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National Treasury
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Dear National Treasury and Ms Collins

SUBMISSION - ANNEXURE C 2021 BUDGET REVIEW

1. We present herewith our written submission on the request for Annexure C 2021 issues on behalf of the South African Institute of Chartered Accountants' (SAICA) National Tax Committee (NTC), as set out in Annexure A.

2. Our submission includes a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification or suggestions for potentially ambiguous provisions, in relation to either existing sections or the latest proposed amendments to various sections of the Income Tax Act, No. 58 of 1962 (the Act), the Value Added Tax Act, No 89 of 1991 (the VAT Act) and the Tax Administration Act, No 28 of 2011 (the TAA), as contained in the Taxation Laws Amendment Bill, 2020 (TLAB2020) and the Taxation Administration Laws Amendment Bill, 2020 (TALAB2020), respectively.

3. In Annexure B, we enclose a copy of our prior year (2019) Annexure C submissions where the proposals have not yet been implemented by National Treasury. We note that National Treasury has largely not favourably considered our prior year submissions and we would seek to engage with National Treasury on why it believes the relevant proposals would not be in the interests of the South African fiscal policy.

4. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. In this respect, you are more than welcome to contact us in this regard.

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

Should you require any further clarification on any of the matters raised please do not hesitate to contact us.

Yours sincerely

David Warneke	**Dr Sharon Smulders**
CHAIRPERSON: NATIONAL TAX COMMITTEE	**PROJECT DIRECTOR: TAX ADVOCACY**

The South African Institute of Chartered Accountants

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ANNEXURE A

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

Section 1: Definition of “pension preservation fund” – Withdrawing retirement funds upon emigration

Legal Nature

6. The TLAB2020 has the effect that the 'emigration' provisions in the definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” are now replaced with a 'residence' based test’ i.e. members of these funds will only be able to take pre-retirement lump sum withdrawals if they are 'not a resident for an uninterrupted period of three years or longer'.

Factual Description

7. The three year waiting period poses the following practical problems as were explained in the SAICA submission on the draft TLAB2020 and these are once again set out below as we are still concerned that these changes will result in many practical and technical challenges for taxpayers, National Treasury and SARS.

8. The definition of “resident” for natural persons relies on whether a natural person is “ordinarily resident" in the Republic or whether they meet a time-based “physical presence” test. If a natural person does not meet either of the tests, that person will not be considered a resident. The test for whether a natural person is not a resident consequently does not require that status to endure for an 'uninterrupted period of three years or longer'. To arbitrarily require a three year waiting period for retirement fund members to access their pre-retirement lump sum withdrawal benefits is inconsistent with the definition of 'resident' and other existing provisions in the Act (such as sections 9H and 108 of the Act) which have immediate tax consequences when ceasing to be a resident.

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

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

11. It is our understanding that SARS already has criteria which it considers as acceptable proof of a natural person's emigration and there is consequently no reason that these same criteria cannot be applied to determine a preservation fund/retirement annuity fund member's non-resident status.

12. One of the requirements contained in the amended definition (in part (aa)(b)) is that the person must not be a resident for an uninterrupted period of three years or longer on or after 1 March 2021. The wording of this section is ambiguous as it is uncertain if this implies that the person should not have been a resident for three years from 1 March 2021 onwards (thus the person could only access their pensions from 1 March 2024), or if the person could have been non-resident for three years before 1 March 2021 and would then be regarded as non-resident from 1 March 2021, as they would have been non-resident for three continuous years.

The nature of taxpayers impacted

13. All taxpayers emigrating and wanting to access their retirement funds.

Proposal

14. We submit that National Treasury’s concerns that taxpayers will create fictitious changes in tax residency status just to access their retirement funds is highly impractical as it is very costly and burdensome to change your tax residence and comes with many other costs implication such as the section 9H exit charge.

15. We propose that these amendments be reconsidered and once the financial emigration processes have been phased out, the requirement for the payment of a lump sum should be aligned with the requirements for ceasing to be a resident as defined in section 1 of the Income Tax Act.

Section 10(1)(o) – Exemptions for remuneration earned whilst outside the country

Legal Nature

16. Section 10(1)(o)(i) provides exemptions from tax in respect of the remuneration earned by an officer or crew member of a ship engaged in the international transportation of goods and passengers if he/she is outside the Republic for 183 days during a year of assessment.

17. Section 10(1)(o)(ii) exempts remuneration earned by a South African tax resident 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 the Republic 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.

18. These sections require that the person must be outside the Republic for 183 (or more) days, with section 10(1)(o)(ii) adding an additional requirement that 60 days should be continuous. The announcement of the national lockdown with effect from 26 March 2020 midnight in South Africa accompanied by the travel bans that were implemented world-

wide, resulted in many individuals being unable to leave South Africa to perform their duties in the country of residence of their foreign employers.

19. This has left many travellers wishing to leave the country stranded and falling foul of the section 10(1)(o)(i) and (ii) requirements. Through no fault of their own, these employees are unable to meet the requirements of section 10(1)(o)(i) and section 10(1)(o)(ii) as well as the Double Tax Agreement provisions (Article 14 and or 15 of most of SA treaties, have reference).

Factual Description

20. National Treasury has made changes in the TLAB2020 so in order to qualify for exemption, the number of days that a person spent working outside South Africa will be reduced to more than 117 days in any 12-month period, for years of assessment ending from 29 February 2020 to 28 February 2021. The current requirement in section 10(1)(o)(ii) that more than 60 of the days abroad should be a continuous period remains as is.

21. Although we appreciate this late relaxation of the 'number of days' rules as stipulated above, the concern, however, is that the 66 days is not sufficient as many were able to leave South Africa but they were not able enter the countries they were returning to for work due to *travel bans* being *imposed in those countries*.

22. In addition to the above, the concern is that irrespective of the number of days the individuals were stuck in South Africa, the remuneration earned during this time, is regarded as being of a South African source as the services were rendered in South Africa. Thus the section 10(1)(o)(ii) exemption would not apply to this income, meaning that it would be fully taxable in South Africa.

23. The foreign employers would continue running their payrolls as usual and foreign taxes will be withheld from the remuneration paid to these individuals. The individual would thus be subject to double taxation and only a section 6quat(1C)(a) deduction may arguably be available as the income earned whilst in South Africa is from a South African source (not from a foreign source).

The nature of taxpayers impacted

24. All taxpayers receiving remuneration whilst rendering services outside the Republic.

Proposal

25. Although reducing the number of days to 117 may assist in many instances, the concern is that the remuneration earned by individuals for services rendered whilst working in South Africa during lockdown would be regarded as being from a South African source and taxable in South Africa and the section 10(1)(o)(ii) exemption would not be applicable to this remuneration.

26. The Secretariat of the Organisation for Economic Co-operation and Development (OECD) has issued recommendations that encourage the tax authorities to focus on minimising or eliminating unduly burdensome compliance requirements given the restrictions in place in

a number of countries and on preventing hardship for taxpayers in the context of the COVID-19 crisis which has resulted in involuntary and temporary changes to the place where employment is usually performed.

27. Rather than changing the number of days in the section 10(1)(o), we suggest that, as was done in the UK, Ireland and Australia, <u>the presence of an individual in South Africa, if such presence is shown to result from travel restrictions related to COVID-19, be disregarded</u>. The time period to determine this will of course be unique to each individual but will ensure that taxpayers will not be prejudiced by the effects of COVID-19.

28. Should this not be accepted, 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 if the reason for this was due to restrictions of travel due to COVID-19.

29. The temporary relief measures should also be applicable to section 10(1)(o)(i) and not just section 10(1)(o)(ii). Changes should also be considered in respect of the DTA's (clause 14 in most South African treaties and clause 15 in the model OECD treaty) – that is, the 183 days in any 12-month period should not be applied in the 2020 and 2021 tax years.

Section 23(b) – Home office relief

<u>Legal Nature</u>

30. Section 23(b) prohibits the deduction of expenses relating to a home office, unless the home office is specifically equipped for purposes of the taxpayer's trade and **regularly and exclusively** used for the trade. In the case of remuneration earners, a further requirement is that the duties must be mainly performed in the home office or, in the case of a person whose remuneration is derived mainly from commission, his duties must be mainly performed otherwise than in an office provided by his employer.

<u>Factual Description</u>

31. Due to the national lockdown, employees in most sectors have been forced to work from home and it is likely that a large portion of employees will continue to work from home for the rest of this year. Certain employees are not equipped to work from home for lengthy periods. Their needs range from proper chairs, screens, printers, data/wifi/fibre access, stationery etc.

32. Many employees will not qualify for section 23(b) as they will not have an area that is specifically equipped for purposes of their work and it also won't be exclusively used for the trade – such as their dining room table that is used to do their work during the day.

33. An employee will, however, if required to buy an asset (such as a desk, chair computer etc.) for work from home purposes, and if not refunded by their employer, be entitled to claim a section 11(e) allowance on these assets taking into account the requirements of section 23(m).

The nature of taxpayers impacted

34. Taxpayers required to work from home due to COVID.

Proposal

35. A tax free, once-off provision for these items, without the need to retain ownership of the asset in the employer, should be provided. It will not only provide much needed financial assistance to employees, but will also reduce the administrative burden for both the employer and employee. The once-off amount could be capped at a maximum of R5 000 for employees that do not have a disability and be uncapped for those who do.

36. A relaxation of the strict requirements of this provision should be considered (for at least the lockdown period), since employees generally have no choice but to work from their homes during this period and may incur various costs in doing so. However, it would be extremely difficult to use these home offices exclusively for work, for example if the home computer is in the office and children have to use it for Google Classrooms or a spouse also stores his or her reading books in the home office.

