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BY E-MAIL: Christopher.Axelson@treasury.gov.za

Dear Mr Axelson

TAX POLICY 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.

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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.

Yours sincerely

Tarryn Atkinson	**Lesedi Seforo**
CHAIRPERSON: NATIONAL TAX COMMITTEE	**PROJECT DIRECTOR: TAX ADVOCACY**

The South African Institute of Chartered Accountants

ANNEXURE A

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CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

Section 23(m) & 23(b) – Home office allowances and disallowance of interest paid *(submission originally made in 2022)*

1. In previous Annexure C submissions, we have requested clarity on the deductibility of the portion of interest (on a bond) that is attributable to a taxpayer's home office; viz, whether the deductibility of such interest in terms of section 24J means that section 23(m) will not apply to prohibit this deduction.

2. We are of the view that section 11(x) does not include section 24J and thus that interest expenditure incurred in respect of a home office should be allowed as a deduction and not be prohibited by section 23(m)(iv). SARS, however, holds the opposite view, as indicated in Interpretation Note 28 (Issue 3).

3. What we can agree on is that SARS' approach does not seem to accord with the basic principles or current policy relating to deductible expenditure for trade income, creating a disparity in the tax system by taxing the whole "trade" capital gain of the home office whilst having disallowed the largest expense relating to the trade income expense pertaining to the home office.

4. We have also proposed various legislative amendments concerning home-office deductions, to reflect the remote working culture that has emerged in a post-COVID world. NT proposed a discussion document to be published in 2022 on a personal income tax regime for remote work. However, the document is yet to be published.

5. We therefore urge NT to begin engagements with industry on this matter.

Seventh Schedule: Paragraph 7 – Right of use of motor vehicle *(submission originally made in 2021)*

Legal Nature

9. 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).

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

11. 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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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

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

Proposal

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

CATEGORY – DOMESTIC BUSINESS TAXES

The taxation of Communal Property Associations and their members *(NEW)*

Legal Nature

21. We made a submission to SARS in October 2024 requesting their interpretation of the principles concerning the taxation of Community Property Associations (“CPA’s”).

22. It is currently unclear whether CPAs are companies as defined; thus rendering distributions to their members as dividends; or whether CPAs are trusts and therefore distributions to members are subject to the conduit pipe principle.

Factual Description

23. CPA's are created in terms of the CPA Act and seek to recognise traditional holding and operation of communal land on behalf of a community through a separate juristic entity.

24. Where communal land or the rights attaching to such land is productively utilised and cash, rather than just joint benefit of use of the communal land or improvements is provided to community members of the CPA, the CPA Act does not specify how this is to be treated in law other than to state that the founding documents must regulate "financial matters". We have not been able to source a CPA founding document that addresses this in detail.

25. The Income Tax Act also does not specifically create a tax regime for CPA's and leaves the normal principles to be applied.

26. The tax law seems to treat this juristic person as a "company" even though it has no shares or shareholders, though the operation of the CPA in terms of the CPA Act seems to accord more with a trust i.e. the CPA holds the land in a fiduciary capacity and its management members are akin to trustees.

The nature of businesses impacted

27. CPAs and their members.

Proposal

28. We request that SARS and National Treasury engage on this matter and issue the appropriate guidance or address any policy/legislative vacuum that aligns to the intended policy rationale for recognizing CPA's and how it should operate within traditional law.

Section 22 – Amounts to be taken into account in respect of values of trading stocks *(NEW)*

Legal Nature

29. Section 22(1)(a) of the Act provides that the closing stock to be included in the income of a taxpayer is the cost price of the trading stock, less such amount as the Commissioner of SARS (Commissioner) may think just and reasonable as representing the amount by which the value of such trading stock has been diminished by reason of damage, deterioration, change of fashion, decrease in market value or for any other reason satisfactory to the Commissioner.

30. SARS has recently issued a draft interpretation note ("IN"), presumably to replace Practice Note 36. The draft IN confirmed the principles established by the below-mentioned cases, being:

- The cost price of the goods and not the actual or anticipated market value is the benchmark against which any claim for the diminution in value is to be measured.

- A claim for a diminution of cost price must be based on events that exist at the end of the year of assessment or events that are known with reasonable certainty will occur in the following year of assessment.

- There will only be scope for a diminution of cost price if the events in question have led to the cost price of the goods ceasing to be a proper measure of their value.

- The use of NRV to determine the value of closing stock under section 22(1)(a) is inconsistent with the principles that underpin the Act.

Factual Description

31. Following the decisions in *C:SARS v Volkswagen SA (Pty) Ltd* (1028/2017) [2018] ZASCA 116 (19 September 2018) the Supreme Court of Appeal (SCA) and C*:SARS v Atlas Copco South Africa (Pty) Ltd* (834/2018) [2019] ZASCA 124, there is significant uncertainty around stock obsolescence provisions.

