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National Treasury Policy Department and Ms Adele Collins
National Treasury / South African Revenue Service

Per email: 2020AnnexCProp@treasury.gov.za
acollins@sars.gov.za

Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2021 AND THE SECOND BATCH OF THE 2021 DRAFT TAX BILLS

The National Tax Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill 2021 (DTLAB) and Tax Administration Laws Amendment Bill 2021 (DTALAB).

Also included in this submission are our comments on the second batch of the DTLAB and the DTALAB that contain the emergency tax measures that seek to address the impact of COVID-19 and the recent unrest in South Africa. This second batch seeks to make amendments to the Disaster Management Tax Relief Act 2020 and the Disaster management Tax Relief Administration Act 2020.

Our submission has addressed amendments to the following tax Acts –

1. The Income Tax Act, 58 of 1962, as amended (the Act);
2. The Tax Administration Act, 28 of 2011, as amended (the TAA);
3. The Securities Transfer Tax Act, 25 of 2007 as amended (the STT Act);
4. The Employment Tax Incentive Act, 26 of 2013;
5. The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and
6. The Carbon Tax Act, 15 of 2019, as amended.

Also included in our submission are areas that have not been considered in the current DTLAB and the DTALAB that we feel strongly should have been included based on the submissions made during the Annexure C process.

We also include our concerns with the constitutionality of various sections currently in the legislation as well as a new section that is proposed in the 2021 DTLAB.

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

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

Yours sincerely

David Warneke

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The South African Institute of Chartered Accountants

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ANNEXURE A

DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL 2021

INCOME TAX ACT

Section 18A – Extended information and third-party reporting (Clause 2)

1. The proposal made by NT is to extend the information required to be included on the section 18A receipts to include information that the Commissioner may prescribe by public notice. It is also proposed that third party reporting will be extended to cover section 18A receipts issued by Public Benefit Organisations (PBOs) in respect of tax-deductible donations in the future.
2. Although we recognise the need to curb incorrect section 18A receipts being issued by PBOs that are not approved, many approved PBOs (especially the smaller and unsophisticated ones) are already struggling with high compliance costs and may not be able to afford the necessary systems changes required to issue the additional information required in the section 18A receipts.
3. Many of the PBOs would also not easily be able to comply with the third-party reporting requirements and they may be forced to incur additional tax compliance costs by having to appoint additional staff/consultants to assist them with this obligation.
4. Furthermore, it raises questions regarding the effectiveness of the audit certificates that are required to be issued as set out in section 18(2B). It would appear the requirement of PBOs having to obtain an audit certificate verifying that ALL the section 18A receipts are issued only for donations received, that will be used for public benefit activities as set out in Part II of the Ninth Schedule to the Income Tax Act (as further explained in Interpretation Note 112), is not working as intended.
5. In this regard, we once again highlight our concerns regarding, *inter alia*, the audit certificates and the fact that the type of audit engagement that is required in order to issue the audit certificates contemplated in section 18A does not fit within the ambit of the pronouncements issued by the International Auditing and Assurance Standards Board. The implications of this is that the PBO's would become non-compliant with the legislation which could ultimately affect the PBO's tax exempt status – see SAICA's submissions made to SARS on 2 May 2018 and 9 March 2020.
6. Submission: Rather than imposing a further compliance burden on the PBOs, we submit that the current fraud mentioned by NT should be investigated and the perpetrators brought to book.
7. We urge SARS to urgently engage with the Independent Regulatory Board for Auditors in order to resolve the practical challenges with the issuing of the s18A audit certificates as outlined in our letters mentioned above.

8. We also urge NT to include the proposed amendments to the legislation to mitigate the concerns raised in our comments on section 18A and Interpretation Note 112 when it was issued for comment.

Paragraph 14 (Fourth Schedule) – Non-submission of EMP501 penalty (Clause 6)

9. The proposed amendment enables SARS to raise a non-submission penalty for the EMP 501 through an estimate of the employees' tax with an adjustment once the actual employees' tax is known.

10. It appears that an EMP501 submitted via e@syfile is regarded as not being submitted on efiling if SARS performs an Employment Taxes Verification (ETV) on the return. An ETV is a process where SARS performs tax calculations on IRP5/IT3(a) certificates and determines if there are any discrepancies in relation to the amount of tax levied and the tax that was deducted from payments to employees. SARS then asks for a reason or clarification of an estimated tax value included in the return as a result of these differences. Differences between the IRP5/IT3(a) certificates and the EMP501 may occur for various reasons. These include *bona fide* errors such as incorrect source codes used, medical aid fund amounts not pulled through correctly etc.

11. Based on the above, an EMP501 could be regarded as not being submitted if it is subject to an ETV. A taxpayer would then, in terms of the proposed amendment, be liable for a non-submission penalty.

12. Submission: An EMP501 should not be regarded as not being submitted if it is subject to the SARS ETV process. The EMP501 should be reflected on the SARS system as being submitted but it should then be flagged as being under review, to prevent the proposed non-submission penalty from being raised incorrectly.

Paragraph 21 (Fourth Schedule) – Provisional tax: short year of assessment (Clause 7)

13. The proposed amendment states that a first provisional tax payment and return are not required when the duration of a year of assessment does not exceed six months (such as when a person dies, ceases to be a tax resident, or a company is incorporated during a year of assessment or it changes it year-end).

14. The concern is that efiling does not appear to be able to cater for a second provisional tax return of an emigrant on the day immediately before ceasing to be a resident. It is also our understanding that the IRP6 does not show or allow for a date or the year end to be inserted.

15. It is not always possible or practical to submit a second provisional tax return on the day immediately before ceasing to be a resident. For example, if a person is a resident in terms of the physical presence test and then remains outside of South Africa for at least 330 consecutive days, their residency would be deemed to have ended on the first day of the 330 consecutive day period. A person may not know whether or not he or she will be outside South Africa for at least 330 consecutive days and therefore would not know whether their

year of assessment would have ended on the date on which they leave South Africa. It is clearly illogical to expect a provisional tax return to be completed in these circumstances.

16. Submission: Until the efiling system can cater for these situations, the proposed subparagraph (1A) should be amended to include that a second provisional payment need not be submitted if the year of assessment is less than six months. Thus the current proposed amendment should read as follows: "Subparagraph (1)(a) and 1(b) must not apply…"

17. In addition, paragraph 19(1)(a) should be extended to cover situations in which a natural person ceases to be a resident by the addition of the following words: "in respect of the year of assessment in which a person dies or ceases to be resident…".

TAX ADMINISTRATION ACT

Section 95 – Estimation of assessments (Clause 2.18)

18. SARS may issue an estimated assessment if a taxpayer fails to respond to a request for information in terms of section 46 of the TAA, after more than one request.

19. We welcome the proposed amendment that will provide SARS with a discretion to extend the 40 business day period for up to 40 business days beyond the prescription date should SARS issue an additional estimated assessment close to the end of the relevant prescription period.

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

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

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

23. The principle of notifying the taxpayer using a channel he or she elects for delivery was also contained in the 2014 Section 255 draft regulations which were never finalised. These

regulations would have compelled SARS to allow taxpayers to elect an email address at which SARS was compelled to notify of documents "delivered" on eFiling.

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

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

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

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

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

DRAFT TAXATION LAWS AMENDMENT BILL 2021

INCOME TAX ACT

Section 1 – "Gross income" definition – Long service awards (Clause 4(1)(d))

29. It is proposed that an amount in cash (of R5 000 or less) that accrued to an employee in respect of a long-service award be excluded from "gross income". This proposal is welcomed as we understand the intention to be that it extends the type of non-taxable long-service award to other types of awards not just those in the form of non-cash benefits. This change is achieved by adding a proviso to paragraph (c) of the definition of "gross income".

30. Currently, where the amount granted to the employee is not in cash, paragraph (i) of the definition of "gross income" applies and includes the 'cash equivalent' as determined under the Seventh Schedule in "gross income". (See the comments by Judge Cachalia in Anglo Platinum Management Services v SARS (20725/2014) [2015] ZASCA 180 (30 November 2015)).

31. The Seventh Schedule (in paragraph 5(2)(b)) reduces the cost to the employer of the asset by R5 000, not the taxable benefit. This results in the amount of the taxable benefit being less, or one can say, a nil value is given to a part of the taxable benefit.

32. Where the policy intention is not to include an amount, or a part thereof, in taxable income, the Act grants an exemption (in section 10(1) of the Act). Thus, in order to remain with the policy intention of the Act, where an amount that accrued to the individual is in cash, it should be included in gross income and an exemption should be provided.