37. 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 this period. Abuse can be limited by inserting a threshold, for example, if not more than 10% of the floor space was claimed as a home office. The 90/10 also aligns with SARS' interpretation of the words "substantially the whole".

38. Looking forward to what the new way of work will be, it is highly likely that many employers will not require employees to return to the offices full time meaning that the home office will become a permanent fixture for many employees. As result this needs to be considered when contemplating amendments to section 23(b) and/or 23(m) in order to enable the future of work.

Fourth Schedule: Definition of "remuneration" – Non-executive directors' fees

Legal Nature

39. The liability to withhold employees' tax arises when an employer pays or becomes liable to pay remuneration to an employee (paragraph 2(1) of the Fourth Schedule to the Income Tax Act).

40. For the purposes of the Fourth Schedule, "remuneration" means *any amount of income, which is paid, or is payable to any person by way of any … fee, emolument … whether in cash or otherwise and whether or not in respect of services rendered, including …*

41. *… but not including -*

(ii) any amount paid or payable in respect of services rendered or to be rendered by any person (other than a person who is not a resident) in the course of any trade carried on

by him independently of the person by whom such amount is paid or payable and of the person to whom such services have been or are to be rendered: …

42. A person deriving an amount by way of a fee would be in receipt of remuneration unless the individual rendered the services in the course of a trade carried on independently (as required by proviso (ii) to the definition of remuneration in paragraph 1 of the Fourth Schedule to the Income Tax Act) by him or her.

43. A non-executive director (NED) is an official of the company and generally not in the employment of the company. SARS accepts that the individual is not a common law employee as no person exercises control or supervision over the manner in which such NED performs his or her duties, or the NED's hours of work.

44. This is confirmed in Binding General Ruling No. 40, where SARS states that "*director's fees received by a NED for services rendered as a NED on a company's board, are thus not "remuneration", and are not subject to the deduction of employees' tax*."

45. However, SARS also states in this ruling that: "*this ruling does not apply in respect of non-resident NEDs*."

46. It furthermore also only applies to directors of Companies notwithstanding that the principles relating to non-executive office holders apply at Boards and Bodies such as Medical Schemes, Water Boards and Professional Bodies. This exclusion seems to apply notwithstanding that "associations of persons" are included in the definition of "a company" in section 1 of the Income Tax Act, though they are not registered as a Company under the Companies Act 2008.

Factual Description

47. An amount paid by a company, resident in the RSA, to a non-resident NED in respect of fees for the services rendered by the non-resident NED, will be "remuneration" for purposes of the Fourth Schedule. Consequently, the company will have to withhold an amount of employees' tax from this amount.

48. It is unclear why there should be a difference between the employees' tax treatment of a resident and non-resident NED.

49. This is especially pertinent since the RSA has a right to tax the fee that accrues to a non-resident NED, not as remuneration, but as "gross income". The definition of gross income, and specifically paragraph (c) of the definition of "gross income" in section 1(1) of the Income Tax Act makes it clear that if the source of the services rendered by the non-resident NED is in South Africa, the fees will constitute gross income, and will be subject to normal tax in the RSA.

50. However, if the individual is a resident of a treaty country, the right of the RSA to tax the director fees, must be determined with reference to the relevant double tax agreement.

51. Most treaties contain a specific clause that deals with "Directors' fees" and in the main, these clauses in South African treaties are similar to the one found in the OECD model treaty. Article 15, in the South Africa / Mauritius treaty is one of those and it reads as follows:

> "**DIRECTORS' FEES"**
>
> Directors' fees and other similar payments derived by a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State."

52. South Africa thus has a taxing rights in respect of fees paid by a South African entity to a person appointed by a South African company as a non-resident NED.

The nature of taxpayers impacted

53. All foreign NEDs receiving NED director services in South Africa and NED at entities that are not companies.

Proposal

54. The definition of "remuneration" in the Fourth Schedule should be amended to exclude directors' fees paid to non-resident NEDs.

55. The exclusion of non-executive directors and office holders from the definition of "remuneration" as addressed in the ruling should be inserted in the Fourth Schedule. It should also be expanded to all office holders who are required to be independent through a founding instrument or law and not just directors of companies.

Fourth Schedule: Paragraph 17(5) – First provisional tax payment (expatriates)

Legal Nature

56. The first provisional tax liability is based on a full year's taxable income of a taxpayer that is then halved to take into account the first six-month period of the year to which this payment relates. From this amount, the PAYE withheld during the period of six months can be deducted as well as any foreign taxes proved to be payable in terms of section 6*quat*.

57. The SARS Frequently Asked Questions on "Foreign Employment Income Exemption (Section 10(1)(o)(ii) of the Income Tax Act, 1962)" explains, in question 34, how the PAYE should be treated in these circumstances. It stipulates that:

"*The R1,25 million should be accumulated on a monthly basis in respect of all qualifying remuneration items. As soon as the R1,25 million limit is reached, the income in excess of R1,25 million becomes subject to normal tax. The R1,25 million cannot be smoothed or averaged over the year of assessment. It must be calculated by adding up all* *remuneration items received from the beginning of the year of assessment or applicable start date of an assignment until the R1,25 million limitation is reached*."

58. For South African expatriate employees this means that for PAYE purposes, employers are allowed to deduct the entire exemption in the first few months, resulting in no or little PAYE claimable in the first provisional tax period. However, for provisional tax purposes it appears that only one half of the capped exemption (R1.25m) can be claimed in respect of the first provisional tax period.

<u>*Factual Description*</u>

59. Thus despite using the basic amount for their first provisional tax payment, taxpayers may only claim actual PAYE paid in the first six months. It therefore appears that an unintended artificial mismatch between the provisional tax due and PAYE available for the deduction is created as the accumulation of section 6quat rebate as set out in the FAQ 34, has not been extended to para17(5) (Fourth Schedule) provisional tax adjustment.

60. Paragraph 17(5) of the Fourth Schedule to the Income Tax Act provides that SARS may after 'taking into account any… <u>factors having a bearing upon the probable liability of taxpayers for normal tax</u>, prescribe tables for optional use by provisional taxpayers falling within any category specified by the Commissioner'.

61. Unfortunately, the factors mentioned above for South African expatriates have not been taken into account for the purposes of the first provisional tax payment, resulting in an artificial first provisional tax payment that the taxpayer will only be refunded 19 months later on assessment.

62. An example[1] to illustrate the point is set out below:

63. A South African tax resident is seconded from South Africa by a local employer to a foreign country where he pays 10% tax (flat rate) deducted from the foreign payroll. Not having worked a single day in South Africa, his March to December 2020 foreign employment income totals R2 million. During January to February 2021, he works in SA earning another R400 000 − that is, his gross annual employment income equals R2,4 million. All his foreign employment income meets the physical days outside SA test − that is, the March to December 2020 days in South Africa were limited to annual leave. His annual balance of remuneration may therefore be reduced by the R1,25 million exemption in terms of section 10(1)(o)(ii), and an IRP3(q) was issued to his employer.

64. The PAYE will be calculated as follows:

[1] Source: Accountancy SA, August edition, article written by Mr H. van Zyl

PAYE HISTORY - recreated	2020/21	1st Prov	2nd Prov
Foreign employment income - including 7th Schedule Benefits	R 2 000 000	R 1 200 000	R 800 000
Local employment income - including 7th Schedule Benefits	400 000		400 000
Gross employment income - including 7th Schedule Benefits	2 400 000	1 200 000	1 200 000
Less: FEIE capped at R1.25m	(1 250 000)	(1 200 000)	(50 000)
Balance of remuneration - 4th Schedule Para 2	R 1 150 000	R -	R 1 150 000
PAYE as per PAYE Table (annual) on balance of remuneration	R 369 257	R -	R 369 257
Foreign tax credit - section 6quat - IRP3(q) directive	(75 000)	-	(75 000)
Foreign taxes paid	200 000	120 000	80 000
Foreign tax disregarded	(125 000)	(120 000)	(5 000)
PAYE as per FAQ No 34's answer applied to PAYE Table (annual)	R 294 257	R -	R 294 257

65. The provisional tax returns will be completed as follows:

FIRST PROVISIONAL TAX	2020/21	1st Prov	2nd Prov
SECOND PROVISIONAL TAX PAYMENT			
Estimated taxable income for 2021 tax year		R 1 150 000	R 1 150 000
Normal Tax on estimated taxable income		R 384 271	R 384 271
Less: primary rebates section 6		(14 958)	(14 958)
Less: Tax credit for medical scheme fee s6A		369 313	369 313
Less: Additional Medical Expenses credit s6B			
Total tax Payable (A)	**(both Ptax)**	369 313	369 313
Half the normal tax payable on taxable income (A/2)	**(1st Ptax)**	184 657	
Tax Payable for the year on taxable income (A)	**(2nd Ptax)**		369 313
Less: Employees' Tax Deducted during the period	**this period!**	-	(294 257)
Less: Foreign tax credits (s6quat and treaty rules)	**allowable this period!**		(75 000)
FIRST PROVISIONAL TAX (Should have been R56/2 ONLY)		R 184 657	
Less: First Provisional Tax actually paid	**(2nd Ptax)**		(184 657)
SECOND PROVISIONAL TAX PAYMENT (Should be R56)	R 56		(R184 601)

66. It is evident from the above, that the taxpayer has made an overpayment of R184 601 and this will only be refunded on assessment.

