitation rules should apply to net interest expense that has already passed the arm's length test*."

223. "*Section 23M and section 23N contain certain limitations on the amount of interest which may be deducted. Section 31 applies prior to considering the impact, if any, of section 23M and section 23N. Accordingly, when these sections refer to taxable income in the definition of ' adjusted taxable income' and to the amount of interest which is allowed to be deducted in section 23M(3) and section 23N(2), the reference is to the amount of taxable income and the amount of interest which may be deducted, after section 31 has been applied*."

224. Unfortunately, neither SARS nor National Treasury have provided any reasoning to support this view.

Factual Description

225. National Treasury and SARS have noted that in their view, section 31 should be applied prior to section 23M. No reasons were provided for this view. Certain commentators have, however, stated that they feel section 23M should apply before section 31. Despite National Treasury's views on this matter, the legislation is not clear on the ordering of these sections.

The nature of taxpayers impacted

226. Those taxpayers meeting the requirements of sections 23M and 31.

Proposal

227. The legislation should clearly stipulate the order in which these two sections should be applied given that the legislation is lacking in this regard and to avoid unnecessary disputes on the matter.

Section 24 – Lay-by agreements *(submission originally made in 2023)*

Legal nature

228. Sections 24(2A) and (2B) of the Act were amended to specify that section 24 relief is applicable to lay-by agreements.

229. It is argued, however, section 24(1) does not in fact apply to lay-by agreements.

Factual description

230. There are two issues that must be evaluated when considering lay-by sales, (a) the deposit received and (b) the accrual of the outstanding debtors' amount.

Deposit received

231. Section 24(2A) refers to *a lay-by agreement as contemplated in section 62 of the Consumer Protection Act, 2008 (Act No. 68 of 2008).*

232. Section 62 of that Act reads as follows:

(1) If a supplier agrees to sell particular goods to a consumer, to accept payment for those goods in periodic instalments, and to hold those goods until the consumer has paid the full price for the goods—

(a) *each amount paid by the consumer to the supplier remains the property of the consumer*, and is subject to section 65, until the goods have been delivered to the consumer; and

(b) the particular *goods remain at the risk of the supplier until the goods have been delivered* to the consumer.

(emphasis added)

233. In *Geldenhuys v CIR (1974) (3) SA 256 (C); 14 SATC 419* it was held that the words "received by … the taxpayer" in the definition of "gross income" in section 1 of the Act mean 'received by the taxpayer on his own behalf for his own benefit'.

234. It is clear then that lay-by cash deposits received by the supplier are not "received" by the supplier, even if the funds are intermingled with the supplier's other cash takings (see ITC 24510, 2019, SATC).

235. Lay-by sales deposits are not "gross income" because taxpayers do not receive them for their own benefit. In law, the seller is effectively holding the cash deposit in trust and the cash deposit is, therefore, not a receipt in the income tax sense.

Accrual of the outstanding debtors' amount

236. In *Mooi v SIR, 1972 (1) SA 674, 34 SATC 1* it was held that the phrase "accrued to" in the definition of "gross income" means a person must be unconditionally entitled to the amount. As the goods sold in terms of a lay-by agreement are still in the supplier's possession, the supplier is not unconditionally entitled to the outstanding lay-by amount.

237. Therefore, the value of outstanding debtors does not accrue to the taxpayer.

238. Section 24(1) therefore does not specifically apply to lay-by agreements (see Hassan & Van Heerden, 2023; Haupt, 2023; Louw, 2022; Nel, 2023). There should consequently be no concern in relation to the relief.

239. There is international support for the arguments presented.

International comparison

240. The Australian Tax Office issued a ruling (TR 95/7) titled "Income tax: lay-by sales".

241. In accordance with the decision (Australian Tax Office, 1995: p 4):

> *When are amounts received under a lay-by sale earned?*
>
> *6. With one exception, amounts received (e.g., initial deposit and instalments) by the seller from the buyer while goods are held by the seller under a lay-by sale are not earned by the seller, and therefore are not derived for the purposes of subsection 25(1) of the ITAA [Australian Income Tax Act], until the buyer pays the final instalment of the purchase price and the goods are delivered to the buyer.*
>
> *7. The exception is any initial deposit which, by the terms or conditions of the lay-by sale, is a non-refundable deposit that a buyer is required to pay to a seller. A non-refundable deposit is earned and is derived by a seller when it is due to be paid by the buyer.*
>
> (emphasis added)

242. The Australian Tax Office consequently does not tax amounts received by or owed as a result of a lay-by sale under the Australian Income Tax Act. The only exception to this rule is for deposits that are non-refundable.

<u>The nature of taxpayers impacted</u>

243. Taxpayers selling goods in terms of lay-by agreements.

<u>Proposal</u>

244. It is proposed that section 24 must exclude the phrase "*a lay-by agreement as contemplated in section 62 of the Consumer Protection Act, 2008 (Act No. 68 of 2008)*".

Section 24BA – Transactions where assets are acquired as consideration for shares issued *(submission originally made in 2021)*

Legal nature of problem

245. Section 24BA is an anti-avoidance provision to address potential value shifting arrangements arising in the context of asset for share transactions. In essence, this section provides for the event where there is a mismatch in the value of the asset received and the value of the shares issued as consideration.

Factual description

246. The test to ensure whether there is a mismatch is if the consideration is different from what would have been the case between independent persons dealing at arm's length.

247. This formulation is understood where the parties are not at arm's length, as then the best indication would be whether the values are the same. But where the parties are independent persons dealing at arm's length, the application of section 24BA does not seem reasonable.

248. There can be many reasons why arm's length parties will agree to different values. But then to apply the test of what would independent parties acting at arm's length do to a scenario where the parties that are dealing with each other are independent parties at arm's length, and yet still come out with a different number to the agreed number and subject the company to tax, does not seem to make sense. However, this is what happens as can be seen from BPR254 – Consequences of cross border and domestic asset for share transactions).

249. SARS justifies its approach because of the words "before taking into account any other transaction, operation, scheme, agreement or understanding that directly or indirectly affects that consideration".

250. In other words, SARS does not apply the facts and taxes the transaction based on the hypothetical facts.

Business/Persons impacted

251. Independent parties dealing at arm's length entering into an asset for share transaction.

Proposal

252. If the legislature wishes to have a blanket rule that there must always be the "correct" exchange ratio between the value of the shares issued and the value of the assets, otherwise tax will be payable, then this must be clearly stipulated in the legislation. However, if the true purpose is only to attack non-arm's length parties who do not transact at arm's length and accept the outcome of actual arm's length dealings, then the legislation needs to be amended to prevent SARS from applying it in the way that they currently do.

Section 24I – The set-off of assesses loss rules and rules on exchange differences on foreign exchange transactions *(NEW)*

Legal nature of problem

253. The 2024 DTLAB published on 1 August 2024 proposed an amendment to section 24I to provide for the offset of foreign exchange losses against future foreign exchange gains despite the fact that an entity is not trading. That version of the Bills referred to:

- any foreign exchange gain reduced by any foreign exchange loss in respect of an exchange item; and

- any premium or like consideration received by, reduced by—

(i) any premium or like consideration [or] paid by, such person in terms of a foreign currency option contract entered into by such person; and

(ii) any consideration paid by such person in respect of a foreign currency option contract acquired by such person

254. The DTLAB thus differentiated between all exchange items and foreign currency options contracts in particular.

Factual description

255. The proposed section 24I(3A)(b), however, is worded such that it seems to apply only to foreign currency options contracts and not all exchange items:

256. "…the aggregate amount of foreign exchange losses, premiums or like consideration paid in terms of foreign currency option contracts and consideration paid in respect of foreign currency option contracts exceeds the aggregate amount of foreign exchange gains and premiums or like consideration received in terms of foreign currency option contracts, the net amount of the excess is deemed to be an exchange loss of that company in the immediately succeeding year of assessment…''; (own emphasis)

Business/Persons impacted

257. Non-trading companies with foreign exchange losses.

Proposal

258. The proposed wording needs to be amended to clearly allow for the carry forward of foreign exchange loss **on all exchange items** as defined against future foreign gains losses for non-trading companies with foreign exchange losses.

Section 24I –The definition of "Exchange item" in Groups of Companies *(NEW)*

Legal nature of problem

259. The proposed amendment to section 24I in the TLAB 2024 broadens the definition of "exchange item" to include all preference shares held in foreign companies ("foreign preference shares") even as capital, though it's the combination with cross swap hedges that seems a concern for NT per the EM.

260. While intended to curb tax avoidance involving these specific financial arrangements with preference shares and hedging instruments, the amendment's broad scope unintentionally captures all foreign preference shares, regardless of their connection to such arrangements.

Factual description

261. The proposal does not extend the current relief afforded to groups of companies financing foreign subsidiaries through debt in section 24I(10A), to this new particular exchange item of "preference shares" in the proposed new para (e) of the definition of "exchange item" even though the preference shares will be used as a debt equivalent.

262. Section 24I(10A)(a) already has multiple anti avoidance mechanisms, including that the "debt" would have to be long-term, not hedged by a Foreign Exchange Contract and prevents funding that debt from debt outside the group or connected persons.

263. Resident group companies who choose to fund foreign subsidiaries long-term through preferences shares and not just through debt and who have not coupled any cross swaps or used external group debt, will now on an annual basis have to now calculate exchange differences on their long term preference shares held in these foreign subsidiaries.

Business/Persons impacted

264. Resident holding companies of foreign group subsidiaries who fund their subsidiaries through preference shares.

Proposal

265. It is submitted that section 24I(10A)(a) be amended to read:

> "…….no exchange difference arising during any year of an assessment in respect of an exchange item contemplated in paragraph (b) **and (e)** of the definition of exchange item shall be included in or deducted from the income of a person in terms of this section….".

Section 25B – Taxation of trusts and beneficiaries of trusts *(submission originally made in 2021)*

Legal nature of problem

266. Section 25B sets out rules for distributions of income by trusts. It does so by deeming the receipt to be awarded to the beneficiary and deeming the related expenses to be incurred by the beneficiary, but it does not allow a loss. If the expenses exceed the income then the beneficiary is treated as 'breaking even', and the excess expenses are carried forward and deemed to be expenses in the following year.

Factual description

267. The effect of this is that current year's losses may be offset against future years' income. But the same principle is not applied to section 7(8) and paragraphs 72, 80(1) and 80(2) of the Eighth Schedule.

268. In the case of section 7(8), while the approach is initially the same as section 25B, a loss cannot be offset against the next year's income for the purpose of determining the amount to be attributed to the donor.

269. Similarly, under paragraph 72 capital losses cannot be offset against capital gains, and only the latter are attributed.