33. Submission: The following exemption should be inserted into the Act to align with the legislative principles of the Act and the intention of the proposed change:

34. "*There shall be exempt from normal tax any amount received by or accrued to or for the benefit of any person in respect of long service as defined in paragraph 5(4) of the Seventh Schedule, to the extent that the aggregate value of an amount determined under this paragraph together with all amounts determined under paragraphs 5(2)(b), 6(4)(d) and 10(2)(e) of the Seventh Schedule do not exceed R5 000*."

35. All references to paragraph (c) (or the R5 000 amount) in the Seventh Schedule must then also be changed to refer to the section 10(1) exemption.

36. It is further submitted that the amount R5 000 should be increased to R10 000 to allow employees to be more realistically rewarded without suffering taxation, for remaining in service to their employers. This is a benefit not only to the employers but also to the economy as a whole. The R5 000 limit has in any event not been changed since 2002 (19 years ago).

Sections 1(1) and 25 – Liquidation & distribution account (Clause 4(1)(e) and 22)

37. The proposal is to include a definition of 'liquidation and distribution account' and to treat the deceased estate as having disposed of the assets in this account on the date when the liquidation and distribution account becomes final. It is proposed to have an effective date and to apply in respect of liquidation and distribution accounts finalised on or after 1 March 2022.

38. The main issue in relation to the amendment is the uncertainty from a time perspective around when the heirs are regarded as having acquired an asset from the deceased estate. This, however, should not be an issue as there is no tax consequence when the executor distributes the assets in the estate to the beneficiaries.

39. With respect to property bequeathed, the legal position is that the heir becomes entitled to the bequest (the asset) but the executor can only distribute the asset to the heir after the estate becomes final. Judge Joubert, in *De Leef Family Trust and Others v the Commissioner of Inland Revenue*, said "*according to our modern system of administration of deceased estates the heir or legatee of an unconditional bequest obtains a vested right (dies cedit) to be entitled to the bequest on the death of the testator (a morte testatoris). Such a right is transmissible but his claim is enforceable only at some future time when the executor's liquidation and distribution account has been confirmed (dies venit)*."

40. Essentially, the legal position is similar to a trust and its beneficiaries - the heir becomes entitled to the bequest (the asset) at date of death (*dies cedit*) but will only acquire the asset after (*dies venit*) the estate became final.

41. Section 25 creates this fictional disposal event, resulting in two disposals – the first by the deceased to the estate and the second, a disposal by the estate to the heir. No capital gain or loss arises on the second disposal as it is deemed to have been disposed of at a value which is the same value the deceased disposed of it, and as was acquired by the deceased estate.

42. Submission: The time of disposal by the estate to the heir should be the date of death and the subsequent distribution by the executor should not be a disposal event.

43. What is not clear and what needs to be clarified is when an estate ceases to be a taxpayer. This would require an amendment to section 25(1). In principle, it needs to be determined when the amounts that are received by the executor will no longer be treated as income of the deceased estate.

44. The current SARS practice is that the estate ceases to be a taxpayer on the date the estate falls open (becomes final). This, however, in practice, creates an administrative problem with respect to returns of income to be submitted to SARS.

45. The executor accounts for the income earned after death in the 'income and expense' account. Incidentally, the executor also deals with the capital gains arising after death, from disposals of assets (to persons other than the surviving spouse, heirs or legatees) in the period after date of death until the estate falls open. Any income that accrued to the executor, derived from assets in the estate or cash in the estate (carried from date of death) or on the cash from assets realised, will need to be included in the deceased estate's tax calculation.

46. In this regard, the "Income and Expenditure Account", as required by paragraph 5(f) of the regulations in terms of section 103 of the Administration of Estates Act, 1965, must contain:

    (i) any income collected which has accrued subsequent to the death of the deceased to the date of the account;
    (ii) any expenses paid from such income;
    (iii) in parenthesis next to the money column of the account, a consecutive number in respect of each entry;
    (iv) *the balance available for distribution and to whom it was awarded*; …

47. The income and expenditure account, and therefore the 'liquidation and distribution account', will only account for income until the date of the accounts. It does not require, with respect to income derived during the 21 business days during which objections can be lodged against the Liquidation and Distribution account, that the liquidation and distribution account be adjusted to include this income and the related tax due to SARS on the income earned during this period.

48. Question 24 in SARS's Frequently Asked Questions: Deceased Estates, is copied below:

49. Question 24: Who is responsible for the tax liability that arises in respect of the income and expenditure that arises during the advertisement period up to the date the Master approves the L&D account?

50. SARS answer: The deceased estate is liable for any tax applicable to income earned during the advertisement period up to approval.

51. Any income earned during the advertisement period up to approval must be declared in the deceased estate's final income tax return although not reflected in the income and expenditure account of L&D account.

52. Submission: The amount of income, that accrues after the period starting on the date of the accounts, actually accrues to the surviving spouse, heirs or legatees and not to the executor.

53. Section 25(1) of the Act should be amended to clarify that it would apply to income that accrues until the date of the liquidation and distribution account.

Section 1 – Definition of "contributed tax capital" (Clause 4(1)(c) and 4(2))

54. According to the Explanatory Memorandum (EM), the proposed amendment to the definition of "contributed tax capital" (CTC) aims to clarify the principle that shareholders with the same class of shares should equally, in relation to their shareholding, share in the allocation of CTC as a result of the distribution. However, this proposed change, with the way it is currently worded, will mean that many share buy-backs could not take place from CTC since not all shareholders participate in all share buy-backs. We don't believe this was the intention of the NT as set out in the EM.

55. Submission: The proposed amendment should be withdrawn and the abuse that is taking place should be addressed with the GAAR provisions.

56. Alternatively, the amendment to the definition of CTC should state that an amount can only reduce CTC if all shareholders who participate in the particular distribution receive proportionate amounts of CTC in relation to what they originally contributed.

57. A further concern is that the amendment is effective retrospectively, that is, it is proposed to come into operation on the date of publication of the 2021 DTLAB, being 28 July 2021. This means that taxpayers had no prior notice of the reach of this proposed change.

58. Submission: As mentioned in our previous submissions, changes that are retrospective and that place a burden or restriction on taxpayers, should as far as possible be amended with prospective rather than retrospective effect.

Section 7C – Loan transfers between trusts (Clause 5(1) - (2))

59. The proposed amendments aim to ensure that the anti-avoidance measures apply in respect of any loans, advances or credit that a trust, directly or indirectly provides to a trust in relation to which, its beneficiaries or the founder are connected persons in relation to the founder or beneficiaries of the trust that provided the loan, advance or credit.

60. Section 7C was originally introduced to counter schemes whereby a person transfers his or her growth assets to a trust in return for a fixed loan without interest in order to avoid wealth taxes (donations tax or estate duty) on the growth asset (per the reasons/ explanations provided in the 2016 and 2017 EM to the Amendment Acts). In light of the above, the proposed amendment to section 7C does not make sense.

61. Also, the impact on existing structures where more than one connected person trust holds investments, funded or partly funded through loans between the trust needs to be considered. Such loans between SA trusts would not have resulted in additional wealth being transferred from a natural person or company to a trust (the original stated purpose for the introduction of section 7C) and has no bearing on companies in the Cayman Islands and share buy-backs that are not taxed.

62. The amendment will lead to double taxation. For example, the original loan by the natural person was made to Trust 1 and Trust 1 then uses these funds to lend to Trust 2. In terms of the current proposal to amend section 7C, both these loans would be subject to section 7C.

63. The amendment is thus extremely wide and will affect many *bona fide* inter-trust loans that bear no resemblance to the reason for the proposed change provided in the EM.

64. Extending loans to fellow family trusts or companies underneath trusts is within the trust principle of supporting beneficiaries and there is no reason why these loans should be subject to interest.

65. A further problematic situation would be where two trusts each hold 50% in a company and both or one of them have made loans to the company. It appears that the amendment will also catch a loan held as an asset by a PBO trust where both trusts have the same founder. If a trust makes a loan to its subsidiary and that company makes a loan to a company under a connected trust, are both of these loans then caught by the proposed amendment?

66. It also appears that the proposed amendment results in the deemed donation not being taxed in anyone's hands.

67. Submission: This proposed amendment should be withdrawn and alternative anti-avoidance measures aimed at the specific mischief, namely companies in the Cayman Islands where share buy-backs are not taxed, should be considered.

68. These could include more specific anti-avoidance rules (either "value shifting" or "dividend stripping" rules) to more effectively target the specific schemes mentioned in the EM.