The nature of businesses impacted

67. All South African resident expatriates.

Proposal

68. Paragraph 17(5) should be amended to cater for this situation.

Seventh Schedule: Paragraph 2(d) – Residential accommodation fringe benefit

Legal Nature

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

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

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

Factual Description

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

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

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

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

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

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

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

The nature of taxpayers impacted

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

Proposal

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

Seventh Schedule: Paragraph 2(*l*) – Employer contributions to foreign retirement funds

Legal Nature

80. Paragraph 2(l) of the Seventh Schedule to the Act states that any employer contribution to an approved pension fund or provident fund is treated as a taxable benefit in the hands of the employee. However, this change in legislation had no impact on contributions made to foreign funds and the previous tax treatment relating to foreign funds still applies – that is, employer contributions to foreign pension/provident funds do not result in a taxable fringe benefit. This is confirmed in SARS' Guide for foreigners working in South Africa, where it is stated that:

81. "*Employer contributions to a foreign pension fund that is similar to an approved South African fund or social security systems are not subject to tax in South Africa. Contributions by an employer to a pension fund are made by the employer as a result of an obligation that rests on the employer under rules of the fund, and therefore do not accrue to the employee*."

82. It is, however, unclear what is regarded as a foreign pension fund that is similar to an approved South African fund. SARS has not provided further clarity on this but confirmation of SARS following the practice stipulated in the Guide can be found in BPR 247, issued on 8 September 2016, where it was ruled that employer contributions to a foreign private pension fund do not constitute a taxable benefit in the hands of the employee.

83. Further to the above, National Treasury and SARS have on numerous occasions advised that they will review the tax treatment of foreign pension funds but to date no changes in legislation have been introduced. Below are the instances where it was mentioned in the National Budget Speech that the tax treatment of foreign pensions would be revisited:

83.1 **2013 Annexure C proposals**: Cross-border pensions: South African residents working abroad and foreign residents working in South Africa regularly contribute to local and foreign pension funds, which gives rise to a variety of tax issues. While certain limited rules have long been in place, these rules are largely *ad hoc*. With overall retirement reform now in effect, cross-border pension issues need to be fully reconsidered. The main issue is whether the tax focus should rely solely on the national source of the services provided or the national origin of the pension fund serving as the savings vehicle. Given the complexity of the issues involved, extensive consultation is required. Possible legislative action may occur if consensus is easily achieved (such as neutralising any unintended differences between cross-border lump sum pay-outs and annuities).

83.2 **2014 Annexure C proposals:** Cross-border retirement saving: South African residents working abroad and foreign residents working in South Africa regularly contribute to local and foreign pension funds. With overall retirement reform now in effect, cross-border pension issues need to be reconsidered. Given the complexity of the issues involved, it is proposed that the review take place over two years, with extensive consultation. On a related matter, certain provisions in the Income Tax Act refer to “pension” or to “pensions or an annuity”. The wording excludes lump sum retirement fund benefit pay-outs. It is proposed that the provisions be amended to apply equally to annuities and lump sums.

83.3 **2016 Annexure C proposals:** Foreign pension contributions, annuities and pay-outs: When the residence-based taxation system was introduced in 2001, section 10(1)(gC) was added to the Income Tax Act to exempt foreign pensions derived from past employment in a foreign jurisdiction (i.e. from a source outside of South Africa). The question of how contributions to foreign pension funds and the taxation of payments from foreign funds should be dealt with raises a number of issues, which require a review. Sufficient time would be required to determine how to deal with contributions to foreign funds and the taxation of payments from foreign funds, taking into account the tax policy for South African retirement funds.

83.4 **2018 Annexure C proposals:** Tax treatment of contributions to retirement funds situated outside South Africa: The Income Tax Act currently exempts all retirement benefits from a foreign source for employment rendered outside of South Africa from taxation. The interaction of this exemption with double taxation agreements and other provisions of the Income Tax Act will be reviewed to ensure that the principle of allowing deductible contributions only in cases where benefits are taxable is upheld.

Factual Description

84. Based on the above it is evident that the tax treatment of employer contributions to foreign pension funds is unclear, and it appears that SARS is no longer applying the principles that applied prior to the introduction of the retirement reforms in 2013.

The nature of taxpayers impacted

85. Employers making contributions to foreign retirement funds.

Proposal

86. Clarity is required on what the requirements are for a foreign fund to be regarded as similar to an “approved South African fund” and to confirm the taxation treatment of employer contributions to foreign funds.

CATEGORY – DOMESTIC BUSINESS TAXES

Sections 7C and 56 – Loans to a trust by a connected person and donations tax

Legal Nature

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

Factual Description

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

The nature of businesses impacted

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

Proposal

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

Sections 12R – Special Economic Zones (SEZs): Reduced corporate tax rate

Legal Nature

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

Factual Description

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

The nature of businesses impacted

93. All qualifying companies operating in SEZs.

Proposal

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

Sections 12R – SEZs: Qualifying companies

Legal Nature

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

Factual Description

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

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

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

The nature of businesses impacted

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

Proposal

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

Sections 12R – SEZs: Monitoring of the Department of Trade and Industry (DTI)

Legal Nature

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

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

Factual Description

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

The nature of businesses impacted

104. All businesses operating in an SEZ.

Proposal

105. Clarification on the above issue is kindly requested.

Sections 12R – SEZs: Interaction of Income Tax Act and SEZ Act

Legal Nature

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

Factual Description

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

The nature of businesses impacted

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

Proposal

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

Section 42(1)(a)(ii)(cc) – Intragroup transactions

Legal Nature

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

111. This may be read in two ways:

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

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

Factual Description

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

The nature of businesses impacted

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

Proposal

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

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

…or

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

CATEGORY – INTERNATIONAL TAX

Sections 7(5), 7(8) and 31 – Low or interest-free loans to offshore trusts

Legal Nature

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

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

Factual Description

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

The nature of businesses impacted

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

Proposal

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

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

Section 7(8) – Donation, settlement or other disposition to a non-resident

Legal Nature

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

Factual Description

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

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

The nature of businesses impacted

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

Proposal

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

Section 7C and section 31 – Clarity on interaction

Legal Nature

125. Section 7C(5)(e) states that the sections 7C(2) and (3) will not apply to a loan "where that loan advance or credit constitutes an affected transaction as defined in section 31(1) that is subject to the provisions of that section."

126. For the exemption to apply the loan must be subject to section 31 i.e. be a cross border connected party transaction which is not at arm's length i.e. an 'affected transaction' and be subject to the provisions of section 31. That is, an adjustment needs to be made. The law is not clear on what this means if the arm's length interest rate is less than the official rate.

Factual Description

127. Where a person has made, for example, a non-interest-bearing loan to a connected offshore trust and a tax benefit is derived, section 31 will require that an amount be included in the South African resident's taxable income to the extent of the arm's length interest is not charged. It will also require a 'secondary adjustment' to be made which, where the lender is an individual, amounts to the deeming of the amount of the section 31 interest included in the taxable income to be a donation for donations tax purposes.

128. If the arm's length interest rate is say 4% and this amount is included in the South African taxpayer's income, it could be argued that the loan has been "subject to the provisions of section 31" even though the official rate is 4.5%, with the result that section 7C would not apply to the loan at all. On the other hand, had actual interest of 4% (the arm's length rate) been charged, section 7C(5)(e) would have applied and the taxpayer would need to pay donations tax on the interest represented by the additional 0.5% in terms of section 7C. Such difference in treatment can clearly not be the intention.

The nature of businesses impacted

129. All persons who have made a loan to an offshore trust and are potentially subject to section 7C.

Proposal

130. Section 7C(5)(e) should be amended to rather state (additional words in bold italics) "'where that loan advance or credit constitutes an affected transaction as defined in s31(1) ***to the extent*** that is subject to the provisions of that section."

CATEGORY – VALUED ADDED TAX and CUSTOMS

Sections 8(23) and 11(2)(s) – Deemed supply to a National Housing Programme

Legal Nature

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

Factual Description

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

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

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

135. Sections 8(23) and 11(2)(s) were to be deleted with effect from 1 April 2017. However, it subsequently became evident that both National Treasury and municipalities were not

ready to implement the amendments that would have the effect that the national housing programme payments would be standard-rated.

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

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

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

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

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

The nature of businesses impacted

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

Proposal

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

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

Section 18(1) and 18B(3) – Temporary letting and sale of dwellings by fixed property developers

Legal Nature

144. Under section 18(1), a vendor that changes the use or application of goods or services from a wholly or partly taxable purpose to a wholly non-taxable purpose, is deemed to have made a taxable supply in the course or furtherance of the vendor's enterprise. As a consequence, developers that applied their fixed property for letting as a result of adverse economic factors, became liable to make an output tax adjustment under section 18(1).

145. Section 18B came into operation on 10 January 2012 and provided that no change in use adjustment was required to be performed until the expiry of a 36-month relief period which commenced from the time the property was first let, or at the time when the property was applied permanently for letting as a dwelling as contemplated by section 18B(3). The temporary relief provided under section 18B ceased to apply on 1 January 2018.

146. BGR 48 clarified the circumstances in which section 18B applies, the period in which a developer is required to make a change in use adjustment, as well as the effect of the cessation of section 18B on dwellings let temporarily for the first time on or after 1 January 2018.

147. On the basis that section 18B ceased to apply on 1 January 2018, developers that let dwellings that were held for sale in terms of an agreement entered into for the first time on or after 1 January 2018, are required to account for the output tax adjustment under section 18(1).

148. Section 10(7) requires that an adjustment in terms of section 18(1) is to be made on the <u>full open market value</u> of the unit as at the date on which the property is let as opposed to repaying only the actual input tax previously claimed.

149. Binding General Ruling (BGR) 55, issued on 10 September 2020, states that the subsequent sale of a dwelling in respect of which the developer was required to have declared the deemed supply under section 18(1) or 18B(3), is not subject to VAT. The purchaser will be liable for transfer duty on the acquisition of such dwelling.