270. For example, the same applies under paragraph 80(1) of the Eighth Schedule – if two assets are vested in a beneficiary, one with a capital gain of R100 and the other with a capital loss of R80, the beneficiary is taxed on the R100 gain and not on the R20; and the loss of R80 cannot be carried forward as a loss in the trust.

271. Similarly, under paragraph 80(2) if there is a realised gain of R100 and a loss of R80, only the gain vests in the case of a vesting trust, and not the net gain. In a discretionary trust the trustees can manage the position by vesting only R20 and leaving the R80 gain behind to be offset by the R80 loss. However, if there is a loss of R100 in year one and a gain of R120 in year 2 and there is a vesting trust, the beneficiary will pay tax on the gain of R120 in year two and get no benefit from the loss of R100 in year one. And in a discretionary trust if the trustees award only R20 in year two, the trust will be taxed on the R100 gain without being able to offset the loss of R100 in year one.

Business/Persons impacted

272. All taxpayers that are subject to section 7(8) and paragraphs 72, 80(1) and 80(2) of the Eighth Schedule.

Proposal

273. To prevent the inequality that arises, section 7(8) and paragraphs 72, 80(1) and 80(2) of the Eighth Schedule should be amended to align with the treatment in section 25B.

Section 31(6) and 31(7) – Exemptions: application unclear *(submission originally made in 2022)*

Legal Nature

274. Section 31 contains two specific exemptions which are included in section 31(6) and section 31(7).

275. Section 31(6) applies where the transaction is the granting of financial assistance or the use of intellectual property to a controlled foreign company (CFC) which has a foreign business establishment ("FBE") and the tax payable by that CFC amounts to 67.5% of the tax that would be paid in South Africa if that CFC were subject to tax in South Africa.

276. Section 31(7) provides an exemption for loan funding made to a foreign group company where the loan is interest free and for a minimum period of 30 years and certain other conditions are met. The purpose of this exemption is to allow resident companies to extend loan funding which is in economic substance equity to group companies without risk of an adjustment.

Factual Description

277. Both the above sub sections only relate to transactions between separate legal entities where one is a South African resident entity and the other is a non-resident entity. The sections do not seem to cater for similar transactions between a South African resident and a foreign permanent establishment (PE) of another South African resident.

278. The application of section 31(6) and section 31(7) between two resident taxpayers where one has a PE offshore and the transaction is with the PE is not clear. A question was raised whether there is an anomaly in the application of these exemptions and whether the sections should be broadened.

The nature of taxpayers impacted

279. Transactions between a South African resident and a foreign permanent establishment (PE) of another South African resident

Proposal

280. The sections should be amended to clarify that these two exemptions apply to all potentially affected transactions listed in section 31(1)(a).

Section 41(10) – Contingent Liabilities *(submission originally made in 2023)*

Legal nature

281. A provision that was added in 2017 is section 41(10) of the Act, which states that, for the purposes of the corporate rules, a contingent liability will be treated as a debt actually incurred.

282. This is not in line with the corporate rules that serve to defer the taxation that would ordinarily arise when assets are transferred from one party to another as set out in the relevant rules.

Factual description

283. The objective of section 41(10) is to make it clear that the specified liabilities include contingent liabilities which also satisfy the specified criteria (e.g. arose as part of the going concern or more than 18 months prior to the relevant transaction etc.). The 2017 Explanatory Memorandum states that because contingent liabilities are not yet real obligations they would not be considered as "debts" for purposes of corporate restructures.

284. Reference to Interpretation Note 94 ("IN 94") and the "Ackerman" Supreme Court of Appeal judgment, issued in 2010 make it clear that the seller cannot allege that the contingent liability has been incurred (and deduct it for tax purposes) and the purchaser may only consider the amount incurred when the obligation ceases to be contingent (if it ever does).

285. IN 94 then explains that, generally, until a continent liability becomes a real liability, the purchaser, which has used the contingent liability as part of the consideration for an asset, may not treat the cost of such asset, to the extent it is paid for with the contingent liability, as incurred.

286. The purchaser must wait until the liability becomes 'real' to be able to deduct the cost or portion thereof of the asset (or related allowances).

287. Since section 41(10) states that the deemed incurral only applies for purposes of the corporate rules and therefore it seems to mean that it cannot be used for other purposes; i.e., (a) to facilitate additional amounts to be deducted for purposes of the general deduction formula (trading stock), (b) capital allowances or (c) base cost for capital assets.

288. However, the corporate rules generally allow the transferee to "step into the shoes of the transferor" insofar as the transferred assets and the claiming of the cost of trading stock or allowances/base cost are concerned.

289. A question that arises is what becomes of the contingent liability when it materializes? Is the transferee allowed to claim deductions, allowances or a base cost related to this loan?

290. IN 94, specifically in relation to the corporate rules (part 7), states that the rest of the IN must be taken into account, but *"In making such an evaluation no regard must be had to the fact that the assumption of the contingent liabilities by the transferee was part of the consideration for the acquisition of the assets"*.

291. Thus, despite the fact that it does not refer to section 41(10), because IN 94 was issued in December 2016 (before section 41(10) was introduced) and has not been updated, and there was thus, at the time of its issue, no legal support for the tax position taken at the time, the IN aligns with s41(10) in determining that the contingent liabilities may, essentially, be considered incurred when used as part of the consideration and, thus, the transferee may continue to claim the allowances for the assets purchased in the same manner as the transferor would have.

292. What happens to the contingent liabilities, however, when they become actual liabilities in the transferee's hands when the corporate rules have been used?

293. IN 94 states that once the contingent liability transferred becomes unconditional, the transferee may claim the expense on the same basis as the transferor would have. The example given is that if the transferor would have claimed a revenue deduction e.g. for a bonus, then the transferee must, when actually incurred, claim it as such, even though the assumption of the liability was used to buy a capital asset.

294. This is the opposite approach to the rest of IN 94.

295. This approach also brings into question, despite it stating that it only applies for the corporate rules, the intended extent of s41(10).

296. Nowhere in sections 41 to 47 does it state that the transferee must step into the shoes of the transferor insofar as contingent liabilities are concerned. Thus, though the outcome is favourable to taxpayers (and one which would be preferred for non-corporate rule asset transfers), it is not supported by the legislation (an IN is not legislation). Nor is it consistent with the treatment of transactions outside the corporate rules which involve contingent liabilities.

The nature of taxpayers impacted

297. All corporate restructures where contingent liabilities will be sold and specifically the transferee in this regard.

Proposal

298. The law thus needs to be clear in order to align with the practice i.e. it should state that the transferee will step into the shoes of the transferor insofar as contingent liabilities are concerned.

Section 42(1)(a)(ii)(cc) – Asset-for-share transactions – nature of asset *(submission originally made in 2023)*

Legal nature

299. Section 42 requires the recipient company to acquire the assets as capital or revenue assets in line with how the transferor held them.

300. This requirement is however overridden by a third provision that the company must acquire the asset *"as trading stock, where that person holds it as a capital asset and that company and that person do not form part of the same group of companies"*.

Factual description

301. This provision may be read in one of two ways:

(a) If the transferor and transferee are not a group of companies, the transferee must acquire the asset as trading stock; or

(b) If the transferor and transferee are not a group of companies, the transferee may acquire the asset as trading stock.

302. These two "options" lead to very different outcomes for the recipient company.

303. The Explanatory Memorandum ("EM") to the 2015 Taxation Laws Amendment Act, which introduced these provisions, makes it clear that interpretation (b) above is what was intended.

304. Therefore, the legislation and not only the EM must make this scenario clear as to the correct interpretation.

The nature of taxpayers impacted

305. All section 42 restructures, specifically the transferee in this regard.

Proposal

306. Section 42(1)(a)(ii)(cc) should be changed to read:

*"as **a capital asset or** as trading stock, where that person holds it as a capital asset and that company and that person do not form part of the same group of companies"* (suggested changes underlined in bold).

Section 42(6) – Asset-for-share transactions – Equity holding and engagement on a full time basis with the transferee *(submission originally made in 2023)*

Legal nature

307. Section 42(6) applies when:

- a person's equity holding falls to less than a 10% interest; or
- they cease to form part of the same group of companies (assuming one of those applied when section 42 was entered into), or

- if the person ceases to be engaged on a full-time basis with the company to which the asset was transferred (or a controlled group company of that company).

308. The effect of this provision is that the person is deemed to dispose of all the shares they hold in the company and they must then pay Capital Gains Tax (CGT) thereon, to the extent of the market value of the assets transferred at the time of the section 42 transaction, less the base cost, and to reacquire the shares at that market value.

Factual description

309. The issue arises due to the fact that the anti-avoidance provision is triggered if the individual took up full-time employment with the transferee company but did not rely on that fact to satisfy the requirements of section 42; relying rather on the qualifying interest criteria, or vice versa.

310. If that person ceases that full time employment but nevertheless retains qualifying interest by continuing to hold more than 10% of the equity shares and voting rights or, if applicable, through continuing to hold shares in a transferee that is a listed company, technically, the anti-avoidance provision is still triggered.

311. Similarly, if the person ceases to hold at least 10% of the shares and voting rights or to hold share in the listed company but continues to be fully employed for more than 18 months, the section will be triggered.

312. Despite the wording this cannot have been the intention as had the person have only relied on one of the criteria i.e. employment or qualifying interest, the section would have permitted deferral and the anti-avoidance provision would only have been triggered if that one criteria ceased to be met.

313. In short section 42(6) is triggered, despite the fact that it sets out alternatives, if both the qualifying interest and the employment requirements were satisfied when section 42 was entered into, but one ceases to be satisfied.

The nature of taxpayers impacted

314. All section 42 restructures where section 42(6) applies and specifically the person referred to in section 42(6).

Proposal

315. The law needs to make it clear that the anti-avoidance provision should be triggered only if neither requirement (i.e., qualifying interest and full-time employment) continue to be satisfied.

Section 42(1)(a)(ii)(cc) – Intragroup transactions *(submission originally made in 2020)*

Legal Nature

316. Section 42(1)(a)(ii)(cc) provides that the recipient company of the asset acquired in terms of a qualifying section 42 transaction will acquire it from the transferor "as trading stock, where that person holds it as a capital asset and that company and that person do not form part of the same group of companies".

317. This may be read in two ways:

1) That if the person and the company are not part of the same group of companies and the transferor held it as a capital asset the recipient company must acquire the asset as trading stock; or

2) That if the person and the company are not part of the same group of companies and the transferor held it as a capital asset the recipient company may acquire the asset as trading stock i.e. there is a choice. The explanatory memorandum indicates that the latter is intended.