Sections 8F & 8FA – Hybrid debt instruments and interest (Clauses 8 & 9)

69. The proposed amendments explicitly clarify that the provisions that deem the return from tainted debt instruments to be a dividend *in specie* paid by the issuer also extend to the holder or recipient of the tainted debt instrument.

70. Although this clarification is welcomed, it may be perceived as a substantive policy change rather than a mere clarification as the current wording of sections 8F(2) and 8FA(2) already indicate the double-sided application to both the issuer and the holder of an instrument. This is evident from the contrast in wording in sections 8E(2) and 8EA(2), which specifically mention "in relation to that person" and clearly only apply in relation to the holder of an instrument.

71. Submitted: The EM should more concisely explain that the proposed amendments to sections 8F and 8FA are not substantive policy changes but mere clarifications of the current and historic policy.

72. To avoid any confusion the section should specifically include a statement to the effect that the interest received by the holder will be deemed to be a dividend *in specie* and not taxed as interest received.

73. As this is not a policy change, the changes should be effective from the date of promulgation of the section rather than 1 January 2022 as is currently proposed.

74. Section 8F(3)(f) stipulates that section 8F will not apply to an instrument that constitutes a hybrid debt instrument solely in terms of paragraph (b) of the definition of hybrid debt instrument, if a registered auditor, as contemplated in the Auditing Professions Act, 2005 has certified that the payment by a company of an amount owed in respect of that instrument has been or is to be deferred by reason of the market value of the assets of that company being less than the liabilities of that company.

75. This means that if an auditor can certify that a payment in terms of a subordination agreement has been deferred by reason of the market value of the assets being less than the liabilities of the company, the exclusion to section 8F would apply and the instrument would not be regarded as a hybrid debt instrument.

76. The concerns we have in regard to the subordination of debt, as communicated to SARS in September 2016, remain and are as follows:

    a. 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.).

    b. In terms of paragraph 291.146 of the IRBA Code of Professional Conduct, when providing assurance services to an assurance client, a firm shall not assume a management responsibility as part of the assurance service.

c. Based on the above, obtaining a subordination agreement would be the responsibility of management and not at the instance of the auditor.

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

78. 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.

79. Submission: It is therefore suggested that the legislation be worded such that, to the extent that a company is factually insolvent and a subordination agreement has been entered into, the portion of the subordinated loan required to make good the net asset deficit would fall outside the scope of s8F but any balance of a subordinated loan in excess of the net asset deficit would be included within the scope of s8F. This would then result in management only entering into subordination agreements in response to the factual insolvency of a company and not for any other tax avoidance purpose.

80. If this is not acceptable, an alternative option is explained below.

81. As explained above, in this respect, the auditor currently has no obligation to SARS in the course of a normal audit engagement. SARS will therefore have to make use of information that is already available as a result of the normal audit process and with the link between the subordination agreement and the auditor's assessment of going concern, this could be found in the following places:

82. **The auditor's report:**

83. a). The auditor may have qualified his opinion based on the going concern basis of accounting not being appropriate or inadequate disclosure around the material uncertainties relating to the going concern assumption;

84. b). The auditor may have included an emphasis of matter based on material uncertainty relating to going concern (please note that in terms of the new and revised auditor reporting requirements effective for periods ending on/after 15 December 2016), this will no longer be an emphasis of matter but will rather be included as a separate paragraph within the auditor's report);

85. c). In the auditor's report this may be included as a key audit matter.

86. **The management report:**

87. This is issued by the auditor to the management of an entity and it would be assumed that if there is uncertainty relating to going concern, this will be included in such report.

Section 9D(9A)(a)(i)(aa) & (dd) – Controlled Foreign Company anti-diversionary rules (Clause 10(1)(c) - (d))

88. The proposed amendments seek to provide clarity in the anti-diversionary rules in respect of CFC outbound sale of goods, that an exemption is available if similar goods are purchased by the CFC, from an unconnected person in relation to the CFC, mainly from within the country in which the CFC is resident, if these goods are physically present or delivered within the country of residence of the CFC.

89. By inserting this requirement, the anti-diversionary rules may apply to CFCs who enter into genuine business transactions with persons outside of the country of residence of the CFC.

90. Submitted: The proposed amendments to section 9D(9A)(a)(i)(aa) and (dd) are too restrictive and should be withdrawn or alternatively the requirement for delivery should relate to the delivery of goods from the country of residence of the CFC to the South African resident rather than the delivery of goods to the CFC in its country of residence.

Section 9H(4)(g) – Tax on retirement fund interest when ceasing to be a tax resident (Clause 11(1)(a))

91. The proposed amendment ensures that when an individual ceases to be a South African resident, interests in retirement funds are subject to taxation in South Africa (an 'exit tax' is charged) at the same rates applicable to either a withdrawal benefit or a retirement benefit.

92. This is achieved by excluding retirement fund interests from the ambit of section 9H. However, retirement fund interests are not currently subject to taxation in terms of section 9H.

93. Submitted: It should be made clear why this amendment is deemed necessary and should state that it is merely a clarification and not a substantive policy change.

Section 9HC – Disposal of retirement fund interest on change of residence (Clause 12)

94. The new section 9HC proposes that when an individual ceases residency, the individual is deemed to have disposed of the individual's interest in the retirement fund and the value of the interest in this fund on the day immediately before ceasing to be a resident is treated as an amount accrued – that is, it is taxable. The tax is only due and payable once an amount is received from the fund.

95. 'Interest', calculated from the day immediately before a person ceases to be resident until the day the tax is paid in full to SARS, is proposed in terms of the new section 9HC(2)(b).

96. Thus, the Bill requires that the tax be levied on the individual on the day before the person ceases to be resident. However, the tax is only payable once the person withdraws (**prohibited for 3 years**) or retires from the fund. In the meantime, interest is payable on the outstanding tax. When the individual eventually exits from the fund, the tax on this exit will be determined on the member's total retirement interest on exit at the prevailing tax rate on the date of exit and will be reduced by a rebate, comprising the withdrawal tax and the late payment interest. The effective date of this proposal is 1 March 2022.

97. Since the tax is levied on an amount that can only physically be receivable in a minimum of 3 years-time, we question the reasonableness and possibly the constitutionality of the levying of the interest on this amount. Surely SARS cannot force a person to 'borrow' money from it and pay interest. SARS may wish to argue that the value of the fund will increase up to the period of the payment, but this is not always true and this has not been considered in the legislation.

98. The legislation has also not taken into consideration further amendments that will be required to achieve the desired effect. Examples of this are that interest in terms of section 189 of the TAA (interest on late payment) can only be applied if a debt is due and payable (which this debt is not) and section 187(3) of the TAA which determines when interest can be charged has not been broadened to include the proposals. In addition, the deemed withdrawal benefit is deemed to be taxable in terms of paragraph 2(b)(ii) of the Second Schedule, yet there is no amendment to that Schedule to tax this deemed withdrawal. The Fourth Schedule has not been amended to cater for the deduction by an employer of PAYE in respect of the deemed withdrawal and interest element. Not to mention the necessary amendments that would need to be made to the Pension Funds Act and rules to ensure that they give effect to the proposed amendments.

99. Furthermore, the section also does not cater for individuals that cease to be a resident and then again become a resident of South Africa, for whatever reason (residence test, physical presence test or in terms of a DTA).

100. The section also stipulates that the "value of the interest" disposed of must be treated as an amount accrued to the person. No guidance is provided as to what is meant by value and how it is to be determined and this may differ per fund.

101. It is also not clear from the proposed legislation, on how the deemed 'exit tax' calculated will be offset against the actual liability on withdrawal.

102. It would appear that the exit charge is seen as a "provisional payment" followed by the actual charge with credit given, and appears to attempt to create the impression that the tax is actually being levied on retirement, so that full credit for South African tax should be given in the country of residence (assuming that the DTA allows South Africa as the country of source to tax it in the first instance and does not give the exclusive taxing right to the residence country).

103. If this is the case, we doubt that the residence country will accept this, especially given that the emigrant's tax year is deemed to end on the day before s/he actually ceases residence, at which date the liability for provisional payment crystallises.

104. The Budget documentation was quite open about the fact that the reason for this is that South Africa is losing tax because the individuals retire after they have ceased residence and the DTA gives taxing rights to the residence country. This is not the emigrant's/taxpayer's fault or doing; these agreements were negotiated by the South African Government, they were signed by the South African Government and they were ratified by the South African Parliament, so if these agreements have left a 'loophole' in the tax system, then the South African Government is at fault. And its remedy should not be to place an undue administrative burden on the emigrant nor should the emigrant be put in the position of paying double tax (see below) as this is in clear violation of the spirit of an international agreement concluded by South Africa.