Factual Description

150. Up until 31 Dec 2017, relief was provided by SARS for property developers that let the properties as opposed to selling them due to harsh economic conditions. Since then, these vendors are liable for an output tax adjustment where input tax was previously deducted – since they will no longer sell the buildings, but will lease them for residential purposes, which is an exempt activity from a VAT perspective.

151. SARS have now confirmed, in BGR 55, that developers that have not accounted for the aforementioned output tax adjustments in the relevant tax periods are liable to be assessed for VAT, penalties and interest.

152. Thus property developers who develop residential properties for the purpose of sale, but who temporarily let such properties due to adverse market conditions until a buyer can be found, will experience adverse cash flow difficulties and they will also be out of pocket for the VAT costs incurred on developing such properties.

153. BGR 55 also stipulates that the subsequent sale of the property (unit) will be subject to transfer duty if applicable. So if the market value of a property is greater than the transfer duty threshold, then VAT & transfer duties will be paid on the same property (unit).

154. The concern is firstly that the BGR requires the VAT adjustment to be calculated using the open market value (OMV). In reality, this value does not represent the value of the exempt supply and is disproportionate to the exempt income (rental) received by the developer, which places a severe cash flow burden on the developer, forcing some of these developers into insolvency.

155. Secondly, it seems that SARS' practice does not follow the law and the only recourse for a taxpayer would be to take SARS on review and follow the court processes, which is a lengthy and costly exercise.

156. SARS previously stated in its VAT News 14 (March 2000), that where a section 18(1) adjustment was made on the temporary letting of a unit and the developer subsequently sold the unit, the developer was entitled to deduct the total amount of VAT previously paid under section 18(1), against the output tax payable when the unit was subsequently sold. This was, however, in contradiction to section 18(4) of the VAT Act, which provides for a deduction to be made only on the lesser of the adjusted cost or the OMV of the unit. Notwithstanding this contradiction, SARS nevertheless allowed input tax deductions in accordance with VAT News 14, that is, until recently upon the issuing of BGR 55.

157. In terms of BGR 55, SARS now holds the view that the subsequent sale of a dwelling in respect of which the developer has accounted for VAT in accordance with section 18(1) (or 18(3B)), is not subject to VAT at all and the purchaser will instead be liable for transfer duty on the acquisition of such dwelling.

158. Thus units sold at prices in excess of the transfer duty threshold will attract VAT on their OMV when the units are first let as well as transfer duty on the selling price when the units are sold.

159. The hardship that section 18(1), read with section 9(6) and 10(7) causes to property developers thus still exists, and the VAT payable by property developers when they first let properties developed for sale as dwellings is still disproportionate to the exempt income received by the developer. These provisions severely impact negatively on the cash flow of property developers. In instances where the market value of the properties is substantially higher than the adjusted cost thereof, it creates an additional VAT cost for the property developer. The section 18(1) adjustment is calculated on the open market value of the property, even though VAT was only deducted on the adjusted cost in relation to the development of the property. When the property is sold, the developer must account for output tax again on the sales consideration (being the market value),

whereas a deduction is only allowed on the adjusted cost. This situation is totally inequitable, and the VAT "penalty" on property developers is severe if one also takes into consideration the cash flow impact and cost of funding the VAT on the change in use adjustment until the property is sold.

The nature of businesses impacted

160. All fixed property developers that subsequently apply dwellings for exempt supplies under an agreement for the letting and hiring thereof, on a temporary basis.

Proposal

161. The law needs to be amended to reduce the value on which the output tax adjustment needs to be calculated when a temporary change in use occurs and an amount lower than the OMV should be used.

162. It should be ensured that SARS follows the VAT Act in respect of property, 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. The developer is then entitled to an input tax deduction in terms of section 18(4) on the adjusted cost of the property sold.

Section 23 – VAT registration threshold

Legal Nature

163. Section 23 currently requires a taxpayer to register for VAT when its taxable supplies exceed R1 million.

Factual Description

164. This threshold was last changed on 1 March 2009 from R300 000 to R1 million. If this amount was changed annually in line with inflation the threshold would have increased to an amount in the region of R1.8 million.

165. For a professional practice with an annual turnover of R1 million, fees would need to be increased by 15% to cater for VAT which in the current economic climate could result in a significant loss of clients who might not be able to pay the fees charged. Alternatively, if fees were maintained at the same level, the professional practice would suffer a direct loss of annual income of R130 434 at a rate of 15/115, less inputs claimable.

166. However, a professional practice is unlikely to have much in the way of VAT inputs to counter the VAT outputs. In addition, there is a significant administrative burden in completing VAT returns for a small business/professional practice.

The nature of businesses impacted

167. All small businesses but specifically businesses rendering services, with taxable supplies above R1 million per annum.

Proposal

168. In the current economic climate where small businesses and professional practices are struggling to survive, it appears that an adjustment to the VAT threshold is urgently needed. It is suggested that the threshold be increased to R1.8m as a minimum.

Electronic Service regulations

Legal Nature

169. Revised regulations to prescribe and clarify the VAT treatment of electronic services (e-services) supplied by foreign suppliers to South African consumers came into effect in South Africa from 1 April 2019. These regulations require foreign electronic service providers supplying "electronic services" to qualifying South African recipients to register for VAT in South Africa and these regulations significantly broadened the scope of "e-services".

170. The new definition of "electronic services" is extremely wide and leaves many foreign suppliers uncertain whether they are required to register for VAT or not. SARS published an explanatory memorandum and a document setting out answers to frequently asked questions (FAQs) that provide some guidance on how to apply VAT in the case of non-resident suppliers of electronic services in South Africa.

171. Section 54(2B) of the VAT Act, which became effective from 1 April 2019, allows a non-resident supplier of electronic services to appoint an intermediary VAT vendor in South Africa to act on its behalf. That is, the foreign entity would supply the electronic service to the South African intermediary which would be regarded as making the supply to residents and not the foreign entity principal.

Factual Description

172. The electronic services regulations require some clarity especially regarding imported services, compulsory VAT application rules and exceptions to registration for single transactions.

173. Despite SARS issuing a FAQ document, it is still unclear whether information or advice which is communicated via an e-mail transmitted electronically falls within the ambit of the regulation. "Electronic communication" is defined in the Electronic Communications and Transaction Act 25 of 2002 to mean 'a communication by means of data messages', and "data messages" is defined to mean 'data generated, sent, received or stored by electronic means'.

174. On the face of it, it seems that information or advice communicated via e-mail will therefore fall within the scope of e-services. The Explanatory Memorandum stipulates, however, that one of the policy intentions behind the amendments is to subject to VAT those services that are provided using minimal human intervention. It provides as an example that legal advice prepared outside of South Africa by a non-resident and sent to a recipient in South Africa via e-mail will not be subject to the regulations.

175. Notwithstanding the statement made in the Explanatory Memorandum, it has to be borne in mind that the Explanatory Memorandum does not have any legal status and limited interpretative persuasion. National Treasury should preferably clarify and confirm this policy intention by requesting SARS to issue a binding general ruling so as to avoid any future disputes in this regard.

176. Furthermore, section 54(2B) only allows for an intermediary who acts on behalf of a non-resident electronic services supplier, being the principal, who is <u>not a registered vendor</u>, to account for VAT on behalf of that principal. As it is unlikely that non-resident suppliers of electronic services who are not liable to register for VAT in South Africa will require the services of an intermediary to supply their electronic services to recipients in South Africa, as the cost of the intermediary services will render these supplies uneconomical, this requirement makes the provisions regarding intermediaries superfluous.

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

177. All foreign suppliers of electronic services in South Africa.

<u>Proposal</u>

178. The electronic services regulations should provide further clarity on the matters mentioned above and the FAQ document should have the status of a binding ruling.

179. We also recommend that section 54(2B)(ii) of the VAT Act be amended to delete the requirement that an intermediary may only account for VAT on behalf of a <u>non-registered</u> supplier of electronic services, but that it be allowed to account for VAT on behalf of all non-resident suppliers of electronic services.

<u>CATEGORY – TAX ADMINISTRATION ACT (TAA)</u>

Section 18(6) – Review of complaint received by the OTO

<u>Legal Nature</u>

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

Factual Description

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

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

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

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

The nature of businesses impacted

185. Taxpayer submitting complaints to the OTO.

Proposal

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

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

Section 20(2) – Resolutions and recommendations by the OTO

Legal Nature

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

189. Whilst the legislature has already affirmed the policy that there should be more transparency and accountability when it comes to the OTO recommendations, there seems to be a technical oversight that there is no express compulsion/prohibition to

supply the SARS reasons to the complainant taxpayer or the taxpayer's rejection of the OTO's recommendation to SARS, though the OTO has a discretion on the latter.

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

Factual Description

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

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

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

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

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

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

The nature of businesses impacted

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

Proposal

198. Where the recommendation by the OTO relates to a specific taxpayer, the OTO should communicate to the taxpayer with 7 days after receipt from SARS, SARS' reasons for not accepting the recommendation. Where the recommendations relate to the outcome of a systemic investigation, the OTO should communicate to the public in the OTO's

annual report, SARS' reasons for not accepting recommendations made by the OTO in this regard.

199. Where SARS accepts the recommendations made by the OTO, such recommendations must be implemented by SARS within 90 business days (systemic issues) or 30 days (taxpayer specific issues) of receiving the recommendations unless SARS can provide **compelling reasons** why it is unable to do so and must provide the time period in which it believes it will be able to comply.