Factual Description

318. The wording is imprecise and leaves taxpayers without certainty.

The nature of businesses impacted

319. All companies who have entered into a section 42 transaction with a person who is not part of their group of companies.

Proposal

80. It is suggested that the provision be amended to say (changes in italics):

"as a result of which that company acquires that asset from that person:

…or

(cc) where that person holds that asset as a capital asset and that company and that person do not form part of the same group of companies that company may elect to treat it as trading stock".

Section 42(6) – Asset-for-share transactions – further corporate restructures *(submission originally made in 2023)*

Legal nature

320. Section 42(6) is not triggered if the subsequent transaction is a section 45, 46, 47 or paragraph 65 transaction.

Factual description

321. The exclusions do not cover the position where the qualifying interest is lost due to a further section 42 or section 44.

322. However, Binding Private Rulings ("BPR") 159 and 231 indicate that this is acceptable to SARS where the shareholder of the liquidated company in the amalgamation acquires the shares previously subject to section 42.

323. BPRs cannot be applied by taxpayers who did not apply for the BPR.

The nature of taxpayers impacted

324. All parties to a s42 corporate restructure.

Proposal

325. The legislation needs to be changed to make it clear that section 42(6) will not be triggered if a further section 42 or a 44 transaction is entered into, and the qualifying interest requirement is fulfilled via the new shareholding.

Paragraph 43A of the Eighth Schedule – Dividends treated as proceeds on disposal of certain assets *(submission originally made in 2023)*

Legal nature of problem

326. During 2017, NT introduced anti-avoidance measures that targeted dividend stripping schemes which included certain share buy-back avoidance schemes. These measures countered the scenario where companies (taxpayers) were applying the exemptions provided in the ITA for corporate income tax when it came to the receipt of a local dividend and the exemption from dividends withholding tax when this dividend was distributed between companies.

327. Effectively taxpayers took advantage of this opportunity to extract value from subsidiary (target) companies through the receipt of large tax-exempt dividends. The target company shares would then be subsequently sold at a significantly lower value (as the net asset value would be net of the pre-sale dividend), thus reducing the tax applicable to the shareholder on the sale of the target company's shares.

Factual description

328. An unintended consequence of these anti-avoidance measures arises where legitimate business transactions may be caught in the net cast by the definition of an extraordinary dividend (for example, the declaration of dividends to create cashflow for holding companies to service debt repayments or obligations).

329. We noted the following in respect of paragraph 43A:

330. Para (b) of the definition of “extraordinary dividend” is ambiguous as the introductory paragraph reference ‘the amount of any dividend received or accrued.

331. Whilst the intention is that the amount of any dividend received or accrued should relate to dividends in respect of the share being disposed of, the wording can be read wider to include all dividends received or accrued from the company. The wording should reference to the dividend received or accrued in respect of “that share” to clearly highlight that the dividend which should be included in the computation of extraordinary dividend relates to a dividend received in respect of the share that is being disposed of.

332. Furthermore, the reference to "within a period of 18 months prior to the disposal of that share" in the paragraph requires clarification, i.e. does the quoted text provide that once a share is disposed of, all associated dividends linked to that share should no longer be considered for the definition of extraordinary dividend in future potential extraordinary dividend transactions.

Business/Persons impacted

333. Companies where dividends are being declared for legitimate business transactions.

Proposal

334. Consideration should be given to:

- Paragraph (b) of the definition should be amended to read as follows “ *any other shares, means so much of the amount of any dividend received or accrued in respect of that share…*”

- Introducing exclusionary criteria in the paragraph to prevent legitimate business transactions from being caught in the net of the definition of extraordinary dividend. This can include, reference to funding requirements, where for example, the intention of the dividend was specifically to fund legitimate business transactions such as settling loan funding and related interest; these types of distributions should be excluded from the definition of extraordinary dividend to the extent that all other requirements of the paragraph is met; and furthermore; the reference to "within a period of 18 months prior to the disposal of that share" in the paragraph requires clarification, i.e. does the quoted text provide that once a share is disposed of, all associated dividends linked to that share should no longer be considered for the definition of extraordinary dividend in future potential extraordinary dividend transactions.

Paragraph 43A of the Eighth Schedule – Dividends treated as proceeds on disposal of certain assets *(submission originally made in 2021)*

Legal nature of problem

335. Paragraph 43A of the Eighth Schedule to the Income Tax Act, 1962 is an anti-avoidance provision providing that any exempt extra-ordinary dividend that is received by a corporate shareholder 18 months prior to the disposal of shares, or in regard to or in

consequence of a disposal of shares, would be reclassified as income or proceeds for capital gains tax purposes.

Factual description

336. In terms of an amendment to paragraph 43A(2) of the Eighth Schedule to the Income Tax Act which is effective for transactions occurring on or after 20 February 2019, a dilution in the effective interest of a company in another company (target company) may give rise to a capital gain in the hands of the former company.

337. Paragraph 64B of the Eighth Schedule provides for a full exemption from CGT in the case of the disposal of qualifying equity shares in a foreign company to a non-SA resident.

338. To illustrate the interaction between these two sections, the following example is provided:

    A South African company (SACo) has a wholly owned Namibian subsidiary (NamSub). As part of an empowerment transaction NamSub issues shares to Namibian residents thereby diluting the effective shareholding of SACo to say, 80%. Should SACo have earned 'extraordinary dividends', the company will be subject to CGT on the capital gain that will need to be accounted for in terms of paragraph 43A(2). Had SACo disposed of 20% of its shares in Namsub to the Namibian residents it would have enjoyed full exemption from CGT in terms of paragraph 64B.

Business/Persons impacted

339. SA Companies issuing shares in their controlled foreign companies to third parties as part of economic empowerment transactions.

Proposal

340. A carve-out should be included in paragraph 43A to provide that the treatment as a disposal set out para 43A(4) will not apply in circumstances where, had there been an actual disposal, the capital gain would have been disregarded in terms of paragraph 64B.

CATEGORY – INTERNATIONAL TAX

Sections 7(5), 7(8) and 31 – Low or interest-free loans to offshore trusts *(submission originally made in 2020)*

Legal Nature

341. Where there has been a low or no interest loan to an offshore trust both section 7(5) or section 7(8) and section 31 potentially apply. In relation to sections 7(5) and 7(8), it is unclear which section applies first if the loan is to a non-resident trust and there is a stipulation in the trust deed that denies any of the beneficiaries the income until the happening of an event, but either way there will be attribution of income received by the trust to the 'donor' to the extent of the interest not charged.

342. However, the effect of applying both sections 7(5) and 7(8) is to include an amount equal to the uncharged interest in the hands of the 'donor' twice. In practice, SARS does not apply both sections and only requires that the income not equal to the 'uncharged interest' be included once. It is left to the taxpayer to decide whether to include the amount of the attributed income or to include the uncharged interest based on the arm's length principle.

Factual Description

343. The law is not clear and should be amended to provide clarity.

The nature of businesses impacted

344. All persons who have made a low or interest-free loan to an offshore trust.

Proposal

345. Sections 7(5) and 7(8) should include a proviso that should a section 31 adjustment have been made the relevant provision will not be applicable.

Section 7(5) should be made applicable only to a resident recipient of the donation, settlement or other disposition in order to clarify that this section is not also applicable to donations to non-residents, which is covered by section 7(8).

Section 7(8) – Donation, settlement or other disposition to a non-resident *(submission originally made in 2020)*

Legal Nature

346. Section 7(8) deals with the position where a donation, settlement or other disposition has been made by a 'resident' to a non-resident entity.

Factual Description

347. Where a person made a donation, settlement or other disposition before becoming a South African tax resident the question arises whether the section 7(8) provisions apply to that same person after they become resident.

348. It should be noted that transfer pricing provisions would, in any event require an amount of deemed interest to be included in that person's income if there is a tax benefit, so this point and the point raised in the previous item mentioned above are linked.

The nature of businesses impacted

349. All persons who have made a low or interest-free loan to an offshore trust prior to becoming South African tax resident.

Proposal

350. Section 7(8) should be amended to clarify that it either applies to persons who made a donation, settlement or other disposition before becoming a South African resident or that it does not apply to such persons (as per the intention).

CATEGORY – VALUED ADDED TAX

Section 1 – Definition of "enterprise" *(submission originally made in 2021)*

Legal Nature

351. The exclusion in proviso (xiii) under the definition of "enterprise" in section 1(1) stipulates the circumstances under which a person that is neither a resident of the Republic, nor a registered vendor and that person supplies to a recipient solely the use or right of use of ships, aircraft and rolling stock under any rental agreement, will be deemed not to be the carrying on of an enterprise, despite that those goods are supplied for use in the Republic.

Factual description

352. The exclusion in proviso (xiii) under the definition of "enterprise" in section 1(1) is limited to only the supply of ships, aircraft and rolling stock.

The nature of taxpayers impacted

353. Persons who are neither a resident of the Republic, nor a registered vendor and that supply assets other than ships, aircraft and rolling stock but that otherwise comply with the requirements of the proviso.

Proposal

354. The exclusion in proviso (xiii) under the definition of "enterprise" in section 1(1) should be expanded to include supplies of all types of assets such as cranes, specialised equipment, heavy machinery etc.

355. There does not seem to be any reason as to why the type of asset supplied should determine whether an enterprise is carried on in SA or not.

Sections 8(23) and 11(2)(s) – Deemed supply to a National Housing Programme *(submission originally made in 2020)*

Legal Nature

356. Section 8(23) deems a supply of services to be made by a vendor to any public authority or municipality to the extent of any payment made to or on behalf of that vendor in terms of a national housing programme contemplated in the Housing Act, 1997 (Act No. 107 of 1997). Section 11(2)(s) zero rates these services.

Factual Description

357. Section 8(23) seems to envisage a single grant recipient who will receive the funding and will be able to apply the zero-rating. Therefore, any disbursements of the funding to other entities (excluding non-profit company (NPC) to NPC transactions which need to be considered separately), will not be able to apply the zero-rating.

358. For example, a developer assists a NPC with the construction of social housing units. The NPC's aims and objectives are to provide low cost housing to the needy. With this particular development, the NPC provides low cost renting of units to the needy. To fund the development costs, the NPC obtained a grant from the Social Housing Regulatory Authority and obtained debt funding. As the zero-rating will not extend to the developer, the developer will need to charge VAT on its development services to the NPC. The NPC, however, will not be able to claim the input tax deduction as arguably, these costs have been incurred for the purposes of making exempt supplies (i.e. the rental of housing units).