105. Furthermore, if the fiscus is going to get the 'exit tax' upfront, how can it be justified that the requirement to be a non-resident is that the person must wait for three years before he/she can access his/her retirement savings? As mentioned above, this is not only unfair but also unconstitutional for members to have both a three-year waiting period as well as a deemed withdrawal immediately prior to ceasing to be a resident and then being forced to pay interest on the deemed withdrawal while being prevent from exiting and actually withdrawing the funds to avoid the payment of the interest.

106. Under the current proposals, the individuals who wish to remain in the fund and to retire from the fund will be disadvantaged just because the individual ceases to be resident. The constitutionality of treating members differently depending on whether they are tax resident or not is also questionable. In many of the cases individuals who emigrate may still be subject to tax in terms of the relevant DTA (not all DTA's give taxing rights to the country of residence) and this could give rise to **double taxation**, as the amount is subject to tax both in South Africa and in the foreign country.

107. The proposed amendments thus seem to circumvent the reason for the introduction of DTAs (being to avoid double taxation) and their inclusion in section 108 of the Income Tax Act. Disregarding the fundamental principles underlying international tax law does not comply with section 39 of the Constitution which states the following:

> "*When the courts are deciding a case on the Bill of Rights, they must promote the values of an open and democratic society based on freedom and equality. They must <u>look at international laws</u> (such as the Universal Declaration on Human Rights) and at the <u>way courts in other countries have decided similar cases</u>*."

108. <u>Submission:</u> Considering the dire impact these proposed changes will have on the retirement industry and ultimately the economy, the proposed amendment should be withdrawn and further consultations should be held on this matter.

109. Should the government still want to address the concern of erosion of the tax base due to emigration, the relevant DTA's that are of concern to the government should be renegotiated accordingly.

Section 11D – Research and Development incentive

110. This incentive was introduced in 2006 and provides government support to reduce the cost of research and development for private companies. This tax incentive expires on 1 October 2022 but in terms of the announcement in the 2021 Budget Speech, NT is in the process of reviewing the incentive.

111. It is our understanding that a discussion document on the future of the incentive will be published by the Department of Science and Innovation (DSI) during 2021 and this will be available for public comment. This has not yet been released to date.

112. It is becoming apparent that due to the uncertainty on the future of the incentive, companies do not want to apply for the incentive if they will only benefit from it for a year (at most).

113. Submission: The incentive should be extended in its current form until the review has been completed, similar to the conservative approach followed for the section 12H and section 12R incentives. This would provide an interim measure of certainty for businesses and act as a further incentive for businesses to keep their research and development expertise and operations in South Africa.

Section 12I – Industrial Policy Projects incentive (Clause 16)

114. The proposed amendments aim to extend the time period within which approved projects must comply with the provisions of section 12I as well as an extension of the "compliance period" within which approved projects must fully comply with the provisions of section 12I.

115. Although we welcome the extension of the "compliance period" within which approved projects must fully comply with the provisions of section 12I of the Act, the requirement that each project must be assessed on a case-by-case basis creates uncertainty for taxpayers as the new provisions will first have to become effective before a case can be made to the Department of Trade Industry and Competition (DTIC) to extend the compliance period for a project. This requirement also further increases Government's administrative burden.

116. Submission: An automatic extension of the compliance period from four years to five years, without a taxpayer having to apply to the DTIC for such extension, should be provided.

117. Should a taxpayer require a further extension beyond this, a case should then be made to the DTIC as to why an additional extension is required. This would provide much needed certainty for current approved projects and would reduce the administrative burden for taxpayers and the Government.

Section 20(1) – Restricting the set-off of the balance of assessed losses (Clause 19)

118. As mentioned by the Minister of Finance in the Budget Speech 2021, the introduction of the assessed loss carry forward restriction was linked to the reduction in the corporate tax rate from 28% to 27%.

119. Currently the DTLAB is silent on the proposed reduction of the corporate tax rate and what is concerning is that the calculations in the example with the limitation of assessed losses still use 28% as the tax rate for the 2022 year of assessment and not the promised 27%.

120. Submission: The intended lower tax rate, as committed to by the Minister of Finance in his Budget 2021 speech, must be addressed in the DTLAB at least in terms of the assessed loss examples.

121. The proposed amendment seeks to restrict the offset of the balance of assessed losses carried forward to 80% of taxable income. This amendment applies across the board, irrespective of the size of the entity and its assessed loss – that is, there is no threshold providing relief to small businesses.

122. Along with this concern and the arguments that the timing is ill-advised due to the fact that many, especially smaller, businesses have only just managed to survive the ravages of the COVID-19 pandemic and need to recoup their losses before paying any tax, there are technical failings of this proposed legislation.

123. The corporate rules do not include any direction as to what happens to ring-fenced losses that arise on sale of assets which have been the subject of a corporate rule and then sold for less than the transferred base cost (s11(o) claims). Must only 80% of these losses be offset against future recoupments of allowances on assets that were part of the same corporate rule transaction?

124. The effect of these provisions on REITS would result in REITS having a tax liability despite having distributed all of their profits. This undermines the flow-through principle applicable to REITS.

125. Furthermore, the impact of this proposal on the additional allowances permitted in terms of certain tax incentives that lead to tax losses, also needs further consideration as the proposed amendments could erode the value of these incentives and be to the detriment of investment decisions.

126. Submission: We propose that the implementation of this proposal be delayed for at least two years (i.e. the effective date should be 1 April 2024) to not only allow companies to improve their cash flow positions but also to allow time for all permutations and implications of the proposed amendment to be considered.

127. The proposed rate reduction may then also have to be delayed.

Section 23M – Definition of "adjusted taxable income" (Clause 20(1))

128. As a principle, section 23M applies to interest deductions in respect of debts owed to persons not subject to tax in South Africa, if the debtor and the creditor are in a controlling relationship. Payments under an interest rate swap may not necessarily be in respect of a debt owed – it could be in respect of a pure trading swap arrangement.

129. Submission: These kinds of payments should not be caught by section 23M as they are not in respect of debts owed. NT should provide this clarity in this regard in the legislation.

Section 23M – Definition of "interest" (Clause 20(1)(a) / (c))

130. Clause 20(1)(c)(b) of the proposed amendment to the definition of "interest" in section 23M specifically includes "*any finance cost element included in amounts deducted from or included in income in respect of any lease arrangement recognised as finance lease in accordance with IFRS16*".

131. Typically, these finance charges would not be deductible (rather the actual lease payments are typically deductible for income tax purposes) by lessees, so it uncertain who this was meant to apply to. Furthermore, IFRS 16 does not distinguish between an operating lease and a finance lease for lessees.

132. Submission: The EM should provide clarity in relation to the above and the definition of interest should be reconsidered with respect to the application of IFRS 16.

133. Clause 20(1)(c)(c) of the proposed amendment to the definition of "interest" in section 23M specifically includes "*amounts taken into account in determining taxable income in terms of section 24I(3) and (10A)*". Foreign exchange gains or losses are not interest, however, it is acknowledged that the OECD have stated that certain foreign exchange differences can be regarded as interest, but only those that are connected with the raising of finance.

134. Submission: Paragraph (c) should be amended so as to exclude foreign exchange losses. Should this not be acceptable, then only foreign exchange differences connected with the raising of finance should be included in the definition of interest.

135. NT should provide clarity as to whether the currency gains would constitute interest income with currency losses constituting an interest expense.

136. It is not clear what is meant by the words "taken into account" in determining taxable income when reference is made to 24I(10A). For example, if an exchange difference is to be deferred in terms of section 24I(10A), is the exchange difference "taken into account" or not?

137. Submission: The quoted phrase should be replaced by "included in or deducted" if paragraph (c) is to be retained at all.

138. Currency gains and losses determined in terms of section 24I(3) and 24I(10) of the Income Tax Act are to be included as interest. In the spirit of section 23M, the currency gains and losses should be those in respect of debts owed between a debtor and a creditor in a controlling relationship. Not all transactions, such as hedging arrangements for interest and currency exposures with a counterparty that is not in a controlling relationship with the debtor (even though the debtor may be connected toa debt to which section 23M does apply), appear to be included in this requirement.