32. The SCA in C:*SARS v Atlas Copco* confirmed its findings as per the Volkswagen case and while the court's findings do not require taxpayers to value each and every item individually, there needs to be a method to writing down its stock and a taxpayer should be able to substantiate this method sufficiently.

33. Both cases confirmed that obsolescence provisions that are aligned with accounting principles do not necessarily meet the requirements of section 22(1)(a).

34. The report on the efficiency of South Africa's corporate income tax system prepared by the Davis Tax Committee confirms the internationally accepted principle that corporate tax has to comply with all the principles of a good tax system, being fairness, ***simplicity, certainty***, and efficiency (our emphasis).

35. There is currently significant uncertainty in relation to the determination of the NRV as contemplated by section 22(1)(a).

36. Unfortunately the SARS draft IN does not alleviate the uncertainty and does not **simplify** the application of section 22(1)(a). The draft IN is an oversimplification of the application of section 22(1)(a).

37. It is important to note that the amount by which closing stock is reduced to arrive at NRV constitutes a timing difference as the exact same amount that is included in gross income in year 1, is deducted from gross income in the very next year as opening stock.

The nature of taxpayers impacted

38. Taxpayers who have stock held and not disposed of at the end of the year.

Proposal

39. To clarify and simplify the tax policy regarding stock obsolescence, we recommend that stock obsolescence provisions that are aligned to accounting principles, are also accepted for purposes of section 22(1)(a), similar to the alignment of doubtful debt allowances as per section 11(j) of the Act.

40. We believe there is no incentive for companies to overstate the stock obsolescence provision for accounting purposes given the short term timing nature of any deferral.

41. Most taxpayers with material amounts invested in inventory are also audited. The obsolescence provision amount is included in the audits, which should provide some assurance to SARS that the provision is reasonable.

CATEGORY – INTERNATIONAL TAX

Section 9A – Blocked foreign funds *(NEW)*

Legal Nature

42. Section 9A of the Act provides that where an amount received by or accrued to any person,

    - which is required to be included in the income of that person;
    - but cannot be remitted to South Africa ("SA") during that year due to currency restrictions or other limitations imposed by the laws of the country where the amount originated,

    then such amount may be deducted from the income of that person for that year.

43. This section offers relief to SA taxpayers, in that the amount that cannot be remitted to SA in these circumstances is not subject to income tax in the year of assessment during which it arose.

44. Because the **laws of another country** may have sanctioned or restricted such monies from being transferred to SA, instead of the laws of the country in which the amount originated, the current legislation becomes onerous for SA taxpayers. That is, SA taxpayers cannot rely on the relief provided in section 9A of the Income Tax Act in these circumstances.

45. It is possible that SA taxpayers made strategic choices to invest in certain specific countries before the sanctions are imposed by the laws of another country.

Factual Description

46. For a variety of strategic reasons, many SA taxpayers invest globally to reach new markets and sources of income, diversify sources of income, lessen reliance on local markets, create a worldwide presence etc.

47. However, income generated by SA taxpayers from the countries in which they have invested may not be remitted to SA due to various reasons. There are numerous reasons why income earned in such countries might be prohibited, or blocked from being repatriated i.e., the limitations may be due to sanctions, regulatory agreements, governments, and courts.

48. The article *"Countries Sanctioned by the US and Why?"* from Investopedia dated July 06, 2024, reports that the United States of America ('US') alone sanctioned more than 20 nations as of June 2023, including Russia and nations mostly in the Middle East and Africa.

49. According to the report, the US imposes sanctions on these nations for a variety of reasons, including transgressions of international law, aiding terrorism, unfair economic practices, or issues pertaining to the environment or climate change. Different kinds of sanctions reported include sectoral, commodity-specific, financial, and trade limitations, to name a few.

50. In such a case, the prohibition on repatriation is not imposed by the country in which the amount arose, but by another country (i.e. the US). As such, section 9A does not apply.

The nature of businesses impacted

51. All taxpayers with an international presence and provide goods/services to recipients in foreign jurisdictions, whose funds have been blocked from repatriation to SA as a result of another nation's laws, regulations or sanctions.

Proposal

52. It is submitted that section 9A should be broadened to provide relief in instances where the funds may not be remitted to SA due to limitations or restrictions imposed by the laws of another country, other than the laws or restrictions of the country in which the money originated.

53. In addition, the legislation should be broadened to provide relief in instances where the funds may not be remitted to SA due to sanctions imposed by any country.

Section 9D – Review of the current Controlled Foreign Companies regime *(submission originally made in 2022)*

Factual Description

89. As part of our submission to National Treasury concerning the proposed amendment to the meaning of "foreign business establishment" per the 2023 draft Taxation Laws Amendment Bill, SAICA and other stakeholders called for the withdrawal of the amendment pending the Constitutional Court's judgment in the case between the CSARS and Coronation Investment Management SA (Pty) Ltd.