359. Hence, the grant funding received by the NPC will need to be consumed to pay the VAT or the NPC will have to source additional debt funding to cover these costs. It puts the NPC in a difficult position and in some cases, the unintended VAT cost jeopardizes the viability of the project which in turn has a ripple effect on the persons who are in desperate need of receiving the low cost housing.

360. Sections 8(23) and 11(2)(s) were to be deleted with effect from 1 April 2017. However, it subsequently became evident that both National Treasury and municipalities were not ready to implement the amendments that would have the effect that the national housing programme payments would be standard-rated.

361. National Treasury, therefore, proposed during 2017 that the effective date of the repeal of the zero-rating be postponed for two years until 1 April 2019.

362. However, this proposal to postpone the effective date of the deletion of sections 8(23) and 11(2)(s) was not enacted.

363. Therefore, section 8(23) and s 11(2)(s) were reinserted with effect from 1 April 2017, based on the same wording which came into effect on 1 April 2011, except that the requirement that the national housing programme must have been approved by the Minister by regulation after consultation with the Minister responsible for Human Settlements was not re-enacted.

364. Further, it is worth noting that prior to 1 April 2011, section 8(23) applied only to the extent that taxable supplies would be made, which meant that houses built for letting purposes did not qualify for the zero rate. As the reference to 'taxable supplies' has been deleted, it would appear that houses built for letting purposes also qualify for the zero rate. In the 2019 Budget Speech, an amendment was to be proposed to clarify the VAT treatment of payments relating to rental stock in terms of the National Housing Programme, however, no clarity has yet been provided.

365. The strict application of the provisions of the ITA (including s11(2)(s)) has led to many housing projects not being viable and have in some instances forced local businesses to liquidate. National Treasury has been approached about this concern but there has been no traction. The only remaining option for taxpayers is to go to Court.

The nature of businesses impacted

366. All vendors that supply services to any public authority or municipality to the extent that any payment is made to or on behalf of that vendor in terms of a national housing programme contemplated in the Housing Act.

Proposal

367. We recommend that National Treasury urgently provide clarity on this matter.

368. Should it be decided that these sections are to be deleted, we would recommend that National Treasury provide alternative mechanisms to ensure that projects of this nature are viable for the implementing parties.

Section 11(1)(*w*) – Zero rating of reusable sanitary towels *(NEW)*

Legal Nature

369. In terms of section 11(1)(*w*) of the VAT Act read together with Part C of Schedule 2 section 1, sanitary towels (pads) are subject to VAT at a rate of 0%. Sanitary towels are further expanded in part C of schedule 2 as including:

370. Sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles, of any material: limited to goods referred to in item No.:-

(i) 9619.00.02: Sanitary towels (pads), of wadding of textile material;
(ii) 9619.00.03: Pantyliners, of wadding of textile materials;
(iii) 9619.00.11: Sanitary towels (pads), of paper pulp, paper, cellulose wadding or webs of cellulose fibres;
(iv) 9619.00.12: Pantyliners, of paper pulp, paper, cellulose wadding or webs of cellulose fibres;
(v) 9619.00.21: Sanitary towels (pads), of other materials of heading 39.01 to 39.14;
(vi) 9619.00.41: Sanitary towels (pads), made up from knitted or crocheted textile material;
(vii) 9619.00.42: Pantyliners, made up from knitted or crocheted textile material; and
(viii) 9619.00.91: Other, sanitary towels (pads) and pantyliners.

Factual Description

371. The zero rating of sanitary towels is limited to sanitary towels as defined. The current definition of sanitary towels is narrowly defined. According to Part C of Schedule 2, sanitary towels are specifically described as "Sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles, of any material" and are limited to specific goods listed under item numbers 9619.00.02 to 9619.00.91.

372. The current defined category of sanitary towels does not adequately cover reusable fabric underwear designed to be washed and reused multiple times. This exclusion has

resulted in period underwear being treated as clothing and subjected to VAT at the standard rate of 15 per cent, rather than being zero-rated as an essential menstrual hygiene product. Menstrual cups are also excluded and the lower and middle income households largely use this as it is longer lasting and reusable thereby making it more affordable than sanitary towels.

373. Sanitary products are meant to manage menstrual flow, and including reusable period underwear in the zero-rated category is important to ensure accessibility to sustainable menstrual hygiene options. Period underwear offers benefits such as versatility, sustainability, and environmental friendliness, aiding women who cannot use traditional menstrual products due to religious reasons and contributing to a reduction in plastic pollution and waste.

374. Excluding period underwear from the zero-rated category creates financial barriers for women seeking sustainable menstrual products, unfairly increasing the cost due to their natural biological process. Lower-income households are over-burdened by the high prices of sanitary towels and zero-rating reusable products assist with the financial burden. Menstrual products should not be viewed as luxury items but as essential items.

375. Empirical evidence also confirm that the zero rating listing in the VAT Act does not adequately cater for women and children, see: Hassan, M.E., *A framework for a simpler South African value-added Tax Act* (Doctoral dissertation, University of Johannesburg).

The nature of taxpayers impacted

376. Women and girls Indirectly manufacturers, distributors and retailers.

Proposal

377. To address this issue, it is proposed that the definition of sanitary towels be expanded to include reusable period underwear and menstrual cups, aligning with international best practices and providing equitable access to sustainable and essential menstrual hygiene products.

CATEGORY – TAX ADMINISTRATION ACT (TAA)

Section 5 &16 – Original law in amendment acts *(submission originally made in 2023)*

Legal Nature

378. The “consolidated law” of the Tax Acts is the original Act read with each amendment Act issued thereafter.

379. However, from a practical perspective, to enable the public to more easily use the Tax Acts, publishers “amend” the original Act by inserting the amendments to that particular Tax Act into the original Act as replacement or new legislation. Sometimes the original legislation is, for whatever reason, put in the amendment Act and not as an amendment, repeal or insertion into the original Act.

380. This was done with section 1 & 2 of the Taxation Laws Amendment Act, 2012 (TALAA 2012) regarding International Agreements and the Tax Ombud's role in addressing complaints relating to certain customs matters.

Factual Description

381. Where the legislator does not amend or insert the new provisions of the legislation in the original legislation (i.e. the TAA) but as original legislation in the amendment Act, it makes it difficult for publisher to insert it into the consolidated text.

382. This legislative style undermines what the creation of the TAA sought to achieve, namely an easily readable and consolidated Tax Administration Act that follows the logical life cycle of the taxpayer.

The nature of taxpayers impacted

383. All taxpayers, politicians and academics as users of legislation published by publishers.

Proposal

384. Section 1 and 2 of the TALAA 2012 should be amended retrospectively and become insertions of new sections in the TAA.

385. It is proposed that section 1 of the TALAA 2012 be inserted as a new section 5A of the TAA given that it is dealing with a general matter applicable to the whole TAA.

386. It is also proposed that section 2 of the TALAA 2012 be inserted as section 16(2A) of TAA given it relates to the mandate of the Office of the Tax Ombud.

Section 18(6) – Review of complaint received by the OTO *(submission originally made in 2020)*

Legal Nature

387. Section 18(6) of the TAA provides that the Office of the Tax Ombud (OTO) "must inform the requester of the results of the review or any action taken in response to the request, but at the time and in the manner chosen by the Tax Ombud".

Factual Description

388. Whilst we understand the limitations on the OTO due to capacity issues, from a taxpayer perspective, there is a need for certainty in terms of when the taxpayer can expect feedback on a matter lodged for review with the OTO.

389. Furthermore, where the taxpayer has taken further action on the matter - for example, if the taxpayer chooses to refer the matter to Tax Court - the feedback from the OTO will be important in the considerations of that process.

390. We also understand that where recommendations are made to SARS by the OTO, these first have to be reviewed by SARS before being sent to the taxpayer, resulting in further delays in communication to the taxpayer.

391. It should be noted that at the point a complaint is lodged by the taxpayer with the OTO, SARS would have had 2-3 internal reviews and weeks or even months to have reconsidered the matter. Time for SARS to respond should therefore not be an issue as the matter should have been well ventilated and documented internally at SARS.

The nature of businesses impacted

392. Taxpayer submitting complaints to the OTO.

Proposal

393. The OTO should be required to provide feedback on the outcome on matters submitted by taxpayers for review within 30 days from the date of the complaint. Similarly, notwithstanding the MoU between SARS and the OTO, SARS should be compelled to respond to the OTO within 14 days to enable the OTO to respond.

394. When the OTO submits its recommendations to SARS, the same should be sent to the taxpayer, despite the fact that SARS is not compelled to accept the recommendations. This would assist the taxpayer in determining whether it would be worthwhile to await SARS response or seek further legal recourse.

Section 20(2) – Resolutions and recommendations by the OTO *(submission originally made in 2020)*

Legal Nature

395. In terms of section 20(2) of the TAA, recommendations made by the OTO after reviewing matters lodged by taxpayers, are not binding on the taxpayer or SARS. If SARS, for example, rejects a recommendation, SARS must communicate reasons for this decision to the OTO, within 30 days of the recommendation.

396. Whilst the legislature has already affirmed the policy that there should be more transparency and accountability when it comes to the OTO recommendations, there seems to be a technical oversight that there is no express compulsion/prohibition to supply the SARS reasons to the complainant taxpayer or the taxpayer's rejection of the OTO's recommendation to SARS, though the OTO has a discretion on the latter.

397. It therefore in practice seems that OTO is afforded a discretion as there is no express prohibition to such disclosure though this discretion does not seem intended given the policy on transparency and administrative fairness adopted by the legislature and does not seem to align to the policy.

398. Once the OTO notes that SARS has not accepted a recommendation and provided reasons, those reasons are the basis on which the taxpayer would have to consider whether further actions are justifiable. Withholding such reasons from the complainant who should be the person to whom disclosure is made undermines the transparency and efficiency of the escalation system,

Factual Description

399. Where a taxpayer has lodged a complaint with the OTO and the OTO has made recommendations to SARS which recommendations SARS does not accept, the OTO merely responds to the taxpayer that SARS has not accepted the recommendations and the OTO cannot further assist the taxpayer.

400. The OTO will merely disclose what their recommendations were but we also understand that where recommendations are made to SARS by the OTO, these first have to be reviewed by SARS before being sent to the taxpayer, resulting in further delays in communication to the taxpayer. In many instances this just compounds the injustice suffered by the taxpayer.

401. In this instance, not only is the taxpayer no further in resolving the matter and will have no recourse other than litigation, but the taxpayer also has no understanding as to why, if the OTO made a favourable recommendation, SARS has refused to implement such recommendation to create fair administrative action.

402. The taxpayer as the complainant, is now forced to either compel disclosure by the OTO through a PAIA request or court litigation just to be informed of the reasons why SARS will not take corrective action directly affecting the taxpayer.