139. Submission: NT should provide further clarity on this in the legislation.

140. Overall, the interest definition has been expanded to include a wider concept of interest, however, this definition does not include all the examples provided in the discussion document released by NT (Excessive debt financing, interest deductions and other financial payments). Also, the alignment of the definition of the hybrid rules applicable to hybrid debt instruments, hybrid interest, hybrid equity instruments and third-party backed shares does not appear to have taken into account.

141. Submission: NT should ensure that all the necessary concepts of interest have been included in the definition of "interest" to ensure that no potential gaps exist. Alignment with the hybrid rules should also be taken into consideration in the definition of interest.

Section 23M(2) – Formula (Clause 20(1)(g))

142. It is proposed, in order to achieve a more consistent treatment for all resident debtors paying interest, that for cases where a resident debtor makes an interest payment and the payment attracts withholding tax on interest at a rate higher than zero, a portion of the deduction for interest expense be subject to section 23M limitation applying the formula contained in Clause 20(1)(g) of the DTLAB.

143. In the proposed formula, B represents the aggregate interest subject to withholding tax. This is too broad and will also include interest incurred or paid to persons who are not in a controlling relationship with the taxpayer.

144. Submission: It is recommended that B be limited to interest incurred or paid to which section 23M(2)(a), (b) or (c) applies.

145. The "D" component in the formula is incorrect.

146. Submission: The "multiplied by the number 100" should be removed.

Section 23M(7) – Exchange differences (Clause 20(1)(i))

147. As discussed above, exchange differences are not interest and should therefore not be included in the definition taking the comments above into account.

148. Submission: Section 23M(7) should be deleted.

149. Should this not be accepted, the wording of subsection (7) should speak to the proposed paragraph (c) of the definition of interest. Currently the proposed subsection (7) uses the word "incurred" whereas the proposed paragraph (c) uses the words "taken into account", which is confusing.

Section 23M – *De minimis* rule

150. The proposed changes to section 23M do not include a *de minimis* rule for smaller companies, as was proposed in the discussion document and is applied in many other countries that have an interest deduction limitation.

151. Submission: A *de minimis* rule should be included in section 23M.

Section 23M – Interaction with section 31

152. According to NT's document setting out the 'Tax treatment of excessive debt financing, interest deductions and other financial payments', section 31 should apply before section 23M.

153. Despite SAICA's request, in its submission on this document, submitted to NT on 30 September 2020, for a clear hierarchy of applying section 31 and the new interest limitation rules submission, no clarity in this regard has been provided in the legislation.

154. Submission: The legislation should address this matter taking into account that it would make sense to apply the interest limitation rules as a specific section before the application of a general anti avoidance provision such as the transfer pricing rules.

155. From a practical perspective this may also prove a cost-effective approach for many companies, avoiding the need for expensive transfer pricing analyses.

Section 23M – Safe harbour rule

156. Despite SAICA's request, in its submission on this document, submitted to NT on 30 September 2020, for a safe harbour in respect of thin capitalisation, no such safe harbour has been provided in the legislation.

157. Submission: The legislation should introduce a safe harbour to ensure simplicity and certainty.

Section 23N – Interest limitation in reorganisations and acquisitions (Clause 21)

158. The proposed amendment seeks to limit interest deductions in respect of reorganisation and acquisition transactions to 30% of adjusted taxable income as a consequential amendment following the proposed 30% limitation on section 23M cases.

159. It is not clear why the deduction formula in section 23N should be amended simply because an amendment is proposed to section 23M. The EM also contains no rationale for this.

160.	Submission: Since no reason has been given for the proposed amendment of section 23N, it is recommended that section 23N remains as is.

161. Arrangements to which section 23N apply will often be entered into with persons who are indeed subject to tax. Therefore, the policy considerations underlying the proposed 30% limitation on section 23M cases do not apply to pure section 23N cases.

162.	Submission: If a 30% limitation is to be introduced to section 23N at all, it is recommended that this only apply to cases where a section 23N arrangement also gives rise to the application of section 23M.

163. The proposed amendment to section 23N is proposed to come into operation on 1 April 2022. This is in effect a retrospective amendment as the limitation will seemingly apply to existing arrangements previously entered into. Tax laws which place a burden or restriction on taxpayers should, as far as possible, be amended with prospective rather than retrospective effect.

164.	Submission: If section 23N is to be amended at all, it is recommended that this amendment only apply in respect of future arrangements.

Section 40CA – Acquisition of assets in exchange for shares (Clause 25)

165. The proposed amendment addresses the anomalous results currently arising from the interaction between anti-value shifting rules in section 24BA and 40CA and the corporate reorganisation rules.

166.	Submission: In paragraph (a) of the proposed new section 40CA, the words "from any person in exchange for shares issued by that company" should be followed by "other than in circumstances contemplated in paragraph (b)" to avoid confusion.
167.	It is not clear from the brief clarification in the EM in which circumstances paragraph (b)(ii) of the proposed new section 40CA will apply and more comprehensive clarification in the EM is needed.

Section 42(8) – Asset for share transactions - Additional consideration (Clause 26)

168. The proposed amendment extends the application of section 42(8) to where the shares were disposed of following another corporate restructure by ensuring that additional consideration accrues to the transferor in relation to any assumed debt immediately before any subsequent disposal of the shares acquired in terms of an asset-for-share transaction. Thus, tax is payable on the additional consideration that is triggered immediately before the subsequent disposal of the shares.

169. An example is as follows: A company acquires an asset with a base cost of R100 and assumes a liability of R80. So, the asset in the acquiring company's hands has a base cost of R100, the CTC is R100 (even though the share capital credited for accounting purposes is R20) and the shares issued by the company have a base cost in the disposer's hands of R100 (even though economically the shares were issued to him/her for R20).

170. If after a couple of years the shareholders were to sell the shares for, say, R140, commercially the profit is R140 – R20 = R120, but the excess of proceeds (R140) over base cost (R100) is only R40. So by adding an amount equal to the debt to sale proceeds, giving deemed proceeds of R140 + R80 = R220, the capital gain becomes R220 – R100 = R120, which equates to the commercial profit. This is fair.

171. The problem arises if those shares are, distributed by way of a liquidation distribution under section 47, or exchanged under another section 42 transaction, or sold under a section 45 transaction – now in the next holder's hands the base cost is R100, with no obligation on the next holder to add the amount of R80 onto proceeds when it sells the shares.

172. So the proposal is to extend the obligation to successor holders. Legally this makes all the sense in the world, but from a practical recording and compliance perspective it creates a nightmare. How is one practically supposed to expect successor holders to be aware that they need to add the amount of debt when the first acquirer was supposed to, and the latter might have acquired the shares (say) 10 years before. In fact it is a challenge for the first acquirer to comply if it sells to a third party after having held the shares for a long time, and it is even a bigger challenge for SARS to police the requirement.

173. <u>Submission:</u> In the interests of both the taxpayers and of SARS, we believe that a far simpler solution would be that, in the initial section 42 transaction, the shares issued to the disposer should have a base cost equal to the base cost of the asset transferred less the amount of the debt assumed. In the above example the base cost of the shares would be R20.

174. Apart from the fact that this accords with the commercial transaction and the accounting treatment, there is no need to build in any further compliance requirements, because automatically it will ensure that a sale will result in the correct capital gain. Moreover, it is not necessary to impose any similar obligation upon a successor holder under a corporate restructure transaction, because the successor holder will automatically "inherit" the lower base cost (R20 in this example).

175. Even if there is some technical preference for the proposed change, we submit that simplicity, practicality, certainty and the security of knowing that one is paying the correct amount of tax, for all – including SARS – should trump a technical argument.

Section 45(3B) – Intra-group transactions (Clause 27(1)(a))

176. The proposed amendment applies where the acquisition of an asset in terms of an intra-group transaction is funded by the issue of debt or non-equity shares.

177. A de-grouping charge is triggered when a transferee company ceases to form part of any group of companies in relation to a transferor company or controlling group company in relation to the transferor company (section 45(4)(b)). However, section 45(3B)(a)(i) only refers to a transferee company and a transferor company ceasing to form part of any group of companies.

178. Submission: Section 45(3B)(a)(i) should be extended as mentioned above.

179. It appears that the base cost rule continues to apply where an asset is disposed of more than 18 months after having been acquired in terms of section 45 transaction outside the corporate reorganisation rules.

180. Submission: Section 45(3B) should apply not only to disposals within 18 months but also to any disposals by transferee companies outside of the corporate reorganisation rules.