Section 42 – Keeping the taxpayer informed (verifications)

Legal Nature

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

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

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

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

Factual Description

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

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

206. Following submission of the documentation:

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

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

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

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

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

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

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

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

211. All taxpayers subject to SARS’ verification procedures.

Proposal

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

Section 89 – Binding private rulings

Legal Nature

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

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

Factual Description

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

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

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

The nature of businesses impacted

218. All businesses applying for BPRs.

Proposal

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

Definition of "date of assessment" & Sections 251 -255 – Electronic delivery

Legal Nature

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

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

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

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

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

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

> …(d) sent to the person's last known electronic address, which includes—
> (i) the person's last known email address;
> (ii) the person's last known telefax number; or
> (iii) the person's electronic address as defined in the rules issued under section 255(1).

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

Factual Description

227. A notice of assessment requires disclosure of the “date of assessment”.

228. The date on the assessment is usually the date when the letter is compiled by SARS on the SARS system backend but this may differ from the date on which it is loaded (“issued”) onto the taxpayer’s efling profile allowing the taxpayer to access it.

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

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

The nature of businesses impacted

231. All taxpayers.

Proposal

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

> *(2) A SARS electronic filing service must—*
> *(a) provide a registered user with the ability to—*
> *(iii) nominate an alternative electronic address to which the SARS electronic filing service must deliver a notification of the submission of an electronic filing transaction by SARS to the registered user’s electronic filing page.*

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

234. This will also address taxpayers’ long-held concern that e-Filing is not a proper or appropriate notification method and will avoid taxpayers being subject to SARS’ sporadic “other notifications”, like SMS etc. which only work in respect of certain products and services.

Section 104 – Grounds to object

Legal Nature

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

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

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

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

Factual Description

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

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

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

The nature of businesses impacted

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

Proposal

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

Section 125 – Appearance at a hearing of the tax court

Legal Nature

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

245. The right to appear on behalf of taxpayers in the Tax Court is not dealt with expressly in the rules after the deletion of section 125(2) TAA. Consequently, the rules prescribe that any matter not expressly dealt with follow the Superior Courts rules.

246. The Superior Court rules address the right of appearance in the Right of Appearance in Courts Act which, as a standing position, only allows admitted advocates and attorneys to appear in court and consequently then in the Tax Court.

Factual Description

247. The deletion of section 125(2) of the TAA appears to us to have been an oversight as the Explanatory Memorandum notes that this right is implicit.

248. In our view, this right is not implicit and this has significantly altered the legal *status quo.* We accept that SARS never intended to change the right of appearance that has been long-standing in our tax dispute dispensation.

The nature of businesses impacted

249. All taxpayers.

Proposal

250. We propose that the deletion of section 125(2) should be repealed retrospectively.

251. Furthermore, in view of the fact that South African registered tax practitioners are subject to a statutorily regulated regime, a SARS' approved professional code of conduct and disciplinary processes that enforce compliance therewith, we believe that National Treasury should seek to amend the legislation so as to provide tax practitioners with 'tax practitioner litigation privilege' as well as a right to appear before the Tax Court.

252. For further details in this regard, please refer to SAICA's submission to National Treasury dated 7 July 2020 entitled "Legal professional privilege and right of appearance in court – Applicability to tax practitioners".

Section 164(3) – Payment of tax pending appeal

Legal Nature

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

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

Factual Description

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

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

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

The nature of businesses impacted

258. All taxpayers requesting suspension of payments.

Proposal

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

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

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

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

Sections 172 – Civil judgments

Legal Nature

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

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

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

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

267. This is notwithstanding that SARS and National Treasury have long defended the constitutionality of this extra-judicial process on the grounds that the filing of the certificate with the High Court in fact brought this process under judicial oversight as required by the Constitutional Court[2].

Factual Description

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

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

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

The nature of businesses impacted

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

Proposal

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

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

Section 234 – Removal of requirement of "wilfulness" from certain statutory offences.

Legal Nature

273. The original proposal made by NT was to remove the requirement for "wilful misconduct" (i.e. intent) in relation to tax criminal offences. The reason provided for this is that the NPA finds it too difficult to prove intention in criminal tax matters.

274. Rather than do away with intent entirely, National Treasury has now categorised the offences into those for which intent or negligence is required and those for which intent is required.

275. The first category will include aspects of non-compliance that strike at key duties that the tax system's broad application depends on, such as failing to register, submit returns, pay over tax that has been collected from a third party and so on.

276. The second category will include aspects of non-compliance where the nature of the non-compliance is such that the requirement of intent is implied, such as issuing a false document, obstructing or hindering a SARS official, assisting another person to dissipate their assets to impede tax collection and so on.

277. The maximum penalty of a fine or two years' imprisonment will remain and it will be left to the presiding officer to decide what sentence or sanction is appropriate on conviction, considering all the aspects of a case, though the offence will remain a criminal conviction with significant consequences. These impacts include employment prospects, international travel, business opportunities etc.

Factual Description

278. The concern we have is that these changes result in the criminalisation of simple cases of negligence i.e. sanction is divorced from the nature of the crime. In this regard, criminalising administrative errors does not appear to be proportionate in relation to the transgression, considering for example the case of a taxpayer not updating registered details timeously.

279. Whilst SARS may choose not to prosecute for administrative ‘mistakes’, the legislation gives SARS the power to do so, should it so wish. This in itself leads to another Constitutional concern of arbitrary prosecution.

280. SARS in response to this matter on TALAB19 noted that it doesn’t prosecute, whereas the NPA does. This response ignores the fact that without SARS seeking prosecution by laying a charge with the SAPS or NPA under section 234 which, as with section 235, will exclusively be done by SARS, no criminal prosecution would occur. SARS is therefore instrumental in the process of prosecuting criminal offences.

281. This is in stark contrast to legislation such as POCA and FICA where there is a compulsion to report such criminal activities and we fail to understand why SARS would not want to compel complaints that result in prosecutions for criminal actions given its stated strategy.

282. SARS and National Treasury’s stance in this matter seems to indicate an inclination that SARS wants to reserve the right who to prosecute for reasons that it feels should not be subject to public scrutiny.

283. This means that where you have 3 taxpayers who have committed the exact same criminal tax offence, a SARS official has a discretion to do nothing, to impose a civil sanction or to lay a compliant for a criminal sanction without any objective legal requirements as to how he/she decided on such sanction.

284. SARS has noted that they would not want to effect a prosecutorial process with all administrative transgressions and would like to have a discretion. This approach is misguided for criminal matters and the solution rather lies in ensuring that only actions that are extremely objectionable to society should be criminalised.

285. The argument of SARS seems to indicate and support our view that the list of offences in section 234 TAA have not been appropriately considered.

286. It is a matter we have raised with SCoF before and has become even more important with these amendments.

The nature of businesses impacted

287. All taxpayers.

Proposal

288. The purely administrative instances of non-compliance should merely be subject to civil sanction or only criminalised for repeat offenders who, through their conduct, show a pattern of intent to undermine the *fiscus*.

289. Sections 234 – 237 of the TAA should include the compulsion to lay a charge for prosecution with SAPS and NPA. These entities will then, in their investigative and

prosecutorial frameworks, re-evaluate evidence gathered of the alleged crime and measure such evidence against the prescribed standard of proof.

Section 240 –Grounds for disqualification as a registered tax practitioner (violent crime)

Legal Nature

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

Factual Description

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

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

The nature of businesses impacted

293. All tax practitioners.

Proposal

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

"has been convicted anywhere in the world of a criminal offence in which violence is an element, including but not limited to public violence; murder; rape; sexual assault; trafficking of persons; robbery; kidnapping; assault and/or torture and has been sentenced in respect thereof to imprisonment without the option of a fine. Where any such conviction has led to a sanction of imprisonment with an option of a fine or to a fine being imposed, SARS shall have the discretion to decide whether or not to register the tax practitioner or cancel the registration of the tax practitioner."

Section 240 – Grounds for disqualification/deregistration as a tax practitioner (insolvency)

Legal Nature

295. Section 240(3) sets out the instances when SARS may not register a person as a tax practitioner or may deregister a person as a tax practitioner. This currently does not include persons who become insolvent.

296. Section 23 of the Insolvency Act sets out the legal limitations of an insolvent though it does not prohibit any employment or occupation.

297. Section 23(2) stipulates the limitations to contract especially where it may adversely affect his or her insolvent estate.

298. Section 69 of the Companies also prevents rehabilitated insolvents from being directors.

299. For SAICA and many other bodies, insolvency is not an automatic disqualification for membership but is subject to a discretion, even though mostly it is applied to disqualify the insolvent as a member.

Factual Description

300. Members of professional bodies who are tax practitioners may become insolvent and be sequestrated while practising as tax practitioners.

301. This potentially not only impacts how they conduct business but also on their ability to fulfil positions of trust, especially in financial matters, including taxes.

The nature of businesses impacted

302. All tax practitioners who are sequestrated.

Proposal

303. It is proposed that section 240(3) be amended to disqualify a person who is an unrehabilitated insolvent from registering or continuing to be registered as a tax practitioner.

304. We furthermore propose that such persons have a statutory duty to inform both SARS and their Recognised Controlling Body of their sequestration with 30 days of being declared insolvent.

Section 240 – Tax practitioner registration and impact of suspension of membership

Legal Nature

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

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

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

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

Factual Description

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

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

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

The nature of businesses impacted

312. All tax practitioners.

Proposal

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

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

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

ANNEXURE B

2019 ANNEXURE C SUBMISSION

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

Section 1 – "gross income" definition & fringe benefits

Legal Nature

315. In the recent case of *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* (1156/18) [2019] ZASCA it was held that the provision of tax consulting services by an employer to its expatriate employees constituted a 'benefit or advantage' as contemplated in the definition of 'gross income' in section 1 of the Act (a taxable fringe benefit) in the hands of such employees in accordance with the Seventh Schedule to the Act.