403. Whilst the OTO may include SARS' reasons in its report to the Minister of Finance, there is no other recourse for taxpayers to know why these recommendations were not accepted by SARS, nor is the taxpayer afforded the opportunity to reject the OTO's recommendations made to SARS.

404. There also appear to be no timelines contained in the law within which SARS must implement recommendations made by the OTO where these recommendations have been accepted by SARS. In practice such implementation may therefore even take years.

The nature of businesses impacted

405. All taxpayers that have lodged complaints with the OTO.

Proposal

406. Where the recommendation by the OTO relates to a **specific taxpayer**, the OTO should communicate to the taxpayer with 7 days after receipt from SARS, SARS' reasons for not accepting the recommendation.

407. Where the recommendations relate to the outcome of a **systemic investigation**, the OTO should communicate to the public in the OTO's annual report, SARS' reasons for not accepting recommendations made by the OTO in this regard.

408. Where SARS accepts the recommendations made by the OTO, such recommendations must be implemented by SARS within 90 business days (systemic issues) or 30 days (taxpayer specific issues) of receiving the recommendations unless SARS can provide

compelling reasons why it is unable to do so and must provide the time period in which it believes it will be able to comply to the OTO.

Section 42 – Keeping the taxpayer informed (verifications) *(submission originally made in 2020)*

Legal Nature

409. Where a SARS official is involved in or responsible for an audit, section 42(2)(b) of the TAA requires that SARS, upon conclusion of the audit in the instance where the audit identified potential adjustments of a material nature, must provide the taxpayer with a document containing the outcome of the audit including the grounds for the proposed assessment.

410. Upon receipt of such document, the taxpayer must respond in writing within a period of 21 days from the delivery of the document by SARS to the facts and conclusions set out in SARS' document.

411. Though the heading of Chapter 5 of the TAA refers to a process called "verification" as information gathering process, nowhere in the TAA is there a defined procedure for this process notwithstanding that there is one for all four other stated processes namely audit, request for relevant information, inspection and criminal investigations.

412. Furthermore, a problem is that the term "audit" is defined neither in section 42 nor in section 1 of the TAA with the resultant ambiguity whether the "verification" procedures, which are nearly the same as an audit, performed by SARS in respect of a taxpayer's return, are subject to section 42 of the TAA or not, given the ordinary meaning of the term "audit" being "a systematic review or assessment of something".

Factual Description

413. SARS in numerous instances, particularly with regard to individuals, notifies taxpayers of a "verification" of the taxpayer's return following submission of that return.

414. The "verification" process usually involves the taxpayer having to submit to SARS extensive supporting documentation in respect of the amounts and disclosures contained in the tax return.

415. Following submission of the documentation:

    1. Where relevant, SARS compares this to information to that which it obtains from external sources (IRP5 submissions by employers, IT3b submissions by financial institutions etc.);

    2. Where relevant, SARS raises queries or requests for further information particularly in the case of an individual who carries on a trade in his/her personal capacity such as the letting of a property or the carrying on of a business.

416. Following its "verification" procedures, SARS will often raise an additional assessment without providing the reasons for the additional assessment or affording the taxpayer the opportunity to respond to the conclusions reached by SARS upon completion of their procedures. Such an approach is in conflict to the process set out in section 42 of the TAA.

417. The manner in which SARS raises additional assessments without providing the taxpayers with reasons therefore and an opportunity to make a submission to refute the SARS' grounds of additional assessment prior to the assessment being raised by SARS is also in conflict with the Supreme Court of Appeal judgment in SARS v Pretoria East Motors (Pty) Ltd (291/12) [2014] ZASCA 91 delivered on 12 June 2014 where the learned judge at paragraph [11] said as follows:

> *"As best as can be discerned, [SARS's] approach was that if [it] did not understand something [it] was free to raise an additional assessment and leave it to the taxpayer to prove in due course at the hearing before the Tax Court that she was wrong. [This] approach was fallacious. The raising of an additional assessment must be based on proper grounds for believing that, in the case of VAT, there has been an under declaration of supplies and hence of output tax, or an unjustified deduction of input tax. In the case of income tax it must be based on proper grounds for believing that there is undeclared income or a claim for a deduction or allowance that is unjustified. It is only in this way that SARS can engage the taxpayer in an administratively fair manner, as it is obliged to do. It is also the only basis upon which it can, as it must, provide grounds for raising the assessment to which the taxpayer must then respond by demonstrating that the assessment is wrong. This erroneous approach led to an inability on [SARS's] part to explain the basis for some of the additional assessments and an inability in some instances to produce the source of some of the figures [it] had used in making the assessments."* [our insertions]

418. Furthermore, verifications are also used by SARS to delay refund payments, however, without a similar feedback mechanism with timelines and outcomes as in section 42.

419. If SARS followed due process for verifications similar to section 42 of the TAA, the number of disputed assessments, which is a time consuming and expensive process for taxpayers and SARS alike, would reduce dramatically.

420. SARS has now on its website added the following definition of verification[2]:

> What is verification?
>
> *Verification is a face-value verification of the information declared by the taxpayer on the declaration or in a return. This involves a comparison of this information against third party data gathered by SARS from various sources, the financial and accounting records and/or other supporting documents provided by taxpayers to ensure that the declaration/return is a fair and accurate representation of the taxpayer's tax*

[2] Being Audited or Selected for Verification – South African Revenue Service (sars.gov.za)

position. Once you have submitted your declaration/return, your declaration/return could be selected for verification.

The nature of businesses impacted

421. All taxpayers subject to SARS' verification procedures.

Proposal

422. A new section or a sub-section of section 42 should be inserted into the TAA to define what constitutes a "verification" performed by SARS and how it is to be conducted by them and it should also include the checks and balances to ensure that SARS adheres to an administratively fair process during the verification process.

423. Given that SARS has since September 2021 added a definition of verification and seems quite capable of defining and distinguishing verification from audit, it is merely prudent that a definition and corresponding process and procedure is added into the TAA to fill the current legal vacuum.

Section 89 – Binding private rulings *(submission originally made in 2020)*

Legal Nature

424. The overall object of a binding private ruling (BPR) is to allow SARS to provide individual taxpayers or "classes" of taxpayers with its views in relation to transactions or facts that are specific to them only.

425. A ruling, therefore, serves to provide guidance as to SARS's views on certain transactions before entering into them and therefore serves to mitigate the risks of proposed transactions.

Factual Description

426. Rulings are generally requested in order to obtain certainty for tax return purposes but also to ensure that the tax implications are not a deal-breaker in relation to a specific transaction/contract. In terms of the SARS Comprehensive Guide to Advance Tax Rulings, "*a binding ruling application can only be accepted if the proposed transaction to which the interpretation is to apply will be concluded in the future. There is no exception to this rule*". It also states that "*there is no express statutory requirement that the proposed transaction may not be entered into before the ruling is issued, but it is arguably the implication*". Thus, these BPRs have to be obtained in advance of any contract being signed or return being submitted.

427. In practice, obtaining a BPR for many transactions is inefficient as it currently takes too long to receive the ruling. In many instances, the BPR application is made and the transaction cannot proceed until the BPR is issued, which is detrimental to transactions and their implementation processes to ensure that they are fulfilled timeously (which often has commercial impacts if delayed).

428. Sometimes the BPR outcome will be a deal-breaker but more often than not the transaction may proceed regardless of the outcome of the ruling. However, the taxpayer wants certainty regarding the tax return treatment so as not to expose the transaction to penalties and interest.

The nature of businesses impacted

429. All businesses applying for BPRs.

Proposal

430. Once SARS has agreed that the matter is accepted for purposes of a BPR, the BPR must be issued within 90 days of the notification to the taxpayer that the matter was accepted for issuing a ruling.

Section 93 – Reduced assessments – timelines *(NEW)*

Legal Nature

431. Section 93 of the TAA enables a taxpayer to request a reduced assessment in certain circumstances without lodging a dispute against an assessment. The objective of the reduced assessment applications were to reduce the number of disputes lodged against assessments that arose due to administrative or bona fide processing errors.

432. Section 93(1) empowers SARS to issue a reduced assessment despite the fact that no objection was lodged or appeal noted [section 93(2)].

433. Whilst there is no timeline associated with the request for a reduced assessment where there requirements of section 93 of the TAA are met, it is limited to a three year period in line with the limitations period [section 99 of the TAA].

Factual Description

434. While the TAA makes provision for SARS to reduce an assessment in cases where it is found that the additional assessment or original assessment was issued with a higher tax payable as a result of an incorrect statement in a return or a processing error or a readily apparent error in the return, the outcome or decision by the Commissioner is not subject to any time period.

435. Due to the lack of resolution with reduced assessment applications, taxpayer's often opt for the dispute process to obtain certainty on the time periods within which their matters will be resolved.

436. The absence of time constraints on the Revenue Service to deal with applications for reduced assessment places the taxpayer with very little comfort to follow this process. These applications in some instances have been lagging for more than 6 months without resolution despite the SARS Service Charter which states that SARS will respond within 21 days.

The nature of businesses impacted

437. All taxpayers who request SARS for a reduced assessment in terms of section 93 of the TAA.

Proposal

438. It is submitted that time periods be imposed on SARS similar to those contained in the dispute resolution rules to compel the Commissioner to deal with reduced assessment applications.

439. Suggested wording:

SARS must notify the taxpayer of their decision and the basis thereof within—

(*a*) 21 days after delivery of the taxpayer's request for a reduced assessment application; or

(*b*) where SARS requested supporting documents, 30 days after—

(i) delivery of the requested documents; or

(ii) if the documents were not delivered,

the expiry of the period within which the documents must be delivered.

(2) SARS may extend the 21 day period for a further period not exceeding 45 day reduced assessment application due to exceptional circumstances, the complexity of the matter or the principle or the amount involved.

(3) If a period is extended the official must, before expiry of the 21 day period, inform the taxpayer that the official will decide on the objection within a longer period not exceeding 45 days.

Sections 93(1)(a) & 99(2)(d) TAA – Period of limitations for issuance of assessments *(submission originally made in 2023)*

Legal Nature

440. SARS can issue additional or reduced assessments between 3 and 5 years after an assessment or self- assessment, respectively.

441. The TAA sets out in a logical manner that assessments for subsequent years will follow each other in sequence. This sequence can be interrupted should SARS or the taxpayer successfully dispute an assessment, since all amounts that impact an assessment in sequence in the following year are impacted, e.g. the balance of the assessed loss or capital loss or allowances that are deducted in one year and carried back the following year. It can also be that tax returns are submitted out of sequence.