Section 46(3B) – Intra-group transactions (Clause 28)

181. The proposed amendment allows a proportionate share of the tax paid by an unbundling company as an uplift to the base cost of the shares of non-disqualified shareholders in an unbundling transaction. This is achieved by the proposed addition of paragraph (iii) to the definition of "expenditure" in section 46(3)(b).

182. Shareholders are unlikely to know how much tax the unbundling company paid and thus might have difficulty determining the base cost of their shares. Furthermore, the amendment ignores the effect of the denial of unbundling relief to part of a transaction.

183. Submission: The ordinary rules for distributions should apply to all shareholders proportionate to their shareholding to the extent that any shares distributed do not qualify for relief.

Section 57B – Cession of right to receive an asset (Clause 33(1))

184. The new section 57B deems an asset to be disposed of under a donation where a right to receive an asset, which asset would otherwise have been acquired in respect of services rendered or to be rendered, is disposed of.

185. This is an anti-avoidance measure aimed at preventing the circumvention of donations tax in particular circumstances involving the cession of the right to receive or use an asset in return for services to be rendered in future.

186. Submission: There appears to be an oversight in that subsection 2(a) of the proposed section 57B only refers to paragraph (c) of the definition of "gross income" and not paragraph (i) of that definition.

Paragraph 2(2B) (Fourth Schedule) – Withholding of employees' tax (Clause 38)

187. It appears that the intention is that annuities paid by funds and licenced insurers under the Insurance Act, will apply to SARS for a directive to withhold employees' tax at a fixed tax rate that the Commissioner directs must be used where the person, to whom that annuity is paid, receives an amount of remuneration from more than one employer.

188. It is assumed that the 'fixed rate of tax', is a reference to a rate which the employer will have to apply to the annuity (to be paid to the annuitant). From the SARS website it is clear that the intention is that all the remuneration of the individual will be added together when SARS determines the 'fixed rate'.

189. The problem is that the annuitant, or taxpayer, may have requested another employer to make a greater deduction of employees' tax, in terms of paragraph 2(2) of the Fourth Schedule. The question then is, (not only in March 2022 but also subsequently), how will SARS know that there is such a request in place? When such a request is made by an annuitant, the employer doesn't inform SARS thereof.

190. Submission: The legislation should provide for this possibility by requiring SARS to determine from the annuitant whether such a request is in place (or intended to be made). SARS should then take the amount of the voluntary deduction into account when the 'fixed rate' is calculated.

Paragraph 5 (Seventh Schedule) – Acquisition of asset at less than actual value (Clause 41)

191. The words "or gift vouchers" are added after the words "any asset" in paragraph (b) of the further proviso to paragraph 5(2) of the Fourth Schedule.

192. This is confusing considering that gift vouchers are already regarded as "any asset".

193. Submission: The need for the addition of "or gift voucher" should be reconsidered.

194. It is also submitted that similar amendments as have been proposed for long service awards, should be enacted for bravery awards as well.

VALUE ADDED TAX ACT

Section 18D – Temporary letting of residential property (Clause 54)

195. A new section 18D deems a change in use adjustment when residential fixed property is leased for the first time by property developers, based on the adjusted cost of the fixed property.

196. This section also states that the subsequent sale of the fixed property is deemed to be a taxable supply and takes place in accordance with section 9(3)(d) – that is, the supply is deemed to take place on registration of transfer or date of any payment, whichever is the earlier.

197. The deemed supply is deemed to be made for a consideration in section 10(2) less so much of the amount of VAT paid when the fixed property was leased.

198. Unfortunately, the VAT payable on the change in use adjustment when residential fixed property is leased for the first time by property developer is still disproportionate to the exempt income earned by the developer despite the proposed change when considering the cash flow implication of the VAT payable (which has to be funded until the property is sold).

199. Submission: The law needs to be amended where it remains the intention of the developer to sell the units as soon as buyers can be found, and the developer still reflects the units in its financial records as assets held for sale, as there is no permanent change in the use or application of the unit. Such units are sold in the course or furtherance of an enterprise carried on by the developer and attract VAT in terms of section 7(1)(a) of the VAT Act.

200. To cater for the change in use, the following formula can be used to determine the VAT payable on the change in use (similar to what has been used in other jurisdictions such as the UK, Australia and New Zealand):

$$\frac{\text{Estimated selling value}}{\text{Estimated selling value + Actual rental income}} \times 100$$

201. This adjustment should be made to the adjusted cost on an annual basis in the tax period in which its financial year ends.

202. These amounts would then be deducted from the output VAT due on the sales consideration once the property is eventually sold.

203. Unless the developer can prove otherwise, should the letting continue for more than say, three years, the developer would then be considered to have made a permanent change and would then be required to make an adjustment in relation to the balance of the adjusted cost.

204. With regard to the subsequent sale of the property, this sale is not required to be a deemed supply as set out in section 18D(3) as it would be an actual sale/supply. This supply would then automatically be regarded as a supply of fixed property falling within the ambit of section 9(3)(d). Section 18D(3) can thus be deleted.

205. The changes are deemed to have come into operation on 1 April 2022.

206. Although the relief is welcomed, 1 April 2022 is considered to be too late to assist developers who have been struggling with cash flow difficulties for a while now, especially since the COVID-19 pandemic hit our shores.

207. Submission: Considering the current dire financial situation of the South African economy and particularly on the developers, relief should be provided to developers, not just from 1 April 2022 but from when 1 January 2018 when section 18B (previous relief provided for temporary letting of residential fixed property) was withdrawn.

208. Should this not be acceptable, relief should then be provided from when the first lock down in South Africa occurred – 26 March 2020.

SECURITIES TRANSFER TAX ACT

Section 40CA – Rehypothecation of collateral (Clause 56)

209. Proposed changes are to be made in the Securities Transfer Tax ("STT") legislation to clarify the policy intention that the shares or bonds transferred as collateral in terms of a collateral arrangement may subsequently only be used for collateral and not be used for trading or in other financial transactions.

210. It is also proposed that the same policy clarification be extended to government's ability to identify and sanction the improper use of the collateral received by the transferee during the 24-month time frame of collateral arrangements.

211. It is well known that in the financial sector industry, rehypothecation reduces the cost of pledging collateral, reduces funding liquidity needs and improves market liquidity. These benefits were acknowledged by NT in the EM to the Taxations Laws Amendment Bill 2015 when changes were made to allow for outright transfer of collateral without triggering adverse securities transfer tax and capital gains tax implications by stating the following:

"*The benefits of an outright transfer of collateral have been identified by the financial sector industry as:*

- *assistance to the financial sector industry in meeting regulatory changes and demands;*

- *increase in availability of high quality liquid assets which directly increases market liquidity;*

- *reduction of transaction costs and market pricing because of the ability to rehypothecate collateral and reduce tax costs; and*

- *making South Africa more attractive as an investment destination*."

212. NT explains the rationale for the proposed changes as follows:

> "*At issue is the rehypothecation of collateral, where the bank, broker dealer or collateral taker (transferee) intends to use collateral received through a tax-neutral collateral arrangement for trading or as security for its own borrowing. The use of collateral for purposes other than subsequent collateral arrangements is against the policy rationale for the introduction of these provisions and could result in the avoidance of securities transfer tax or capital gains tax*."

213. It is unclear how the use of collateral for purposes other than subsequent collateral arrangements could result in the avoidance of securities transfer tax or capital gains tax or loss to the fiscus. Firstly, a collateral arrangement is a defined concept in the STT Act and any arrangement falling outside of this definition is subject to STT. Secondly, a transfer of an asset as security for debt or by a creditor who transfers that asset back to that person upon release of the security is nonetheless not a disposal for capital gains tax – an embedded principle in the capital gains tax legislation. Thirdly, any trading profits arising from trading collateral are subject to income tax principles and taxed accordingly.

214. It is therefore punitive to unwind a clearly defined tax position of a collateral arrangement structured within the legislation because of a subsequent transaction (rehypothecation of the collateral) that poses no loss of tax revenue to the fiscus; in this regard the fiscus does collect the tax due within the tax framework.

215. This limitation erodes the benefits of rehypothecation of collateral to the financial sector as listed above, which benefits NT themselves have acknowledged.

216. This is a regressive position (one step forward and two steps backwards) without a clear indication and articulation by NT of how the risk of avoidance of securities transfer tax or capital gains tax arises from rehypothecation of collateral.

217. <u>Submission:</u> Tax legislation should not be used as a tool to address abusive positions in financial markets – the correct legislation should be used. The actual impact (or potential negative impact as perceived by NT) of this proposal should be fully considered and evaluated by means of consultation with the financial sector industry as it may be that NT's concern is unwarranted due to (i) the small market of rehypothecation of the collateral and (ii) unlikely tax erosion.