Factual Description

316. Paragraph 10 of the Fourth Schedule to the Act stipulates that the value of the fringe benefit in the above circumstances is the actual cost incurred by the employer in rendering the service. Determining the cost of this service is problematic as in some cases an employer has agreed to fees which incorporate a number of services, of which only some might be exclusively for the benefit of its employees. The administrative complexity in calculating the abovementioned fringe benefit is burdensome and time consuming for employers.

317. The USA for instance, has recently put rules in place to simplify the process of determining what cost relates to the benefit derived by the employer versus that of the employee. These rules state that the employer will assume the annual cost of preparing one host country, one U.S. federal and one state (if required) tax return and the tax equalization calculation. In accordance with IRS regulations, income will be imputed to the expatriate equal to the **estimated fringe benefit received** for the personal portion of the tax preparation services. A like amount will be taken as a deduction if deductions are itemized and are not limited on the tax return. Any additional tax that results from this imputed income will be assumed by the employer through the tax equalization program.

The nature of businesses impacted

318. Employers that have expatriate employees who are tax equalised or tax protected as the employer is liable to bear the tax cost in the employees' host location.

Proposal

319. It is proposed that an imputed amount to be allowed to be regarded as the estimated fringe benefit amount received by the expatriate employees as is permitted in the USA so as to lessen the administrative burden on employers in calculating the tax on the fringe benefit amount.

320. It is also proposed that the taxation of these fringe benefits be done prospectively, not retrospectively.

<u>Second Schedule – Tax Treatment on Withdrawal of foreign pensions</u>

<u>Legal Nature</u>

321. Paragraphs 2C and 6 of the Second Schedule deal with the withdrawal or resignation from a pension fund, pension preservation fund provident fund, provident preservation fund or retirement annuity fund. These funds are generally defined in section 1 of the Act as being local South African funds.

322. According to the 2016 Budget Speech, the question of how contributions to foreign pension funds and the taxation of payments from foreign funds should be dealt with raises a number of issues. A review of these issues is necessary taking into account the tax policy for South African retirement funds. NT was supposed to review this as part of the Davis Tax Committee findings, but no clarification has been forthcoming.

<u>Factual Description</u>

323. Tax treatment on withdrawal (by a South African tax resident) from a foreign pension fund appears to be uncertain – contributions made to such a fund would not have been allowed as a deduction.

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

324. All taxpayers who wish to withdraw their foreign pensions.

<u>Proposal</u>

325. Clarification is required as to the tax implications in this regard, given that the contributions made to such a fund would not have been allowed as a tax deduction.

<u>Paragraph 11A of the Fourth Schedule - Employees' tax for employee share incentive schemes</u>

<u>Legal Nature</u>

326. Paragraph 11A of the Fourth Schedule to the Act deals with the employees' tax aspects of employee share incentive schemes which fall within the ambit of section 8A, 8B and 8C of the Act, and which are included in the definition of "remuneration", specifically in paragraphs (b), (d) and (e).

327. Paragraph 11A of the Fourth Schedule appears to be a stand-alone provision which operates independently of paragraph 2(1) of the Fourth Schedule to the Act.

328. Paragraph 2(1) prescribes the employees' tax withholding obligation for a resident employer (or a representative employer) who pays or becomes liable to pay

remuneration to an employee; whereas paragraph 11A appears to apply to both resident and non-resident employers.

329. Paragraph 11A(2) provides as follows:

> *"(2) Employees' tax in respect of the amount of remuneration contemplated in subparagraph (1) must, unless the Commissioner has granted authority to the contrary, be deducted or withheld by the person …*
>
> *Provided that where that person is an "associated institution", as defined in paragraph 1 of the Seventh Schedule, in relation to **any employer** who pays or is liable to pay to that employee any amount by way of remuneration during the year of assessment during which the gain contemplated in subparagraph (1)(a) or (b) or the amount contemplated in 1(c) or (d) arises; and—…*
>
> *(i) that person is not resident nor has a representative employer;*
> *(ii) that person is unable to deduct or withhold the full amount of employees' tax during the year of assessment during which the gain or the amount arises, by reason of the fact that the amount to be deducted or withheld from that remuneration by way of employees' tax exceeds the amount from which the deduction or withholding can be made; or*
> *(iii) the amount of the dividend referred to in paragraph (c) consists of an equity instrument referred to in section 8C,*
>
> *that person and that employer must deduct or withhold from the remuneration payable by them to that employee during that year of assessment an aggregate amount equal to the employees' tax payable in respect of that gain or that amount and shall be jointly and severally liable for that aggregate amount of employees' tax." (Our emphasis and underlining.)*

330. Paragraph 11A(2) provides that employees' tax must be withheld by the "person" (who granted the right or from whom the equity instrument or qualifying equity share was acquired), unless the Commissioner has granted authority to the contrary.

331. In the first instance, where the "person" is a non-resident entity, that non-resident entity would be liable for the employees' tax withholding. However, in terms of the proviso to paragraph 11A(2) where the "person" who is required to withhold the employees' tax is an associated institution (as defined in paragraph (1) of the Seventh Schedule), in relation to any employer (who pays or is liable to pay to that employee any amount by way of remuneration during the year of assessment during which the gain arises) and certain conditions are satisfied, the "person" and the employer become jointly and severally liable for withholding and paying the employees' tax over to South African Revenue Service ("SARS").

Factual Description

332. In the circumstances described in the proviso to paragraph 11A(2) the employees' tax withholding obligation is placed on the following entities, if they are associated institutions (as defined):

- the "person" by whom that right was granted or from whom that equity instrument or qualifying equity share was acquired; and

- "any employer" who pays or is liable to pay to that employee any amount by way of remuneration during the year of assessment.

333. This may be problematic where both the "person" (who granted the right or from whom the equity instrument or qualifying equity share was acquired) and the employer (who pays or is liable to pay any amount by way of remuneration to the employee during the year of assessment during which the gain arises) are foreign non-resident entities. This may occur where a foreign national on a secondment to South Africa is paid by his/her non-resident home country employer and acquires an equity instrument from a foreign group entity.

334. In these circumstances it is unlikely that either the foreign home country employer (who pays the employee's remuneration) or the foreign entity (from whom the equity instrument was acquired) would be registered with SARS as employers for purposes of employees' tax withholding. Note that in our experience it is extremely difficult to register a non-resident entity as an employer with SARS. This may not even be possible where the non-resident entity does not have a permanent establishment in South Africa.

335. The abovementioned problem is further illustrated in the following scenario:

336. An award is made to a non-resident employee in terms of a Long Term Incentive Plan implemented for employees of the group. The award is made by a non-resident group entity and the employee is subsequently seconded to the South African entity for a period of 2 years. The employee is repatriated at the end of the 2 year secondment period in South Africa. The award vests a year later while the employee is rendering services to his home country employer (who is not the grantor of the award (i.e. the "person" referred to in paragraphs 11A(1) and (2)).

337. In these circumstances neither the "person" referred to in paragraphs 11A(1) and (2) nor the employer who pays the employee's remuneration during the year of assessment in which the gain arises are South African resident entities. These entities are unlikely to be registered with SARS and furthermore, it may be impractical, if not impossible for these entities to register as employers with SARS.

The nature of businesses impacted

338. All foreign employers who pay or are liable to pay to an employee any amount by way of remuneration in respect of employee share incentive schemes which fall within the ambit of section 8A, 8B and 8C of the Act, and which are included in the definition of "remuneration", specifically in paragraphs (b), (d) and (e).

Proposal

339. It is proposed that the proviso to paragraph 11A(2) should be amended to refer to "any *South African resident* employer who pays or is liable to pay to that employee any amount

by way of remuneration during the year of assessment during which the gain contemplated in subparagraph (1)(a) or (b) or the amount contemplated in subparagraph (1)(c) or (d) arises;…"

Section 24 – Credit agreements and debtors allowance – sale of fixed property

Legal Nature

340. Section 24(1) of the Act states the following:

"*Subject to the provisions of section 24J, if any taxpayer has entered into any agreement with any other person in respect of any property the effect of which is that, in the case of movable property, the ownership shall pass or, in the case of immovable property, transfer shall be passed from the taxpayer to that other person, upon or after the receipt by the taxpayer of the whole or a certain portion of the amount payable to the taxpayer under the agreement, the whole of that amount shall for the purposes of this Act be deemed to have accrued to the taxpayer on the day on which the agreement was entered into*."

Factual Description

341. For individuals and smaller businesses, the impact of the above section may be significant as the tax on the transaction needs to be paid before the funds have actually been received. This causes severe cash-flow issues for these taxpayers.

The nature of businesses impacted

342. All individuals and small businesses who sell property as set out in section 24.

Proposal

343. It is proposed that consideration should be given to introducing a "cash basis" for the payment of the tax due in respect of the sale of immovable property by individuals and small businesses so as to alleviate any cash-flow difficulties that may arise from the tax having to be paid before the money for the sale has been received.

CATEGORY – DOMESTIC BUSINESS TAXES

Section 1 – "gross income" definition - Tenant installation allowances

Legal Nature

344. Certain landlords provide tenants with an allowance to cover the cost of refurbishing leased property.

Factual Description

345. Case law (Heron Investments (Pty) Ltd vs Secretary for Inland Revenue 33 SATC 181) seems to indicate that these allowances should be treated as capital in nature, but in practice, the treatment appears to vary. In most instances these allowances are provided in respect of short term leases that are concluded.

The nature of businesses impacted

346. All taxpayers who receive refurbishment allowances.

Proposal

347. Clarity is required as to whether these allowances are capital or revenue in nature as the property market has changed substantially since the time of the Heron's decision and furthermore the case dealt with a set of particular circumstances where the lease period approximated ten years.

Section 1 – Definition of "equity share"

Legal Nature

348. The definition of "equity share" in section 1 of the Act is defined as '*any share in a company, excluding any share that, neither as respects dividends nor as respects returns of capital, carries any right to participate beyond a specified amount in a distribution'*.