90. This was duly accepted by National treasury (NT) and the proposed amendment has been withdrawn.

91. We also suggested in our submission that NT should review South Africa's CFC legislation against similar regimes in other jurisdictions in order to align our legislation to international best practice, including considering the recommendations of the OECD's BEPS Action Plan 3, the impact of the pending OECD Pillar 2 Global Minimum tax, and the extent that the current legislation is administratively burdensome for most taxpayers.

The nature of taxpayers impacted

92. South African taxpayers subject to section 9D of the Act.

Proposal

93. We recommend once again that NT should review South Africa's CFC legislation against similar regimes in other jurisdictions in order to align our legislation to international best practice.

International agreements signed during the period of the Interim Constitution *(NEW)*

Legal Nature

54. Uncertainty exists regarding the status of signed bilateral agreement between South Africa and other countries entered into before the 1996 Constitution.

55. As example, the Economic Technical and Related Assistance agreement entered into between South Africa and the USA on 5 December 1995 ("ETRA Agreement") is one such agreement which illustrates the nature of the problem.

56. In essence, the bilateral agreement allows South Africa to benefit from economic, technical and related assistance hereunder as may be requested.

57. Article 5.4 of the ETRA Agreement provides, as far as is relevant, as follows:

58. *"All personnel (and their families), except citizens and permanent residents of South African, whether –*

    (i) …

    (ii) …

    (iii) …

    who are present in South Africa to perform work in connection with this Agreement shall be accorded exemptions, concessions and privileges in respect of taxation, import duties and otherwise, no less favourable than those accorded to such personnel of comparable bilateral governmental assistance organisations, to the intent that such personnel will –

    (a) not be subject, including retroactively, to income or similar taxes in respect of salaries and emoluments;".

59. Section 231(4) of the 1996 Constitution requires that international agreements bind South Africa when entered into but only become effective when enacted into law by national legislation.

60. However this section only seems to apply to international agreements entered into before the 1996 Constitution as recognised by section 231(5) of The Constitution which confirms that South Africa is bound by agreements entered into before the 1996 Constitution came into effect.

61. It is also important to note that the 1993 Constitution in particular did not have an exact provision like section 231(4) of the 1996 Constitution. Section 231(2) & (3) of the 1993 Constitution merely requires Parliament to ratify or accede an agreement[1] that was agreed and signed by the President (section 82(1)(i)) and does not require local law enactment. Section 231(1) of the 1993 Constitution also expressly recognises all pre-existing international agreements as binding unless Parliament passes legislation to the contrary, which is the exact contrary to the 1996 Constitution section 231(4).

Factual Description

62. South Africa has entered into various international agreements both before the 1993 Constitution and also in the period between the 1993 and 1996 Constitution.

63. Some of these agreements contain fiscal relief provisions such as the ETRA Agreement.

64. In a non-binding private opinion sought by a SAICA member on behalf of a client on the 1995 ERTA Agreement, SARS stated the following:

    "SARS accepts that the ETRA Agreement is an agreement contemplated in section 231(3) of the Constitution. However, section 231(3) of the Constitution provides that such an agreement "binds the Republic". This must be contrasted with section 231(4) of the Constitution, which provides that "Any international agreement becomes law in the Republic when it is enacted into law by national legislation;"

    The concepts "binding on the Republic" and "law in the Republic" are distinct concepts. "Binding on the Republic" refers to agreements that SA as a state has entered into on the international plane and is binding on that plane as between nations. "Law in the Republic", on the other hand, means international treaties that have been expressly incorporated into SA municipal law (domestic law) by means of one of the approved processes.

    In Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) the Constitutional Court confirmed that international treaties do not become law in South Africa simply because they are ratified by Parliament and are binding on SA on the

[1] The current process to ratify or accede an international agreement is set out on the DIRCO website which also notes that DIRCO is to keep a record of all such agreements. See https://dirco.gov.za/ratification-accession-procedure/

international plane. The court confirmed (at paragraph 92) that an international agreement –

"…that has not been incorporated in our law cannot be a source of rights and obligations… As this Court held in AZAPO [Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others 1996 (4) SA 671 (CC)]: "International conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment." (footnotes omitted)

No evidence was provided by the client that the ETRA Agreement has been enacted into SA domestic law. We have also investigated the matter and have found no indication that it has been so enacted, or even approved or ratified by Parliament.

Similarly, under the section 231(3) of the Interim Constitution, which may have been in force when the ETRA Agreement was entered into, Parliament had to ratify or accede to international agreements entered into by the Executive; and had to expressly provide during ratification or accession that the agreement formed part of SA's domestic law. Again, there is no evidence that this occurred.

For these reasons, we conclude that the ETRA Agreement does not form part of SA domestic law, and the exemption contained in Article 5.4 is not an enforceable right by the Taxpayer. Accordingly, the Taxpayer is not exempt from tax directly under the ETRA Agreement."