EMPLOYMENT TAX INCENTIVE ACT

Section 1, 6 – Curbing abuse in the employment tax incentive (ETI) (Clause 59)

218. The proposed amendment aims to confirm the policy position of NT that an employee must actually work for an employer in terms of an employment contract and the employee must be documented in the employer's records as envisaged in section 31 of the Basic Conditions of Employment Act.

219. The definition of "employee" in section 1 of the ETI Act, was amended with retrospective effect by the Taxation Laws Amendment Act 23 of 2018 and was deemed to come into operation on 26 July 2018. In terms of that amendment, it is no longer a requirement that the natural person works "directly" for another person.

220. Our understanding of the amendment is that the employee will be considered as working for an employer if remunerated by that employer but may perform services for a third party in terms of an agreement with that employer.

221. Submission: If NT's view is that the person must work 'directly' for the employer with whom the individual has an employment contract, then consideration must be given as to how this can be clarified.

222. What does not appear to be addressed is where employees are seconded to an "intermediary" in terms of learnerships and apprenticeships. We understand that there is a risk that this could be seen as a "temporary service" in terms of the Labour Relations Act and affected employees could be seen to be deemed employees of the "intermediary".

223. Submission: NT should clarify if an employee will be considered as working for an employer if remunerated by that employer but where the employee may perform services for a third party in terms of an agreement with that employer. Consideration of the treatment of secondment agreements should also be included in this clarification.

224. Clarity should also be provided on how the different Acts (such as the Labour Relations Act and Basic Conditions of Employment Act) are inter-related and remove ambiguities and/or contradictions in the application thereof, in determining the correct meaning of "employee" for purposes of the ETI Act. This guidance is necessary as this would affect whether or not the employer qualifies to claim the ETI.

225. The term "wage" is defined in section 1 of the ETI Act and means: '*wage as defined in section 1 of the Basic Conditions of Employment Act No. 75 of 1997*' (the BCEA).

226. The term "wage" is defined in the BCEA as: '*the amount of **money** paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week*'. (our emphasis)

227. Based on the above, there is an argument that the term “wage” as defined in the BCEA means **cash** and not a payment in kind.

228. Furthermore, the word “paid” is not defined in the ETI Act and therefore one would need to refer to the ordinary meaning of the word. The word “paid” means being given money for something, in this case – work performed.

229. There are schemes whereby the employees do not/will not receive payment from the employer, since the employer must pay such remuneration to, for example, a consulting firm or training college under the relevant agreement, on a monthly basis. In some instances, the agreement will provide that the employees ‘cede’ their remuneration to the consulting firm or training college.

230. In such circumstances, it is envisaged that the employees will have a right or entitlement to remuneration from the employer and then cede such right or entitlement. So, whilst the requirement that remuneration is ‘paid or payable’ will be met, there needs to be consideration of whether or not the requirement of the minimum wage being paid to the employee, in terms of section 4, has been met. If not, the employer will not be entitled to claim the ETI.

231. To this end, clarification may be necessary to ensure that there is a clear requirement for the employee to receive a cash payment from the employer.

232. Submission: The definition of wage should be clarified to provide that this must be a cash payment.

CARBON TAX ACT

Schedule 2 – Reporting requirements for poultry (Clause 64)

233. The changes to Schedule 2 of the Carbon Tax Act include a change to the reporting threshold for poultry. Activities now reportable to the Department of Forestry, Fisheries and Environment now include poultry with a threshold of 40 000 places for poultry (previously nil).

234. Submission: The reason for only including poultry, and not other farming activities (such as cattle farming), in the reporting requirements should be provided in the EM.

SECOND BATCH OF THE DRAFT TAX ADMINISTATION LAWS AMENDMENT BILL 2021

DISASTER MANAGEMENT TAX RELIEF ADMINISTRATION ACT, 2020

Section 1 – Definition of 'qualifying taxpayer'

235. To qualify for the new PAYE and ETI relief, a taxpayer must be a 'qualifying taxpayer' which is defined as a person conducting a trade. Public Benefit Organisations (PBOs) approved in terms of section 30 of the Income Tax Act and many other exempt organisations such as recreational clubs, professional bodies and schools are effectively excluded from this definition as most of them do not conduct a trade. As many of these organisations are not excluded from withholding employees' tax from their employees, they will not be entitled to the employees' tax relief provided in terms of the second batch of the Draft TALAB Bill.

236. These organisations, PBOs in particular, play a major role in SA by undertaking a shared responsibility for the social and developmental needs of our country and have been hit the hardest in terms of the closure and disruption of the economy. Given that these organisations rely primarily on donations and many maintain budgets on a month-to-month basis, the lockdown has caused severe financial hardship impacting the short to medium term sustainability of these organisations. Whilst even salaries to employees may prove difficult to pay for many organisations, these financial incentives will alleviate significant pressures currently faced by this very important sector of our country.

237. Submission: As these organisations, especially PBOs, play a significant role in our society and have been affected dramatically by the COVID-19 lockdown (and will be affected for many months thereafter as they may no longer receive donations that they previously relied upon), we submit that the definition of 'qualifying taxpayer' should be amended to include these organisations as mentioned above.

MATTERS NOT ADDRESSED IN DRAFT TAX BILLS 2021

Fringe benefit relief for support to staff affected by the recent unrest

238. With the recent unrest and resultant looting, companies with staff members in the affected areas (especially KZN) provided basic necessities and other support (e.g. ambulance service for staff in distress) to staff members at no cost to latter. Of concern are the fringe benefits tax implications of this support.

239. Submission: Relief from the fringe benefit arising from the provision of food parcels, security support, evacuation, temporary accommodation, clothes etc. provided by employers to their employees that were affected by the recent unrest should be provided.

Essential service relief

240. Many individuals are still putting their health and that of their families at risk by being in the 'front-line' in the fight against COVID-19 without any form of compensation.

241. Submission: In recognition for the services performed by these individuals, the remuneration earned by them during this period should be treated as a qualifying donation in terms of section 18A. Essentially, this will allow these employees to claim a 10% deduction against their taxable income.

242. The provisions of section 5(10) of the Income Tax Act could also be extended to all employees of businesses which qualify as essential services. A qualifying employer will thus have the flexibility to structure payments to its employees as 'special remuneration'. This will ensure that the amount paid is not added to the monthly remuneration which is annualised in order to calculate the employees' tax. This will result in a direct cash-flow increase for the individual, but ultimately the correct amount of employees' tax is still paid to SARS.

243. The 'payroll giving' provisions of paragraph 2(4)(f) of the Fourth Schedule to the ITA should be amended to allow for a deduction of 10% (or higher percentage) in calculating the employees' tax to be withheld. This will have the effect of an immediate cash-flow benefit for such employees.

Home office allowances

244. We once again note our disappointment that our comments on the 2020 Disaster Management Tax Relief and Tax Administration Bills (17 July 2020), the 2020 Annexure C submission (23 November 2020) and on the SARS' draft Interpretation Note 28 (Issue 3) (14 June 2021) were not considered and that the strict requirements of section 23(b) still stand with no amendments/relaxations.

245. Submission: The current law ignores that it is highly likely that many employers will not require employees to return to the offices on a full-time basis, meaning that the home office will become a permanent location of work for many employees regardless of the lockdown restrictions. This needs to be considered when contemplating amendments to section 23(b) and/or 23(m) in order to enable an equitable tax regime relating to the future working environment. Section 23(b) has an extremely narrow application and should be expanded to accommodate the "new normal".

246. We strongly feel that there should have been a certain degree of relaxation in the legislation especially in relation to the requirement in section 23(b) that the home office be "exclusively" used for the purposes of trade.

247. Consideration needs to be given to amending the definition of "exclusively used" to "used as a home office for substantially the whole time". This wording is also consistently used throughout the Act to convey a much stricter application than "mainly" but to allow for practicality of other uses.

248. Furthermore, we believe SARS' interpretation of "such part" in section 23(b): that this relates to a specific room, does not correctly reflect the law. Where the same part is exclusively used for carrying on a trade by more than one taxpayer it should be allowed as a deduction for both in equal parts and this should be clarified in the legislation.

249. In addition to the above, the scope of qualifying expenses for purposes of section 23(b) should be expanded. An example of items that should be included in the section and allowed as a deduction, would be a salaried employee meeting all the other requirements of sections 23(m) and 23(b), having to incur costs such as printing paper, cartridges, stationery, fast/stable internet (such as fibre), security costs etc. relating to working from home.