442. Where all the impacted assessments have not prescribed, this can be remedied by SARS reissuing all the impacted assessments in the correct sequence with the correct carry-forward and carry-back amounts.

Factual Description

443. However, where all or some of the assessments have prescribed, the TAA does unfortunately not properly cater for this, as SARS correctly argued in the recent High Court case of ***I-Cat International Consulting (Pty) Ltd v Commissioner for The South African Revenue Service*** (41667/2021) [2023] ZAGPPHC 268; [2023] 3 All SA 154 (GP) (24 April 2023).

444. This is also an issue if, for example, a dispute occurs in year 1, which takes 6 years to resolve, and then impacts the amounts in year 2. In such a case, neither SARS nor the taxpayer can dispute year 2 before the year 1 dispute is resolved.

445. This is neither party's fault, but an inherent problem with the TAA.

446. Following the judgment in I-Cat, a taxpayer or SARS would have to specifically include ALL of the following prescribed years in a compromise or in the heads of argument before a court on appeal, to ensure that SARS is enabled to make the relevant adjustments in the subsequent assessments following the year of assessment in dispute.

The nature of taxpayers impacted

447. SARS and taxpayers in dispute in relation to assessments where the subsequent periods are prescribed or become prescribed while the dispute is being finalized, and the subsequent periods' tax payable/refundable or carry forward of balances will be impacted by the outcome of the prior year's dispute.

Proposal

448. Sections 93(1)(a) and 99(2)(d) of the TAA should be expanded and clarified to confirm and enable SARS' to amend subsequent years of assessments impacted by the amendment of an assessment in a previous year where such subsequent assessments are not prescribed (s93) or when those assessments are prescribed (s99) even if those assessment were not directly in dispute.

Section 98 – Withdrawal of assessments *(submission originally made in 2021)*

Legal nature of the problem

449. The withdrawal of assessment provisions in section 98 of the TAA are too narrow in their application.

Detailed factual description

450. Section 98 of the TAA provides very limited circumstances under which SARS may withdraw an assessment despite the fact that no objection or appeal has been lodged by the taxpayer.

451. These include assessment issued to the incorrect taxpayer or in respect of the incorrect tax period or incorrect payment allocation.

452. Circumstances may arise where SARS raises an incorrect assessment either because it does so based on incorrect facts or a misunderstanding of facts, the incorrect application of law, or because it hasn't followed proper administrative procedure as laid out in the TAA and various court judgments.

Nature of the business / persons impacted

453. All taxpayers issued with assessments by SARS containing an obvious error.

Proposal

454. A taxpayer should be allowed to request SARS, and SARS should be permitted, to withdraw an incorrect assessment in any of the aforementioned circumstances as it allows SARS to perform its duties more efficiently without a long and protracted dispute resolution process which absorbs unnecessary time and resources on the part of both SARS and taxpayers.

Section 104 – Grounds to object *(submission originally made in 2020)*

Legal Nature

455. In the *Barnard Labuschagne Inc v South African Revenue Service and Another 2020 ZAWCHC* (15 May 2020) case, the taxpayer (Barnard Labuschagne Inc), sought to rescind a statement filed by SARS under section 172 of the TAA.

456. The reason for SARS filing the statement with the Court in that case was due to the taxpayer having a long-running dispute with SARS on the allocation of payments against an outstanding tax debt.

457. The Court held that the application for a rescission of judgment could not be upheld because the taxpayer should first have used the dispute resolution mechanisms, such as objections against assessments and appeals contained in the TAA, before electing to bring the application to the High Court.

458. However, no right of objection in relation to such matters is provided for in law in section 104 of the TAA.

Factual Description

459. The concern we have is that in the above case the taxpayer had no mechanism to object as was suggested by the judge because, although it is acknowledged that a taxpayer can object against an assessment, there is no mechanism for a taxpayer to object against a statement of account.

460. Not being able to object against a statement of account is particularly problematic where the balance is incorrect due to a misallocation of a payment by SARS or due to a journal entry made by SARS - the reasons for which are unclear to the taxpayer despite trying to clarify the reasons with SARS.

461. In this regard we refer specifically to the Office of the Tax Ombud's Report on its investigation into systemic issues, released in June 2020, which highlighted the escalating number of complaints received in relation to PAYE Statements of Account changing regularly with no explanation given to the taxpayer. In some instances, these changes resulted in the taxpayer becoming non-compliant - for instance, when SARS raised assessments to absorb the credits, it resulted in EMP501's (reconciliations) reflecting as outstanding which affected the compliance status of the taxpayer. Taxpayers cannot be expected to change the reconciliations as they were correct.

The nature of businesses impacted

462. All businesses where the statement of account contains misallocations of payments by SARS or journal entries processed by SARS that were incorrectly processed as mentioned in the Office of the Tax Ombud's report.

Proposal

463. Section 104(2) of the TAA should be amended to include the right of taxpayers to object against a decision by SARS not to correct entries on a statement of account.

Section 164 – Suspension of payment requests & reduced assessments *(submission originally made in 2023)*

Legal Nature

464. Section 164(2) of the TAA enables a taxpayer to request for the suspension of the payment of tax (or a portion thereof) due under an assessment if he/she lodges or intends to lodge a dispute.

465. Section 93(1) empowers SARS to issue a reduced assessment despite the fact that no objection was lodged or appeal noted [section 93(2)].

Factual Description

466. While the TAA makes provision for SARS' issuance of a reduced assessment even where a taxpayer has not lodged a dispute, section 164 as it currently reads does not allow taxpayers to request that SARS suspend their payment of tax if they submit a request for a reduced assessment in terms of section 93.

The nature of taxpayers impacted

467. All taxpayers who request SARS for a reduced assessment in terms of section 93 of the TAA.

Proposal

468. Section 164(2) of the TAA should allow a taxpayer to request for the suspension of the payment of tax if that taxpayer requests that SARS issues a reduced assessment in terms of section 93 of the TAA.

469. The provision should read as follows:

*"(2) A taxpayer may request a senior SARS official to suspend the payment of tax or a portion thereof due under an assessment if the taxpayer **[requests that SARS issue a reduced assessment in terms of section 93]**, or intends to dispute or disputes the liability to pay that tax under Chapter 9."*

Section 164(3) – Payment of tax pending appeal *(submission originally made in 2020)*

Legal Nature

470. In terms of section 164(3), a senior SARS official may suspend payment of the disputed tax or a portion thereof having regard to various factors mentioned in the sub-section. There have been some practical challenges with respect to the suspension of payments, for example, there are no timelines to which SARS must adhere in making a decision on whether to grant the suspension or not.

471. Delays in making the decision sometimes lead to collection action being taken by the SARS debt management department and/or this impacts the tax compliance status of taxpayers.

Factual Description

472. Whilst SARS is making a decision regarding the request, in accordance with the legislation and as confirmed by SARS, it is as though a suspension is in place and SARS may not take collection steps. However, this is not the case in practice, due to lack of adequate communication between the various divisions within SARS - for example, if the suspension request is made via the auditor or even on e-Filing, this is not necessarily communicated timeously to the debt management department.

473. It is also not possible to request the suspension via e-Filing in some instances - for example, disputes in relation to trusts. When making the request by calling the Contact Centre or via email, there are often delays in SARS' internal communications conveying this to the relevant departments, and taxpayers are then subjected to third party collections in some instances.

474. To recover the funds after such an agency appointment is an immense challenge in practice.

The nature of businesses impacted

475. All taxpayers requesting suspension of payments.

Proposal

476. SARS should implement a 21 business day turnaround for issuing decisions regarding suspension of payment requests. If SARS does not respond within this timeframe, the suspension should automatically be applied.

477. Section 164(3) should be amended to expressly state that until a decision is made, the tax compliance status of the affected taxpayer should not be impacted by the related payment due, which is subject to the suspension request.

478. Similar to the SARS portal on its website for taxpayers to upload documentation, there should be a similar 'portal' to request suspension of payment where, for whatever reason, the suspension request is not available on e-Filing.

479. Having this within the system will hopefully alleviate the communication issues where the requests are made by teleconference or via email.

Sections 164 & 95 – Suspension of payment requests & Estimation of Assessments *(NEW)*

Legal Nature

480. Section 95(1) of the TAA allows SARS to make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate, if the taxpayer:

(a) does not submit a return;

(b) submits a return or relevant material that is incorrect or inadequate; or

(c) does not submit a response to a request for relevant material under section 46, in relation to the taxpayer, after delivery of more than one request for such material.

481. In terms of subsection (5), an assessment under paragraph (a) or (c) above, is only subject to objection and appeal if SARS decides not to make a reduced or additional assessment after the taxpayer submits the return or relevant material.

482. Section 164(2) provides that a taxpayer may request a senior SARS official to suspend the payment of tax or a portion of the tax due under an assessment if the taxpayer intends to dispute or disputes the liability to pay that tax under Chapter 9.

Factual Description

483. An assessment raised under section 95(1)(c) is not subject to objection or appeal, hence it cannot be disputed under Chapter 9. It is only when SARS decides not to reduce the assessment after the relevant material has been submitted, that the assessment becomes subject to objection and appeal.

484. In the 40 business day-period from when SARS raises the assessment to when the taxpayer submits the information, and thereafter, until SARS makes a decision whether to reduce the assessment or not, the taxpayer cannot intend to dispute the assessment under Chapter 9 and can therefore not, in terms of the TAA, submit a request for suspension of payment.

485. In practice, taxpayers are allowed to submit a request for suspension of payment.

The nature of taxpayers impacted

486. All taxpayers.

Proposal

487. It is recommended that the legislation is aligned with practice.

Sections 172 – Civil judgments *(submission originally made in 2020)*

Legal Nature

488. Section 172(1) states that if a person has an outstanding tax debt, SARS may, after giving the person at least 10 business days' notice, file with the clerk or registrar of a competent court a statement, certified by SARS as correct, setting out the amount of tax payable.

489. In the *Barnard Labuschagne Inc v South African Revenue Service and Another 2020 ZAWCHC* (15 May 2020) case, the taxpayer (Barnard Labuschagne Inc), sought to rescind such a statement filed by SARS under section 172 of the TAA.

490. The reason for SARS filing the statement with Court in that case was due to the taxpayer having a long-running dispute with SARS on the allocation of payments against an outstanding tax debt.

491. The Court held that the application for a rescission of judgment could not be upheld because the taxpayer should first have used the dispute resolution mechanisms, such as objections against assessments and appeals contained in the TAA, before electing to bring the application to the High Court.

492. This is notwithstanding that SARS and National Treasury have long defended the constitutionality of this extra-judicial process on the grounds that the filing of the certificate with the High Court in fact brought this process under judicial oversight as required by the Constitutional Court[3].