65. After the relevant SAICA member consulted with National Treasury, it was confirmed that they currently have no record of the ETRA Agreement being specifically enacted into South African domestic law or ratified in Parliament.

66. They, however, noted that Interim Constitution of 1993 did not require it to be tabled in Parliament, while section 231(3) of the Constitution of the Republic of South Africa, 1996 (i.e. the final Constitution), expressly requires that international agreements be tabled in Parliament.

67. As it stands, it seems National Treasury's the view is that the ETRA Agreement could still hold validity in international law, but it hasn't been incorporated into domestic law. If this is NT's view concerning the ETRA agreement, then we submit it is likely to affect the similar bilateral agreements entered into during the period when the Interim Constitution was in effect. This means some provisions may be effective due to other legislation, such as the Diplomatic Privileges and Immunities Act, 2001, while others may not National Treasury stated that they are continuing to investigate the status of the ETRA Agreement and will provide further information in the next round of legislative amendments.

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

68. South African international relations; and current delegates working on projects funded by the governments of South African trading partners

Proposal

69. It is submitted that NT provide policy clarity regarding the status of international agreements with fiscal implications entered into before 1996 Constitution.

70. Furthermore, policy guidance is required as to whether affected foreign nationals, including diplomatic staff, should rather engage their Consulates to engage with the South African government, especially as relates to any disputed localisation of pre 1996 international agreements. This is of particular importance given SARS' more narrow approach to pre 1996 Constitution agreements.

CATEGORY – VALUED ADDED TAX

Section 1 & 2(1)(*o*) – Financial Services – definition of "cryptocurrency" *(NEW)*

Legal Nature

94. The issue, acquisition, collection, buying, selling or transfer of ownership of any cryptocurrency is deemed to be a 'financial service' in terms of section 2(1)(*o*) of the VAT Act.

Factual description

95. The concept 'cryptocurrency' is not defined in the VAT Act. At the time when section 2(1)(*o*) was introduced by the *Taxation Laws Amendment Act*, 2018 it was proposed that a definition of "cryptocurrency" be included in the VAT Act and the Income Tax Act in order to avoid confusion and to provide clarity. However, in its response to these comments to the Standing Committee on Finance in Parliament, SARS and National Treasury stated that the proposal regarding the inclusion of a definition of "cryptocurrency" is not accepted, adding that a definition of "cryptocurrency" in both the VAT and Income Tax Acts is not necessary since "there is a general understanding of the meaning of cryptocurrencies".[2]

96. The word "cryptocurrency" in the definition of "financial instrument" in section 1 of the Income Tax Act was however replaced with effect from 20 January 2021 with the term "crypto asset". The reason for the amendment was to bring the Income Tax Act in line with the proposed adoption of a uniform definition of crypto assets within the South African regulatory framework.[3] The VAT Act was not amended accordingly.

97. If one applies the guidance of our courts in relation to statutory interpretation, then the ordinary meaning of the word "cryptocurrency" must be assigned thereto, unless the ordinary meaning results in an absurdity. Secondly, the word must be considered in the context in which it appears, and regard must be had to the purpose of the section in which it appears.

98. The word "cryptocurrency" is defined by various dictionaries to mean the following:

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[2] Final Response Document on Taxation Laws Amendment Bill, 2018 and Tax Administration Laws Amendment Bill, 2018 (Based on hearings by the Standing Committee on Finance in Parliament) 17 January 2019

[3] *Explanatory Memorandum on the Taxation Laws Amendment Bill*, 2020, at clause 2

a. *Cambridge Dictionary: "a digital currency produced by a public network, rather than any government, that uses cryptography to make sure payments are sent and received safely."*

b. *Merriam Webster Dictionary: "any form of currency that only exists digitally, that usually has no central issuing or regulating authority but instead uses a decentralized system to record transactions and manage the issuance of new units, and that relies on cryptography to prevent counterfeiting and fraudulent transactions."*

c. *Oxford Learner's Dictionary: "any system of electronic money, used for buying and selling online and without the need for a central bank."*

71. Unfortunately, the normal meaning of the word "cryptocurrency" does not provide clarity in relation to the various types of crypto assets which currently exist and which may loosely be understood to be a form of digital currency, simply because they can be traded or exchanged for goods or services.

72. An Intergovernmental Fintech Working Group ("**IFWG**") was established in 2016 between National Treasury, the South African Reserve Bank, the Financial Services Board (now the Financial Sector Conduct Authority), and the Financial Intelligence Centre. The National Credit Regulator and SARS joined the IFWG in 2019. The objectives of the IFWG are the testing of innovative products and services against regulation or legislation within predefined parameters and timeframes.[4] The Crypto Assets Regulatory Working Group of the IFWG published a consultation paper on policy proposals for crypto assets on 16 January 2019, and a position paper on crypto assets on 16 April 2020, which was updated on 11 June 2021.