250. Regarding internet costs, taxpayers have had to upgrade their internet and telecommunications systems in order to increase bandwidth so that they can carry out their employment duties effectively, including participating in virtual meetings/video conferences and being available on their cell phones (sometimes requiring the installation of boosters etc).

251. Once-off expenses incurred specifically due to working from home e.g. a generator and internet installation costs, should also be considered for an outright deduction or at least these expenses should qualify for a wear and tear allowance.

252. Thus, the interpretation of the provision "expenses in connection with premises" in section 23(b) should be extended to include the costs of equipping the home office with the necessary consumables (stationery, insurance etc) and running costs (e.g. monthly charges in respect of communication services).

253. The legislation should be amended to accommodate the deduction of these costs, considering the "new normal".

254. Furthermore, relief should be provided from the pro-rata capital gains tax that will arise on the subsequent sale of the house due to the section 23(b) claims that were allowed, for at least the period covered by the lockdown.

Constitutionality of various provisions in the legislation

255. SAICA has over the years expressed its concerns over the constitutionality of powers provided to either the Commissioner of SARS (CSARS) or NT. Examples of these include:

    a. The constitutionality of the default judgment procedures in terms of section 172 - 176 of the TAA (see SAICA's 2020 TLAB submission dated 20 October 2020 and the Annexure C 2021 Budget Review submission dated 23 November 2020) where SARS argues that these procedures fall outside of judicial oversight and are thus not subject to judicial review;

b. the removal of the requirement of "wilfulness" from certain statutory offences that could result in selective or arbitrary prosecution by SARS (see SAICA's Annexure C 2021 Budget Review submission dated 23 November 2020); and

c. the powers of CSARS to prescribe the List of Qualifying Physical Impairment and Disability Expenditure (see SAICA submissions dated 24 May 2019 and 31 May 2021) allowing CSARS to determine what is tax deductible or not.

256. Added to this list is NT's power in terms of section 10(1)(r) and the newly proposed section 9HC as discussed earlier in this document.

257. Section 10(1)(r) of the Income Tax Act affords NT the power to declare free of tax, any gratuity (other than a leave gratuity) received by or accrued to any person from public funds upon his retirement from any office or employment, or from funds of the Land and Agricultural Bank of South Africa upon his retirement as a member of the board of the said bank.

258. The proposed section 9HC also proposes various provisions that infringe on the rights of taxpayers in terms of the Constitution – see page 15 onwards.

259. Submission: In all the above examples, CSARS or NT have been given the power to provide relief from taxation. It is submitted that this power is unconstitutional and invalid as only Parliament may, in terms of the Constitution, levy taxes.

260. Secondary legislation that prescribes tax deductible expenditure would therefore also be legislation of a "money bill" subject to section 77 of the Constitution and which the Executive must excuse itself to allow the legislative authority of the Legislator - meaning that the Executive does not have the power to change the legislation and the proposed changes in the secondary legislation would need to follow the normal legislative process allowing the legislator (Parliament) to consider public comments before approving any changes to the law.

261. These sections should be revisited to ensure that Parliament approves the levying (or not) of taxes in these particular circumstances.

VAT refunds

262. In 2020 various concerns, including those raised by SAICA, were raised with SARS, NT and Parliament, regarding the delay in the payment of VAT refunds by SARS. Unfortunately, this situation has not improved since then.

263. Submission: In order to protect taxpayer rights, legislative changes should be introduced to provide that –

- a VAT audit must be completed within a maximum period of six months, provided that the taxpayer submits information and documents to SARS timeously;

- SARS' requests for relevant material must be clearly relevant to the audit at hand and not overly broad and onerous;
- while that audit is conducted, SARS may not continuously roll out further audits until the audit for the original periods has been finalised;
- only the VAT refunds for the original audit periods may be withheld;
- SARS at the outset must set a deadline with the taxpayer for the audit finalisation;
- any extension of the audit must be supported by a full motivation for the extension; and
- once the audit is finalised, SARS must issue an assessment within one month from the date of finalisation.

264. A further concern is that SARS cannot make any part payments of VAT refunds withheld. The taxpayer must provide security for 100% of the VAT withheld. A part refund is not possible.

265. Submission: Part payment of VAT refunds should be allowed where the taxpayer cannot provide security for 100% of the VAT withheld.

Lying or misrepresentation to the Office of the Tax Ombud

266. A taxpayer that is aggrieved by SARS' conduct can approach the Office of the Tax Ombud (OTO) to assist with the grievance. The OTO can issue a recommendation to SARS to remedy the situation. We understand that there is no compulsion for SARS to implement the recommendation, however, it has come to our attention that SARS can decide not to comply with section 191 of the TAA and the terms of an instalment payment agreement that was agreed upon by with the taxpayer.

267. In one instance we have established that a SARS official has been falsely communicating to the OTO that the taxpayer defaulted on the agreement when it is clear from the SARS Statement of Account that this is not the case.

268. In the current circumstances, the taxpayer's only remedy is to contact the Public Protector.

269. Submission: Lying or misrepresentation by a SARS official should be a criminal offence. This should apply to both taxpayers and SARS officials.

Section 10(1)(o)(ii) – Exempt foreign income

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

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

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

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

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

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

276. Submission: The Secretariat of the Organisation for Economic Co-operation and Development (OECD) has issued recommendations that encourage the tax authorities to minimise or eliminate unduly burdensome compliance requirements for taxpayers in the context of the crisis.

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

Section 31 – Associated enterprise definition

278. The previously proposed (but deferred) amendment relating to the insertion of the term "associated enterprise" in section 31 of the Act (as an alternative to the term "connected person" in the definition of "affected transaction") would result in the inclusion of transactions between associated enterprises in the ambit of section 31, thereby broadening the scope of the transfer pricing rules.

279. NT in its presentation on 30 October 2019 entitled "Revised Joint presentation to the Standing Committee on Finance (SCoF) and the Select Committee on Finance (SCoF) on the Response to the 2019 Tax Bills – 2019 Medium term budget policy statement" said the following:

280. "*SARS will further provide guidance on the interpretation of the term "associated enterprise". In order to give SARS and taxpayers more time to consider the interpretation of the term "associated enterprise", it is proposed that the effective date of this provision be postponed by a year from 1 January 2020 to 1 January 2021*."

281. The "associated enterprise" amendment has, however, subsequently been deferred to 1 January 2022. As there are only four months before this section becomes effective, it is concerning that no guidance as to the interpretation of the term "associated enterprise" has been forthcoming as mentioned in the NT presentation above.

282. Submission: In order to provide certainty to taxpayers, it is imperative that clear guidance is given in relation the proposed inclusion of the term "associated enterprise" in section 31.

283. Should guidance not be provided soon, it is proposed that the effective date be postponed to 1 January 2023.

Information gathering (Chapter 5 of the TAA) – Verification process

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

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

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

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

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

289. SARS is a creature of statute and should operate within the confines of that statute, while balancing its powers with the rights of taxpayers. Employing practices and tactics that have no defined empowering legislation seems to be outside that scope as merely relying on a single undefined word does not justify SARS's actions in this regard.

290. However, it must be acknowledged that SARS does require various information gathering processes to be legislated, but such processes should be defined and constitute fair administrative practices, such as is the case for inspections, field audits and criminal investigations.

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

Section 104 of the TAA – Decisions subject to objection

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

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

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

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

Section 190(2) of the TAA – Refunds of excess payments

295. 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.

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

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

298. 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.

299. 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.

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

301. 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.

302. 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.

303. 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.

304. 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[1]. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially puts SARS on equal footing with the historical Scorpions unit.

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

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

307. 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.

[1] https://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles-first-edition-63530cd2-en.htm

Section 252 – 255 of the TAA – Electronic delivery of documents

308. Sections 251 and 252 of the TAA state that delivery of notices, documents or other communication is regarded as having been delivered if it is:

(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).

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

310. We note the judgment in *SIP Project Managers (Pty) Ltd v CSARS (Case No: 11521/2020)* clarifying the law that 'correctly submitted' means 'when the user can access it'.

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

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

313. This has been our members experience as well.

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

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

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

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

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

> *(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.*

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

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

[2] https://www.sars.gov.za/wp-content/uploads/Legal/Drafts/LAPD-LPrep-Draft-2016-24-Draft-Replacement-Rules-for-Electronic-Communication-under-Section-255-of-the-TAA-15-March-2016.pdf