Factual Description

493. The concern is that SARS and National Treasury have created a legal vacuum as relates to taxpayers' rights to have civil judgments rescinded, by arguing they are both inside the mandate of the High Court when faced with Constitutional objection and also outside the High Court's mandate when faced with an application to rescind.

494. This has removed all of a taxpayer's legal rights to have unilateral SARS debt judgments rescinded.

The nature of businesses impacted

495. All taxpayers against who SARS have taken judgment under section 172 of the TAA.

[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)

Proposal

496. It is proposed that National Treasury should propose to bring the conduct of SARS back under principles of constitutionality by subjecting SARS' conduct to judicial scrutiny as required by the Constitutional Court.

497. All section 172 applications should not merely be filed with the clerk but should be a judgment of the court by application brought by SARS. Given that this is an action of last resort and all SARS' other rights under the TAA such as agency appointment and "pay now argue later", there are only few instances where this would apply.

Section 190(2) of the TAA – Refunds of excess payments *(submission originally made in 2021)*

Legal nature of the problem

498. The TAA currently provides that SARS may not authorise a refund until such time that a verification, inspection, audit or "criminal investigation" has been finalised.

Detailed factual description

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

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

501. 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.

502. As SARS impacts taxpayer rights by withholding refunds, lack of legislative clarity in this regard should not continue. An example is the 2019 investigation of an entire industry, the agriculture sector, followed by a blanket withholding of refunds.

503. The verification, inspection, audit or criminal investigation in the section should refer to the specific refund in question and not any refund.

504. As was evidenced in the Tax Ombud's 2019 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.

505. 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.

506. Though not part of this specific matter, we have also previously raised concerns with SARS' involvement in the criminal justice system, 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 oversees the legality of all these processes as they are outside of the jurisdiction of the Independent Police Investigative Directorate.

507. In regard to criminal intelligence-gathering, which is part and parcel of criminal investigations, we note in the 2017 OECD report that SARS claims it conducts no criminal intelligence-gathering activities at a covert level. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially puts SARS on equal footing with the historical Scorpions unit.

Nature of the business / persons impacted

508. All taxpayers subject to verification, inspection, audit or criminal investigation.

Proposal

509. "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.

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

511. To ensure that SARS does not turn into a *quasi*-Scorpions Unit, it should ensure that its actions do not overlap with those of the NPA and SAPS whose role it is to follow up on criminal matters and who have the prosecution rights in this regard.

Chapter 14 – Part D – Compromise of Tax Debt *(NEW)*

Legal Nature

512. In terms of section 200 of the TAA under Part D, a senior SARS official may authorise the compromise of a portion of a tax debt upon request by a 'debtor'. Sections 201 to 204 then set out the requirements for the request, considerations that SARS must take into account, and the procedure for the compromise.

Factual Description

513. Taxpayers that have applied for the compromise of a tax debt often do not receive feedback from SARS timeously. It can often take many months or years before the taxpayer's application is acknowledged, or the taxpayer is informed of the outcome of this application.

514. There is no recourse for the taxpayers in these cases because there are no legislated time periods within which SARS is required to respond to a taxpayer.

515. If SARS does not timeously inform the taxpayer of the outcome of the compromise, the taxpayer may rely on the assumption that they will be informed of the outcome and plan their financial affairs incorrectly. Taxpayers may also rely on an outcome they assume will be positive and when that outcome is not forthcoming, be faced with life changing financial distress such as bankruptcy of them as an individual or their business(es).

The nature of taxpayers impacted

516. All taxpayers requesting a compromise of tax debt.

Proposal

517. We recommend that SARS be compelled to respond whether SARS is willing to consider a compromise or not within 21 business days and that collection steps be stayed, similar to section 164(6) TAA and similar powers to revoke suspension as in section 169(5) TAA.

Section 240 – Grounds for disqualification as a registered tax practitioner (violent crime)
(submission originally made in 2020)

Legal Nature

518. Section 240 of the TAA states that a person may not register a tax practitioner or that SARS may deregister a registered tax practitioner if the person/tax practitioner has during the preceding five years been convicted, whether in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged document, perjury, an offence under the prevention of Corrupt Activities Act, an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004) or any other offence involving dishonesty, for which the person has been sentenced to a period of imprisonment exceeding two years without the option of a fine or to a fine exceeding the amount prescribed in the Adjustment of Fines Act, 1991 (Act No. 101 of 1991).

Factual Description

519. Given the state of violent crime in South Africa we propose that violent crimes also be included as a disqualification criterion.

520. SAICA has proposed a similar prohibition for the Audit Professions Amendment Bill 2020 and will also be reconsidering its bylaws in this regard.

The nature of businesses impacted

521. All tax practitioners.

Proposal

522. It is suggested that the following wording be added to section 240(3):

> *"has been convicted anywhere in the world of a criminal offence in which violence is an element, including but not limited to public violence; murder; rape; sexual assault; trafficking of persons; robbery; kidnapping; assault and/or torture and has been*

sentenced in respect thereof to imprisonment without the option of a fine. Where any such conviction has led to a sanction of imprisonment with an option of a fine or to a fine being imposed, SARS shall have the discretion to decide whether or not to register the tax practitioner or cancel the registration of the tax practitioner."

Section 240 – Tax practitioner registration and impact of suspension of membership *(submission originally made in 2020)*

Legal Nature

523. One of the sanctions imposed by SAICA on its members, in addition to fines and termination of SAICA membership, is suspension of membership.

524. Section 240(3)(a) however only allows for deregistration where a member has been **removed** for serious misconduct.

525. Suspension does not legally equate to removal in the strict sense and is also temporary.

526. Furthermore, this section only applies to a "related profession" (e.g. accounting) by a controlling body and not to the tax profession itself.

Factual Description

527. Where a member is subject to disciplinary proceedings, he or she may have committed a breach of the code of professional conduct that does not justify permanent removal as a member but temporary removal through suspension for a fixed period e.g. 6 months.

528. Such person will not enjoy the rights of membership during the period of suspension, but as he or she was not removed as member, it would seem that he or she would still be able to continue to practice as tax practitioner.

529. A similar concern was noted and proposal made in relation to **registered auditors** in the Audit Professions Amendment Bill 2020.

The nature of businesses impacted

530. All tax practitioners.

Proposal

531. It is submitted that the law needs to be amended to introduce a **new ground** under section 240(3) whereby a person whose membership is suspended by a "controlling body" shall on notification by such body to SARS, not qualify to be registered as a tax practitioner or cease to be registered as a tax practitioner for the same period as the suspension of membership.

532. Furthermore, section 240(3)(a) should be amended as follows:

*"(a) during the preceding five years has been removed **by a controlling body as a tax practitioner or** from a related profession by a 'controlling body' for serious misconduct;"*

Section 240 – Registration of tax practitioners *(submission originally made in 2022)*

Legal Nature

533. Section 240(1) of the TAA requires natural persons who provide tax advice or assistance with completing a tax return (for consideration) to register with (a) a recognized controlling body and (b) SARS as a tax practitioner.

Factual Description

534. While keeping individuals accountable for the tax advice they provide is important, this has given rise to several practical concerns in the context of incorporated practices and partnerships.

(a) *Legal client relationships versus tax practitioners*

535. When a client signs on with a tax practitioner firm, legal liability as well as "ownership" of the contract with the client rest with the firm and not the individual partners.

536. No one member/shareholder/partner of the firm is therefore the full owner of that contract.

537. To use an example, A and B are both individuals who have incorporated a company called "TP Inc", a limited liability company. Client C then signs on for tax services to be rendered by TP Inc.

538. A proper interpretation of section 240(1) is that A or B should charge the Client C for tax services rendered in their personal capacities.

539. TP Inc may alternatively adhere to section 240 by providing the tax services, but for no consideration. This is because the requirement to register as a tax practitioner excludes persons who provide tax advice for no consideration.

540. However, neither of the above options are in line with the legal contract signed by Client C, nor is it in line with the working practices of any practice other than sole practitioners.

541. It is the current working practice of SARS to accept that, for example, A will be the named tax practitioner and therefore takes responsibility for all tax services performed by TP Inc.

542. This is, however, only a working practice.

543. Section 240(1) does not recognize and allow non-natural persons to register as tax practitioners. A strict reading of the TAA therefore implies that TP Inc is in breach of

section 240(1) because while it renders tax services for a fee, it does not qualify to register as a tax practitioner because it is not a natural person.

(c) Employees of incorporated firms and their obligation to register as tax practitioners

544. Section 240(2)(d) exempts individuals from registering as tax practitioners if they are working under the direct supervision and authorization of a tax practitioner.

545. Continuing the example provided above, A only has authority to issue instructions to the employees of TP Inc in his capacity as an employee of TP Inc, not in his (personal) capacity as tax practitioner.

SARS E-filing profiles for individuals versus firms

546. The SARS e-Filing platform currently provides for an accounting/tax firm to have its own e-filing profile which contains all its tax clients' e-filing profiles. This firm's e-filing profile is, however, linked to the e-Filing account of any registered tax practitioner who is an owner or employee of the firm.

547. To continue the TP Inc example noted previously, the e-filing profile of A (one of the owners/employees of TP Inc) will now therefore contain access to every single client of TP Inc. It is also on A's e-Filing profile that the user rights for all employees of TP Inc are granted.

548. If A were to ever leave TP Inc, he would retain e-filing access to all of TP Inc's clients. He cannot simply abandon his e-Filing profile to TP Inc, as it is his personal e-filing profile.

549. Additionally, he would still retain legal liability for all tax returns submitted on this profile, since all powers of attorney and authorizations would have been in his personal name, not TP Inc's.

550. TP Inc's employees have access to the clients' e-filing profiles only through A's profile.

551. Although it is possible to transfer these profiles to a new tax practitioner should A leave TP Inc, this is an extraordinarily time-consuming process as it would require a manual transfer request (on e-filing) for every single client and a new Power of Attorney to be signed for every single client of TP Inc.

552. In addition, if a client leaves the firm, none of the partners are currently able to remove the clients' profile without the profile losing its transactional history. Also if a partner leaves a firm and the clients remain, the TP cannot remove the clients from his/her profile as the client would have to action such transfer even though it is not legally moving from the service provider.

This is not unique to tax hence the Auditing Professions Act recognizes "firms" in section 38.

The nature of taxpayers impacted

553. All firms that run tax practices with registered tax practitioners with profiles on the SARS e-filing platform.

Proposal

554. An amendment be made to section 240 to recognize non-natural persons (including incorporated firms and partnerships) as tax practitioners.