73. The latest position paper of the Crypto Assets Regulatory Working Group of the IFWG recognises that various naming conventions have been adopted, including 'digital tokens', 'digital assets', 'crypto tokens' and 'crypto assets'. The Working Group stated that, despite the various terminology used, the crypto phenomenon is commonly based on decentralised technology such as blockchain and distributed ledger technology. The definitions used generally focus on its electronic nature, its potential role as a medium of exchange, and its perceived role as a representation of value. The position paper stipulates further that, consistent with the international preference, the term 'crypto assets' is preferred in the South African context as it encapsulates and extends to these functions. Furthermore, the term "crypto assets" is seen as a broader, or 'umbrella', term for different crypto asset tokens which may be classified into three types:[5]

- *Exchange or payment token:* These are tokens designed to be used as a means of exchange or payment for buying goods and services. Some users also utilise it for investment purposes.

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[4] https://www.ifwg.co.za/Pages/IFWG_Regulatory_Sandbox.aspx#:~:text=The%20Intergovernmental%20Fintech%20Working%20Group,within%20predefined%20parameters%20and%20timeframes

[5] IFWG Crypto Assets Regulatory Working Group *Position Paper on Crypto Assets* 11 June 2021

- *Security token:* These tokens provide rights such as ownership, the repayment of a specific sum of money, or entitlement to a share in future profits.

- *Utility token:* These tokens can be redeemed for access to a specific product or service that is typically provided using a distributed ledger technology platform.

74. The term "crypto assets" is therefore a broad term which includes all digital products based on decentralised technology such as blockchain and distributed ledger technology. Both the Organization for Economic Co-operation and Development[6] and the Australian Taxation Office[7] consider the term "crypto assets" to encompass both fungible and non-fungible tokens. It is submitted that the same would apply in South Africa.

75. Non-fungible tokens can be defined as a one-of-a-kind digital asset, stored on a blockchain, which assigns ownership when placed in the blockchain, that cannot be replaced by any other token or cryptocurrency and that is implemented through a smart contract. The "non-fungible" characteristic means these tokens cannot be exchanged because they are exclusive cryptographic assets, with unique identification codes and metadata that cannot be replicated.[8] A non-fungible token is generally used to record ownership in an asset and represents an ownership interest in a tangible or intangible asset.[9]

76. Non-fungible tokens can be used as a payment mechanism when acquiring goods or services. However, when the non-fungible tokens are applied as payment, the value of such token is generally converted to fiat currency first, and it is then the fiat currency that is applied as payment. The non-fungible tokens themselves are therefore not used as a digital currency for making online payments.

77. Furthermore, cryptocurrencies can be distinguished from a non-fungible token. Cryptocurrencies are fungible in their nature as their holders are willing to exchange them for any other cryptocurrency regardless of the serial number to which it belongs and because the unit itself is not relevant. Non-fungible tokens are per definition non-fungible, which means the unit is the most relevant aspect and cannot be traded or exchanged at equivalency. Non-fungible tokens do not share the nature of cryptocurrencies or other digital currencies as they are not configured as currencies nor treated as fungible goods.[10]

78. Moreover, the value of cryptocurrencies is determined by supply and demand for the cryptocurrency itself. The value of asset-backed non-fungible tokens is determined by

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[6] OECD,*Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard Public Consultation Document* (2022)

[7]https://www.ato.gov.au/individuals-and-families/investments-and-assets/crypto-asset-investments/what-are-crypto-assets

[8] Laura Alarcón Díaz, *European Union - The VAT Treatment of NFTs in the European Union,* International VAT Monitor, 2023 (Volume 34), No. 2 at paragraph 2.1

[9] OECD,*Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard Public Consultation Document* (2022)

[10] https://www.ato.gov.au/individuals-and-families/investments-and-assets/crypto-asset-investments/what-are-crypto-assets

the price of the underlying asset. Accordingly, the issue of a non-fungible token, should not be a “cryptocurrency” as contemplated in section 2, but it is nevertheless a crypto asset.[11] This creates uncertainty as to whether the term “cryptocurrency” in section 2(1)(*o*) should be widely interpreted to mean all types of crypto assets, or whether it should be limited to fungible tokens specifically designed to be used as a means of exchange or payment for buying goods and services.

79. There is unfortunately not a general understanding of the meaning of “cryptocurrency” as originally stated by SARS and National Treasury when section 2(1)(o) was introduced into the VAT Act. The term could include various types of tokens, fungible and non-fungible, as is evident from the latest position paper of the Crypto Assets Regulatory Working Group of the IFWG.

The nature of taxpayers impacted

80. Persons issuing, acquiring, collecting, buying, selling or transferring the ownership of any cryptocurrency.

Proposal

81. In order to avoid confusion and to provide clarity regarding what is envisaged by section 2(1)(o), we propose that a definition of “cryptocurrency” be included in section 1(1) or section 2(2) of the VAT Act, and that the term be limited to exchange or payment tokens, being tokens designed to be used as a means of exchange or payment for buying goods and services, as classified by IFWG Crypto Assets Regulatory Working Group.