349. The second proviso to section 10B(2) also refers to an equity share. This section provides for an exemption for foreign dividends received or dividends received from a head quarter company and the proviso reads as follows: '*Provided further that paragraph (a) must not apply to any foreign dividend received by or accrued to that person in respect of a share other than an equity share'*.

Factual Description

350. The definition of "equity share" in section 1 of the Act currently does not refer to "foreign dividends" and "foreign returns of capital". It is clear from, for example, the second proviso to section 10B(2), that shares in non-South African tax resident companies may also qualify as "equity shares", however, the definition "equity share" in section 1 of the Act refers to "dividends" and "returns of capital", which are concepts that are only defined in relation to South African tax resident companies and not "foreign dividends" and "foreign returns of capital", which are the corresponding concepts that refer to shares in non-South African tax resident companies.

The nature of businesses impacted

351. All taxpayers who wish to claim an exemption for foreign dividends or dividends declared or paid by headquarter companies.

Proposal

352. It is proposed that the definition of "equity share" in section 1 of the Act be amended to also refer to "*foreign dividends*" and "*foreign returns of capital*".

Section 8E – Dividends deemed to be income

Legal Nature

353. The Explanatory Memorandum (EM) proposed amendments to the definition of "hybrid equity instrument" in paragraphs (*a*), (*b*) and (*e*) to clarify the scope of the definition of hybrid equity instrument by clarifying that any part redemption of a share refers to a distribution of an amount constituting a return of capital or a foreign return of capital in respect of that share as it is impossible to otherwise redeem a portion of a share.

354. The TLAB2019 refers to the obligation to "distribute an amount determined with reference to the issue price of that share".

355. The proposed amendments to this section are deemed to have come into operation on 21 July 2019 and applies in respect of years of assessment ending on or after that date.

Factual Description

356. The EM seems to target "distributions constituting return of capital or foreign return of capital" but the updated TLAB2019 refers to the obligation to "distribute an amount determined with reference to the issue price of that share".

357. This change is much wider than what the EM proposed, and thus would cover a normal dividend. It would thus seem as if an obligation to distribute a normal dividend would render a share a hybrid equity instrument.

The nature of businesses impacted

358. All taxpayers who receive any dividend or foreign dividend in respect of a share or equity instrument.

Proposal

359. The section needs to be amended to limit the application of the section to at least that proposed in the EM as it clearly cannot be NT's intention that an obligation to distribute a normal dividend would render a share a hybrid equity instrument.

360. The effective date of the amendment (21 July 2019) should not applied retrospectively, but prospectively.

361. The lack of consultation on the additional amendments from the original bills to the promulgated bills is concerning and undermines the credibility and transparency of the legislative process and does not foster a trusting relationship with the public.

Section 22 – Trading stock valuation

Legal Nature

362. The proposed amendments to the TLAB2019 provide that in determining any diminution in the value of trading stock, no account must be taken of the fact that the value of some items of trading stock held and not disposed of by the taxpayer may exceed their cost price.

Factual Description

363. Although the removal of the initial requirement that any diminution in the value of trading stock must be done on an item-by-time basis is welcomed and the new proposed amendment is accepted, the fact that there is still no alignment with the valuation of trading stock for IFRS/GAAP purposes still creates a huge administrative burden for taxpayers in that they need to two separate records for the valuation of trading stock – one for accounting purposes and one for tax purposes.

The nature of businesses impacted

364. All taxpayers who have trading stock.

Proposal

365. It is proposed that the valuation of trading stock for taxation purposes be aligned with the accounting treatment thereof as having to keep two separate records is burdensome for businesses and costly from an audit perspective for both SARS and taxpayers.

366. Aligning the accounting and tax treatment would align with the President's drive to reduce regulatory burdens and improve economic growth for businesses in South Africa as mentioned by him at the Jobs Summit and the Financial Times Africa Summit in 2019.

Section 30 – "Retrospective approval"

Legal Nature

367. The current section 30 and 30A allows for CSARS to retrospectively approve these organisations, and for PBO's to the extent that they have complied with the requirements of a PBO, in essence an entity that conducted PBA's.

368. This submission will only address PBO's as we believe they require special attention given their service to society.

369. As noted to SCoF, this provision was extended in scope in 2009 beyond the initial limitations periods in 2001 and 2006 in acknowledgement by NT that this sector seldom understands the complexity of their obligations and especially for PBO's, the burden of this complexity should not be an added burden where these entities are helping society and government.

370. Government seeks compliance which we support but it must be fair given the circumstances of the taxpayer group.

371. The proposals in the TLAB2019 limit the retrospectivity to 3 years and only after all returns are submitted. Though this is an improvement from the initial draft bill it remains problematic especially for PBO's.

<u>Factual Description</u>

372. Mr and Mrs X looks after AIDS orphans and started as a couple making their house available. Initially it was self-funded and then they received local cash, clothes and food donations. They also sell some of the food donated where it would spoil for not being used in time.

373. After 5 years the burden is too great and they seek more external funding, but the 'external funder' requires them to be a registered PBO.

374. They thus approach SARS for registration.

375. By law, they must register as a company (section 1 definition of company in the ITA), submit 5 years of income tax returns as a company and pay any taxes due. The latter is required as even though they want to apply as PBO, the process takes months and SARS debt management will in practice seek to recover as the "stops" are seldom effective.

376. They will now have to engage the services of a professional to draft a founding instrument which must also be in compliance with the tax legislation, sign on as fiduciary responsible persons, pay the professional to analyse their cash flows/accruals for the last 5 years to submit returns and pay the corporate tax and any penalties/interest.

377. Only then will SARS TEU register them and if successful, they will get a refund a year or more later.

378. Under the TLAB2019 they will now be penalised for 2 years to pay corporate taxes and penalties/interest.

379. This debt is in our view a "false debt" and so is the refund as it never should have occurred in the first instance, thus the practical problem is self-created due to the application of the law and practice by SARS.

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

380. All taxpayers who are PBO's.

<u>Proposal</u>

381. The proposed legislation creates a disincentive to register or conduct PBA's given the risks which are both not in the public interest or that of government.

382. It also remains unclear for unincorporated entities, who exactly SARS intended holding responsible, as no one will incur such responsibility after the fact as fiduciary.

383. It is proposed that the proposal in section 30(3A) be reconsidered and returned to its original wording.

384. It is further proposed that the law be amended to remove the dual application procedure which creates this problem so that a PBO can directly apply to the TEU rather than first as a normal company. In such instance no refund will be necessary as there will be no debt raised on application, only if the application is rejected by the TEU.

<u>Section 30B – Meaning of "funding"</u>

<u>Legal Nature</u>

385. In order for a section 30B association to qualifying for exemption under section 10(1)(d)(iii) or (iv) certain criteria need to be met.

386. Section 10(1)(d) will exempt all "**<u>receipts and accruals"</u>** if the criteria in section 30B are met, which includes two criteria referring to "**<u>funding</u>**".

387. The "funding" requirement is used in section 30B and a threshold requirement is therefore critical.

388. We accept that these types of entities funding models may out of necessity have been expanded and that the policy of what was intended, namely a simple compliance approached but with a restricted funding model, may not be realistic anymore. In such case NT may want to reconsider the current policy, especially where compliance has become a concern.

389. Receipts and accruals include both capital and revenue amounts and also will include passive amounts like interest and dividends, but also trading income, which will be fully exempt should these requirements be met.

390. As the rules of interpretation require all words to be given a meaning, "funding" invariably means something different to "receipts and accruals", hence the use of a different word.

<u>Factual Description</u>

391. One of the requirements is that "*substantially the whole*" of the entity's **funding** must be derived from its annual or other **<u>long-term members</u>** or from an **<u>appropriation by the government</u>** of the Republic in the national, provincial or local sphere.

392. When calculating this threshold, the question then arises what is in "funding" that is not in receipts and accruals and what is "total funding" (base of calculation) as opposed to "*member funding*".

393. For example, below is two approaches, though more exist, to this classification:

EXAMPLE A – STRICT		**EXAMPLE B – BROAD**	
Member income	R100	**Member income**	R100
Interest on cash	R 10	**Interest on cash**	**R 10**
Dividends from subsidiary	R 10	Dividends from subsidiary	R 10
Trading income from Members	R 10	**Trading income from Members**	R 10
Trading income from others	R 10	Trading income from others	R 10
Receipts from assets disposed of	R 5	**Receipts from assets disposed of**	**R5**
Receipts and accruals	R145	Receipts and accruals	R145
Total funding	R140	Total funding	R145
“Funding” from members	R110	“Funding” from members	R135

394. In example A there is contravention and in example B compliance, though both revenue streams are the same.

395. This uncertainty in the law creates much disparity in the market depending on which interpretation is followed. It also means that in the broader interpretation, corporate structures are now created with “dividends” seen as member funding (as it was originally funded with member money) and whether NT intended group structures under these section 30B organisations is unclear.

396. As it is also unclear what “funding” means, for example, does it exclude exempt amounts and capital gains; it remains unclear what “total funding” would be in relation to member funding. It is clear that in practice it is wider than just member affiliation fees.

397. We have engaged the SARS TEU to clarify this and have provided the following examples of “funding” for them to consider:

Income types which are derived from non-members to consider for **interpretation of “funding”** for section 30B(2)(ix) purposes or funding from members that are non-member fees:

90.1. **Donations** from members and non-members

90.2. Sponsorships for events / projects

90.3. Contributions by or fees paid by “related” international industry organisations which promote common interests of their members in similar professions, businesses, industries outside SA to support SA specific projects and/or to provide support services to their members in SA.