555. The amendment provide that each accounting/tax firm have an individual who takes full responsibility for the function of the tax/accounting practice, similar to how a representative taxpayer take responsibility for all other taxes of incorporated entities.

556. The Act could create personal liability for this representative.

Penalties could be built into the law to ensure that incorporated entities would lose their SARS tax practitioner status if they do not update or maintain the eligibility of the representative taxpayer.

Definition of "date of assessment" & Sections 251 - 255 – Electronic delivery *(submission originally made in 2020)*

Legal Nature

557. Section 96 states the notice of assessment must include the "date of assessment". The definition of "date of assessment" has been deleted from the Income Tax Act, but it still remains in section 1 of the TAA.

558. In terms of the TAA, the "date of assessment" is defined as, *inter alia*, in the case of an assessment by SARS, the date of the issue of the notice of assessment.

559. Thus the "date of assessment" is tied to the "issue" of the assessment and it is our understanding that an assessment will only be "issued" if it is delivered to the taxpayer.

560. In terms of a recent court case (*SIP Project Managers (Pty) Ltd v The Commissioner for the South African Revenue Service* (Case Number 11521/2020), it was held that delivered means that the document must be delivered to the taxpayer (via electronic platform or to the last known address of the taxpayer) and a notice generated by the e-Filing system does not satisfy the requirement of delivery unless such notice is uploaded onto the taxpayer's profile.

561. Furthermore, in handing down its decision in the matter of *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA), the Supreme Court of Appeal confirmed that a taxpayer can lawfully receive notice of an assessment only if it is delivered electronically by SARS as prescribed by sections 251 and 252 of the TAA.

562. Sections 251 and 252 state that SARS is regarded as having issued, given, sent or served the communication to the company if -:

…(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).

563. The rules issued under section 255(1) state at 3(2) that delivery will occur for electronic filing communications when SARS correctly submits the notice etc on the user's electronic system, which the court in SIP case held is when the taxpayer can access it ie. not when it is generated on the SARS system "backend".

Factual Description

564. A notice of assessment requires disclosure of the "date of assessment".

565. The date on the assessment is usually the date when the letter is compiled by SARS on the SARS system backend but this may differ from the date on which it is loaded ("issued") onto the taxpayer's eFiling profile allowing the taxpayer to access it.

566. The law is now clear that date of issue for the purpose of section 251-255 of the TAA and the rules is not the "letter date" or even the date that SARS adds something in the back end of the system, but rather the date that the taxpayer can access it on his eFiling profile.

567. 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 calculates the days from the date of the letter or when the letter is uploaded on the backend of their system and not from date that the taxpayer is able to access it on eFiling.

The nature of businesses impacted

568. All taxpayers.

Proposal

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

(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 filing transaction by SARS to the registered user's electronic filing page.

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

571. This will also address taxpayers' long-held concern that e-Filing 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.

Decisions not subject to objection or appeal *(submission originally made in 2021)*

Legal Nature

572. The ITA and the TAA, in various sections, provide the taxpayer with an opportunity to lodge a dispute against a decision or action taken by SARS.

Factual Description

573. Notwithstanding the above, there are sections in the ITA and the TAA that do not allow a taxpayer the opportunity to dispute a decision or action taken by SARS.

574. These include:

1. Section 58(1) of the Income Tax Act – Where any property has been disposed of for a consideration, *which in the opinion of the Commissioner*, is not an adequate consideration, then that property shall be deeded to have been disposed of under a donation.

2. *Section 9 of the TAA* – A decision or notice made by a SARS official (excluding a decision giving effect to in an assessment or notice of assessment that is subject to objection and appeal) to a taxpayer, may *in the discretion of a SARS official* be withdrawn or amended by a SARS official.

3. Section 93(1)(d) and (e) of the TAA – SARS may make a reduced assessment if *SARS is satisfied* that there is a readily undisputed error in the assessment by either the taxpayer or SARS and *if a senior SARS official is satisfied* that an assessment was based on the failure to submit a return or submission of an incorrect return by a third party under section 26 or by an employer under a tax Act or a processing error by SARS or a return fraudulently submitted by a person not authorised by the taxpayer.

4. Section 161(3) of the TAA – If security is required by SARS, the security *must be* of the nature, amount and form *that the senior SARS official directs*.

5. Section 164(3)/(5) – *A senior SARS official may suspend* the payment of tax or a portion thereof having regard to various factors set out in section 164(3), one of the factors being whether the taxpayer has tendered adequate security for the payment of the disputed tax and accepting it is in the interest of SARS or the fiscus. A senior SARS official may also deny a request for suspension or revoke a decision to suspend payment with immediate effect *if satisfied* of certain criteria set out in section 164(5).

6. Section 167(1)/(4) of the TAA – A senior SARS official may enter into an agreement with a taxpayer under which the taxpayer is allowed to pay a tax debt in one sum or in instalments *if the official is satisfied* of certain criteria stipulated in section 167(1). A

senior SARS official may also terminate an instalment payment agreement *if satisfied that* certain requirements are met in section 167(4).

7. Section 227 of the TAA – This section describes the requirements for a valid voluntary disclosure, however, a decision taken by SARS regarding the validity of the requirements of a voluntary disclosure application is not subject to objection and appeal.

The nature of taxpayers impacted

575. All taxpayers that are subject to a SARS official's decision or SARS' discretion as mentioned above.

Proposal

576. To avoid expensive court procedures for all concerned, the above sections should be made subject to objection and appeal.

CATEGORY – UNEMPLOYMENT INSURANCE CONTRIBUTIONS ACT & SKILLS DEVELOPMENT ACT

Foreign employer UIF & SDL anomaly *(NEW)*

Background

577. Prior to the 2023 tax amendment cycle, in the case of a non-resident employer, the obligation to withhold PAYE only arose if the company had a representative employer in South Africa. A representative employer is defined as any agent (who resides in South Africa) of such employer, having the authority to pay remuneration. Thus, a representative employer only exists if that person, who resides in South Africa, has the authority to pay remuneration to the employee on behalf of the non-resident employer.

578. In most cases, non-resident employers would not have a representative employer in South Africa and, therefore, no PAYE withholding obligation arose. Despite this, the non-resident employer had an obligation to make Unemployment Insurance Fund (UIF) contributions and pay Skills Development Levies (SDL).

579. In July 2023, National Treasury released draft legislation indicating a proposed change to the PAYE withholding obligation that would specifically impact non-South African tax resident employers (foreign employers). After public consultation, a revised Tax Administration Laws Amendment Bill, 2023 (TALAB) was issued on 1 November 2023, which moved away from the initial amendment and instead inserted an obligation for foreign employers to withhold PAYE if that foreign employer conducts business through a permanent establishment (PE) in South Africa.

580. Although a welcome change to what was initially proposed, the misalignment between the PAYE withholding obligation of foreign employers and their obligation to make UIF contributions and pay SDL remains.

Legal nature

581. Paying SDL to the South African Revenue Service (SARS) requires an employer registration whereas UIF must be paid via SARS (if the employer is registered with SARS) or directly to the fund (if the employer is not registered with SARS). A SARS employer registration for non-resident employers with no obligation to withhold PAYE has been practical challenge to date.

582. Currently, in order to register as an "employer" with SARS, an employer will require, among other things:

- a Companies and Intellectual Property Commission (CIPC) registration number;
- a SARS income tax registration number; and
- a South African bank account.

583. After registration, the cost of compliance of running a payroll far outweighs the amount of taxes to be paid (even if the possible penalties that SARS could levy is included. The maximum monthly UIF contribution is R177.12 for the employer (and R177.12 on behalf of the employee), along with SDL of 1% of payroll. For this reason, there is a significant amount of non-compliance in this space.

584. We do note that National Treasury might be of the view that the Unemployment Insurance Contributions Act, 2002 (UIF Act) and the Skills Development Act, 1998 (SDL Act) are not administered by them, however SARS is responsible for the collection of UIF and SDL.

585. However, the SDL Act and UIF Act also falls within the definition of "tax act" in the Tax Administration Act, No. 28 of 2011 (as amended) (TAA). Therefore, alignment of these acts to the Income Tax Act, No. 58 of 1962 (as amended) (IT Act) is critical.

586. It is recommended that National Treasury find alternative methods to collect these levies/contributions. Furthermore, the cost of trying to keep foreign employers honest will far outweigh the amount of levies/contributions collected, so it would be sensible to make the method of compliance easier and more practical.

Factual Description

587. The issue is best described by way of an example. Person X is employed by Company Y. Both are non-residents for income tax purposes. Due to personal circumstances, Person X will now work remotely from SA. Person X's role within Company Y is a back-office function, non-revenue generating role. Person X earns the equivalent of ZAR 600,000 per annum.

588. Company Y does not have a permanent establishment in SA. On that basis, due to the recent amendment, Company Y is not required to withhold PAYE on the salary paid to Person X. Person X will in turn be a provisional taxpayer and pay the necessary taxes via the provisional tax system.

589. However, the UIF and SDL is still applicable. As no alternative mechanism exists for the payment of UIF and SDL, Company Y must register as an external company, activate its tax number of e-filing and register for payroll taxes. The annual SDL amounts to R6,000. The annual UIF amounts to R 4,250.88 [(177.12 x 12) x 2].

590. Chapter 17 of the TAA deals with offences committed under a Tax Act, which also applies to the UIF Act and SDL Act. An offence is committed if a person fails or neglects to register. A person convicted of any of these offences may be liable to a fine or imprisonment for a period not more than two years. The maximum penalty would amount to 200% of the tax. Therefore, the maximum penalty, in the example above, would amount to R12,000 (SDL) and R 8,501.76 (UIF).

591. In totality, the taxes and fines amount to R30,752.64. A rough estimate of cost to keep a company compliant with CIPC, run a payroll function, and keep the company tax compliant will far outweigh the cost of the possible tax and penalties. Commercially, Company Y will therefore opt not to register as an employer in SA and not contribute to UIF and SDL.

The nature of businesses impacted

592. Foreign employers and their employees rendering services in South Africa. It should be noted that this impacts employees (usually non-residents) of foreign companies who are working remotely in South Africa, and also resident employees who work for foreign employers.

Proposal

593. It is recommended that the SDL and UIF Acts are aligned with the Income Tax Act and that these contributions/levies are only applicable if a foreign employer operates through a PE in South Africa.

594. An alternative would be a mechanism which allows a foreign employer to make annual or bi-annual payments of SDL and UIF to SARS. It should be noted that SARS should allow these payments via foreign bank accounts otherwise non-compliance will persist. A further alternative would entail the local employee paying these amounts as part of their annual tax submission.