Section 15 – Accounting basis – cash basis for SMEs *(submission originally made in 2022)*

Legal Nature

82. Section 15(1) directs that vendors account for VAT on the invoice basis, while section 15(2) provides for an exception to this rule, allowing specific vendors the option of accounting for VAT on the payments basis. This group of vendors includes natural persons with taxable supplies of less than R2.5 million during the preceding (or coming) 12 months [section 15(2)(*b*)].

Factual Description

83. The below extract from the SARS VAT404 Guide provides some well-known reasons for this concession by government:

[11] Botes, MC, *Juta’s Value Added Tax*. Juta and Company (Pty) Ltd at p 2-16B

A few advantages and disadvantages of the payments basis of accounting are set out in the table below.

84.

Advantages	Disadvantages
• Suitable for small businesses. • Advantageous when the vendor allows lengthy periods of credit. • Facilitates cash flow.	• May deduct VAT only after payments made to suppliers. • More difficult to implement accounting systems to manage, administer and calculate accurately (for example, reconciliation with income tax returns and adjustments).

85. The above shows government's awareness of the cash flow difficulties faced by small businesses, which are partially caused by the fact that they are often paid months after invoicing customers. Some of these customers include government departments, municipalities and state-owned entities[12].

86. These businesses are often placed in the very unfortunate position of having to choose between tax compliance and paying their overhead expenses, which are often "more pressing" as failure to settle these may threaten the very existence of these businesses.

87. With the success rate of small businesses currently being as low as it is, it is incumbent on government to provide the necessary assistance needed to address some of the difficulties faced by the small business sector, since it is well recognized that this sector is crucial to the economic success of any nation.

88. Though some small businesses may choose to trade as sole proprietorships, many others choose to trade as juristic persons.

89. Through the insertion of section 15(2)(*a*)(viiii) into the VAT Act[13], the legislature has previously shown that it is willing and able to aid a business' VAT-related cash flow constraints by extending the payments basis to include the South African Broadcasting Corporation (SABC).

90. The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015[14] noted the following in this regard:

91. *Under normal VAT rules, the SABC should account for output tax on the earlier of an issued invoice (i.e. on issued TV license notices) or payment made for the supply. However, there is a high level of non-payment of TV license fees by television owners.*

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[12] https://www.dpme.gov.za/publications/Reports%20and%20Other%20Information%20Products/70008-20200630%20Research%20on%20Late%20Payment%20of%20SMMEs%20V03.pdf

[13] Taxation Laws Amendment Act No. 25 of 2015

[14] https://www.sars.gov.za/wp-content/uploads/Legal/ExplMemo/LAPD-LPrep-EM-2015-01-Explanatory-Memorandum-on-the-TLA-Bill-29-of-2015.pdf

The VAT requirement to account for output tax on an invoice basis on the revenue it might not be able to collect, places a significant financial constraint on the SABC.

92. If a multi-billion rand corporation can be strained by habitual and known late payments, the impact on SME's is much greater. Extending the payments basis to the rest of the small business sector would be keeping in line with this legislative sentiment.

The nature of taxpayers impacted

93. Small businesses trading as juristic persons.

Proposal

94. Section 15(2) should be amended to include juristic persons with taxable supplies not exceeding R5 million. Extending the payments basis to juristic persons will provide parity with natural persons.

95. A concomitant amendment may also be necessary to s15(2A)(iii) as the continued rationale of the per invoice limit seems to have disappeared as reflected in the removal of various local government and entities from this requirement. There is also already a total annual supply limitation. To add to this challenge, the R100 000 per invoice limit has not been amended **since its insertion in 1997**. It is proposed that it be deleted or at least significantly increased.

CATEGORY – TAX ADMINISTRATION ACT (TAA)

Chapter 2 – New Part G: Taxpayer Bill of Rights *(submission originally made in 2021)*

Legal Nature

96. Currently SARS and taxpayers' rights are contained in the TAA. The SARS Service Charter also stipulates a taxpayer's rights and obligations as well as the service time frames that a taxpayer can expect from SARS.

Factual Description

97. Despite the above, SARS does not necessarily always comply with the procedures outlined in the TAA (see the Office of the Tax Ombud's Systemic Investigations Report) or in the SARS Service Charter. Due to the long time periods and exorbitant costs involved in addressing these deficiencies, only a few taxpayers have challenged SARS' non-compliance in court.

98. As many taxpayers are not well acquainted with the TAA, crystallising taxpayers' rights in a document would help raise public awareness of taxpayers' rights as well as SARS' legal obligations.

The nature of taxpayers impacted

99. All taxpayers interacting with SARS.

Proposal

100. A Taxpayers' Bill of Rights that is binding on SARS should be included in a separate chapter (Part G) of the TAA. SAICA's TAA sub-committee is currently doing research on the international best practice to assess what would be the best solution for the South African context and is willing to share the findings with the National Treasury.

Section 26 – Third party returns – expand across other areas/industries *(NEW)*

Legal Nature

101. Section 26 authorises SARS to require third party returns by means of public notice. This forms a critical element in SARS achieving its 9 Strategic Objectives, including specifically the objectives of increasing and expanding the use of data; modernisation; ease of compliance; and detection of non-compliance.

Factual Description

102. Third party reporting and associated pre-population of taxpayer returns uses modern data collection tools to improve ease of compliance, and make non-compliance more difficult. There are various areas where third party returns are effectively used.

103. However, there are other areas or industries where the use of third party data could be valuable.

104. Legal industry:

Advocates would traditionally fall into the category of "referral advocates", who do not see clients directly, but rather act under the instructions of an attorney. This means that, for most advocates, there is a convenient source of third-party data available, held by the relevant attorneys, which may be useful to enhance tax compliance within the legal industry.

105. Medical industry:

Medical aids hold significant amounts of third party data in relation to income paid to various medical practitioners, either by the medical aid itself, or by the medical aid's client (the patient) directly. It appears that this type of data may be useful to enhance tax compliance within the medical industry.

The nature of businesses impacted

106. Whereas all taxpayers are positively impacted by increasing tax compliance and associated revenues for the fiscus, the specific businesses impacted by this proposal are: the legal industry; and the medical industry.

Proposal

107. Legal industry:

SARS should extend the third party reporting requirements to the legal industry, as regards all payments made by attorneys to advocates. The amounts reflected on these IT(3) forms should be pre-populated in the relevant advocate's income tax returns, as is the case currently for IRP5 data. Attorneys should be required to separately report this line item of expenditure in their own tax returns, to facilitate verification of this data.

SARS could also consider using this data as the basis for minimum provisional tax payments, and/or implementing a withholding tax system for payments made by attorneys to advocates. For example, a withholding tax rate of 25% may be appropriate, as this is aligned to tax rates for "non-standard employment", and it allows for the fact that advocates would have certain tax-deductible expenditure.

108. Medical industry:

SARS should investigate the practicality and usefulness of extending the third party reporting requirements to the medical industry, for example requiring medical aids to issue IT(3) certificates in respect of medical practitioners, for payments made by the medical aid to that medical practitioner or paid directly by the underlying patient to that medical practitioner (and reported to the medical aid).

Chapter 17 – Criminal offences *(submission originally made in 2021)*

Legal Nature

109. Section 234 contains a list of criminal offences wilfully committed by a person and also includes a list of requirements that if a person wilfully or negligently fails to do these, will be considered a criminal offence.

Factual Description

110. Currently, a SARS official falsely communicating information to the Tax Ombud (lying or misrepresenting facts) does not constitute a criminal offence. Neither is the lying by a SARS official to get a search warrant a criminal offence. The only remedy afforded to the taxpayer is to approach the Public Protector.

111. In terms of section 28(1) of the Criminal Procedure Act 51 of 1977, if a policeman lied to get a search warrant, it would be a criminal offence of perjury.

The nature of taxpayers impacted

112. All taxpayers submitting complaints to the Tax Ombud or subjected to a search warrant where a SARS official has lied or misrepresented facts.

Proposal

113. A similar offence and sanction to that in the Criminal Procedures Act should be included in the TAA or Chapter 17 of the TAA should be amended to include as a criminal offence a SARS official that lies or makes misrepresentations to the Office of the Tax Ombud or to get a search warrant.

114. Consideration should also be given to compulsory publication of SARS disciplinary cases (similar to what SAICA does with its members) on a no name basis which the Office of the Tax Ombud could review.

115. This would certainly improve SARS' public image and build trust with taxpayers that SARS does in fact apply consequence management.

Section 240 – Exceptions to tax practitioner registration *(NEW)*

Background

116. Tax practitioner regulation was introduced in 2002 and expanded in 2013 to enhance the professionalism of tax professionals, to provide for the reporting of unprofessional conduct by tax practitioners and for matters connected therewith.

117. One of SARS' main reasons for introducing tax practitioner regulation was, purportedly, to protect taxpayers from being exploited by unscrupulous individuals.

118. The first phase of regulation essentially became a "license to trade" regime with registration of individuals with SARS the only requirement.

119. This was then expanded to including registration with statutory or recognised controlling bodies (RCB), since 2013 – effectively requiring individuals to fulfil certain education and experience requirements before being allowed to register as a tax practitioner.

120. Despite the registration requirement being in place for more than a decade, unfortunately, 'ghost' tax practitioners continue to freely operate. These 'ghost' tax practitioners are sometimes referred to as tax preparers and provide tax services outside of the regulatory framework. They often facilitate this by submitting tax returns directly on their taxpayer-clients eFiling profiles with no indication that the return was completed by someone other than the taxpayer.

121. Many of these 'ghost' tax practitioners may charge contingency fees – that is, a percentage of the tax refund or saving secured, which in some cases may be invalid.

122. Despite recognised controlling bodies raising concerns about 'ghost' tax practitioners since the inception of the regulatory model, this seems to continue unabated with no clear indication as to what is being done to decisively address this.

123. There is a growing uneasiness amongst registered tax practitioners who feel undermined by SARS' inability to address this issue, which is negatively impacting taxpayers, tax practitioners and ultimately, the fiscus.

Legal Nature

124. Section 240(1) of the Tax Administration Act, 2011 (the TAA) provides that every natural person who provides advice to another person with respect to the application of a tax Act; or completes or assists in completing a return by another person, must register with

or fall under the jurisdiction of an RCB and register with SARS as a tax practitioner in the prescribed form and manner and within the prescribed timeframes.

125. Subsection (2) provides for circumstances in which such individuals, even though providing tax services, are not required to register as tax practitioners.

126. Paragraph (c) in particular, provides that there is no requirement to register as a tax practitioner if the person only 'provides the advice as an incidental or subordinate part of providing goods or other services to another person'.

Factual Description

127. In our view, the term 'incidental or subordinate part' of providing goods or services to another person is potentially open for abuse as it is open to interpretation as to what extent of services may constitute incidental or subordinate tax services. This also differs to paragraphs (a); (b) and (d) which are, in our view, clear in terms of requirements exempting one from the obligation to register.

128. Depending on how paragraph (c) is interpreted by each individual, there may well be instances where what is considered 'incidental or subordinate' by the individual providing such services, may breach the requirements of what SARS would consider incidental/subordinate, if it had to apply tests that it deems appropriate. Unfortunately, there is no clear guidance on this – further increasing the risk of misinterpretation or misuse.

129. It may well be that this potential loophole creates more opportunity for 'ghost' tax practitioners to continue to freely operate.

The nature of taxpayers impacted

130. All persons who provides tax advice to another person or completes/assists another person in completing a return

Proposal

131. We propose that SARS reconsider the wording of Section 240 2(c) or alternatively, repeal this subsection in its entirety.

132. In this way, there would be no opportunity for abuse as any individual providing any tax service would be required to register as a tax practitioner, unless one of the other three requirements in subsection 2 have been met.

CATEGORY – TAX THRESHOLDS, REBATES AND EXEMPTIONS

Non-adjustment of various tax thresholds, exemptions and limits

Legal Nature

133. The various tax Acts include specific amounts for exemptions, thresholds and rebates. These include the following:

	Item	Legislative provision	Amount	Last increased
1	Provisional Tax under-estimation penalty	Para 20, 4th Schedule ITA	R1 million	2015
2	Small business Corporation gross income	Section 12E(4)(a)(i) ITA	R20 million	2013
3	Small business Corporation tax table maximum threshold	Income Tax Act (RMAARLA)	R550 000	2013
4	Donations Tax exemptions	Section 12E(4)(a)(i) ITA	R100 000 & R10 000	2002
5	CGT natural persons annual exclusion	Para 5(1), 8th Schedule, ITA	40 000	2012
6	CGT natural persons exclusion (death)	Para 5(2), 8th Schedule, ITA	300 000	2012
7	CGT definition of 'small business'	Para 57, 8th Schedule, ITA	R10 million	2012
8	CGT exemption on disposal of 'small business' assets	Para 57(3), 8th Schedule, ITA	R1,8 million	2012
9	CGT Primary Residence rebate	Para 45, 8th Schedule, ITA	R2 million	2012
10	Withholdings Tax on non-resident's sale of property	Section 35A(14) ITA	R2 million	2015
11	VAT compulsory registration threshold	Section 23(1)(a) VAT Act	R1 million	2008
12	Public Benefit Organisation (non-donation) income exemption	Section 10(1)(cN) ITA	R200 000	2011
13	Body Corporate (non-levies) income exemption	Section 10(1)(e) ITA	R50 000	2011
14	Estate Duty exemption	Section 4A(1), Estate Duty Act	R3,5 million	2011
15	Tax-free Investment (tax-free contribution limit)	Section 12T(4)(a) ITA	R36 000	2020
16	Tax-free Investment (penalty application)	Section 12T(7)(b) ITA	R500 000	2015
17	Wear and tear allowance for "small items"	Section 11(e) ITA	R7 000	2009
18	Long-service awards fringe benefit	Para 5(2)(b), 7th Schedule ITA	R5 000	2002

Factual Description

134. These exemption and threshold amounts have not been adjusted to account for inflation. In the majority of cases, there has been no such adjustments for over a decade.

135. We have previously raised this issue multiple times at the Annual Annexure C workshops, but the issue continues to be ignored by NT.

The nature of taxpayers impacted

136. All taxpayers.

Proposal

137. It is submitted that NT reviews all exemption and threshold amounts in the various tax Acts and increase them in line with inflation.