90.4. Bequests from estates of members and non-members

90.5. Project contributions from international organisations like World Bank, OECD and IFAC to produce industry products like accounting standards to be used globally

90.6. Other capital receipts including profits on the sale of assets and intellectual property

90.7. Interest income (passive investment)

90.8. Dividend income (passive investment)

90.9. Royalty income and licensing fees for use of IP

90.10. Rental income from third parties for excess office space – eg. Association rents out excess office space in its building to non-member to ensure that under-utilised part of the building does not stand vacant

90.11. Training attendance fees charged to firms or employers (non-members) where individual members and non-members work

90.12. Amounts received to Fund the Association’s public benefit project activities (eg bursary schemes, education and academic support, community development projects etc)

90.13. Entrance, participation or exhibition fees to occasional events open to public to promote the industry (eg entrance fees to industry shows)

90.14. Attendance fees for occasional technical events or forums open to public

90.15. Advertising income

90.16. Sale of technical books, journals, magazines to non-members (for example sale of medical journals to exempt entities like libraries, universities).

90.17. Cost recovery charges (no mark-up) to non-members to recover expenses incurred for their benefit (shared facilities, resources)

90.18. Admin and/or management fees charged to other (exempt) industry organisations (eg shared services or facilities of “related” industry organisations that are not members of each other)

90.19. Commission income or similar rewards from third parties for member participation or utilization of their services/ products

90.20. Levies raised by Law on third parties (eg employers) for non-member participation in collective bargaining / negotiations (Trade Unions).

The nature of businesses impacted

91. All taxpayers to whom section 30B applies, which include trade unions and member bodies.

Proposal

92. It is proposed that the wording of section 10(1)(d) and section 30B be harmonised to clarify what the difference is between “funding” and “receipts and accruals”, if any was intended.

93. It is proposed that the concept of “funding” be clarified so that it is clear what is “total funding” as the base of the calculation and what is “member funding” as the threshold. This is especially important to income sources, both passive and active, created from member fees.

Section 30B – Meaning of “substantially the whole”

Legal Nature

94. Section 30B requires “substantially the whole” of as a requirement in relation to funding income, spending and activities. This term is also used in many other sections.

95. SARS have issued BGR20 to clarify its interpretation of the clause as meaning 90% in the strict sense, but will allow 85% as a pragmatic approach.

96. It also then affirms that the taxpayer must use an appropriate method to determine the percentage as relates to the relevant circumstances.

97. Though this pragmatic approach is welcomed, the legislative uncertainty is not.

Factual Description

98. “Substantially the whole” is used for the determination of the threshold in 3 instances in section 30B. Together with the uncertainty of “funding” it makes for a very unclear legal position to implement practically.

99. For example, if a taxpayer uses 85% of the broader or narrow view on section 30B and is involved in a dispute with SARS, is the 85% tenable under law?

100. A concern is also expressed that SARS cannot take a formal interpretation such as 90% and then issue a legally binding BGR that is against its own clear interpretation.

The nature of businesses impacted

101. All taxpayers to whom the term “substantially the whole” applies.

Proposal

102. It is proposed that the term “substantially the whole” be replaced with 85% given that the latter is what SARS gives effect to.

103. It makes no sense to have uncertainty in the tax exempt space which could be resolved with a clear percentage.

Section 31 – Arm’s length principle in relation to withholding taxes

Legal Nature

104. Section 31(1) of the Act is broad and extends to any transaction, arrangement, scheme, or understanding and would apply to the advancement of funds from an offshore resident to a South African resident. An interest-free inbound loan therefore appears to fall into the ambit of section 31(1).

105. For section 31(2) to apply to an interest-free inbound loan, not only do the terms of the transaction have to fail the arm's length test, but there must also be a tax benefit as a result of the terms of the agreement. “Tax benefit” is defined as any avoidance, postponement or reduction of any liability to tax.

Factual Description

106. It is uncertain whether section 31(2) would be applicable to an inbound interest-free loan as from the perspective of the borrower, there is arguably no tax benefit as there is no deductible interest to claim.

107. If section 31(2) were invoked this would result in an imputed interest charge which would arguably reduce the taxable income of the borrower and therefore go against the tax benefit requirement in section 31(2). It is our understanding that the tax benefit requirement was to limit the application of section 31 to only provide for adjustments which resulted in an increased tax liability not a reduced liability. So from the borrower’s perspective, SARS would not be able to apply section 31(2) to make an adjustment.

108. However, from the perspective of the lender, which is a separate legal entity but also potentially subject to tax in South Africa on any interest it may derive –a tax benefit as a result of the ‘avoidance’ of the withholding tax (WHT) on interest could arise. The DTA provisions would, however, also need to be taken into consideration. Arguably section 31(2) allows SARS to impute a notional interest accrual for the lender and subject this to the WHT on interest. As the lender would not be subject to tax on the interest in its home

country there is no double taxation so there is an argument the DTA would not apply, giving SARS the taxing rights with no DTA relief.

109. We note the findings in the BPR192 issued by SARS on 28 May 2015 that appears to provide SARS' view that in such cases SARS will not seek to apply the WHT on interest to an inbound interest free loan. However, taxpayers do not have full details of the facts under which the ruling was applied for.

The nature of businesses impacted

110. All taxpayers who have and provide inbound interest free loans.

Proposal

111. Clarity should be provided on whether section 31(2) would apply to inbound interest-free loans and whether the WHT on interest will be imposed on the non-resident lender.

Section 41 and 44 – Exclusions to application of the corporate rules

Legal Nature

112. The following words appear in a number of places in the corporate rules (Section 41(1) definition of group of companies; section 44(14)(e)):

"*any amount constituting gross income of whatever nature would be exempt from tax in terms of section 10 were it to be received by or to accrue to that company*"

Factual Description

113. If this provision were to be applied literally, a number of the corporate rules would not apply and there would furthermore be no 'groups of companies' as most companies will at some stage receive dividends which are exempt from tax in terms of s10(1)(k).

114. In order for this legislation to make sense it needs to be interpreted as meaning if all income would be exempt.

The nature of businesses impacted

115. All taxpayers to whom the corporate rules apply.

Proposal

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

"*all amounts* constituting gross income of whatever nature would be exempt from tax in terms of section 10 were they to be received by or to accrue to that company"

<u>Section 42(8)(b) – Asset for share transaction</u>

<u>Legal Nature</u>

117. Section 42(8) provides that any debt that is transferred along with an equity share in exchange for an asset in terms of section 42 will not give rise to any immediate tax implication if it arose as set out below:

“ *Where a person disposes of …..*

(b) any business undertaking as a going concern to a company in terms of an asset-for-share transaction and that disposal includes any amount of debt that is attributable to, and arose in the normal course of that business undertaking, ….”

<u>Factual Description</u>

118. The question that arises in this regard is whether, if a business undertaking is disposed of as a going concern but the rollover aspects of section 42 are applied to only some of the assets, the provision still applies in respect of all the debt. It is understood that it does.

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

119. All taxpayers to whom section 42 applies.

<u>Proposal</u>

120. It is suggested that the wording be amended to state (changes in italics):

“(b) any business undertaking as a going concern to a company *and some of the assets of that business undertaking are disposed* of in terms of an asset-for-share transaction and that disposal includes any amount of debt that is attributable to, and arose in the normal course of that business undertaking, ….”

<u>Section 45 – Intra-group transactions</u>

<u>Legal Nature</u>

121. The current legislation contained in section 45(1)(b)(i) limits the compensation format payable by the transferee company to either be in the form of a loan (issue of debt) or for an exchange of shares (other than equity shares). No other payment format is contemplated based on the wording of this section.

122. In instances where the transferor company and the transferee company agree to settle the consideration by cash, for example, the relief sought in terms of section 45 is not available due to the current wording of the legislation. Generally, in terms of section 45(1)(b), an “intra-group transaction” includes, inter alia, any transaction where a transferor company disposes of equity shares held in foreign company to a transferee

company **in exchange for the issue of debt or shares** other than equity shares by that transferee company.

123. The result is companies who may have the cash resources to settle the payment consideration and who may wish to do so by means of using cash resources – are excluded from using the relief that is provided by section 45(1)(b)(i). We have observed in practice that in these instances, the parties have had to first resort to entering into a loan agreement with its attendant essential (determining an arm's length interest rate, period of the loan, repayment terms, etc.) in order to fall within the parameters of the 45(1)(b)(i) group relief provisions. It is also noted that these loan agreements are often shortly thereafter settled using cash resources of the transferee company.

Factual Description

124. The historic EMs have not provided any reasoning as to why a cash settlement mechanism was excluded from the legislation introduced effective 1 January 2013. This may have been an oversight when the debt limitation rules were also introduced at the same time as there is no anti-avoidance that may arise by providing a cash settlement mechanism for utilising section 45(1)(b)(i) group relief transactions.

The nature of businesses impacted

125. All transferor and transferee companies that agree to settle the consideration for an intra-group transaction by means of cash.

Proposal

126. We submit that section 45(1)(b)(i) should be extended to include a cash settlement, as this will provide certainty for taxpayers wanting to use this manner of settlement without having to first enter into a loan agreement.

127. The availability of the option to use cash as a payment format for settlement of the consideration (in section 45(1)(b)(i)) will provide relief to taxpayers from both an administrative and legal perspective and will be more cost efficient as well for both parties.

Eighth Schedule: Paragraph 56 – Disposal by creditor of debt owed by connected person

Legal Nature

128. Paragraph 56(2)(a)(ii) allows a capital loss, determined in consequence of the disposal by a creditor of a debt owed by a debtor (who are connected persons), to be taken into account by the creditor to the extent that the amount of the debt so disposed of represents an amount which is applied to reduce any assessed capital loss of the debtor in terms of paragraph 12A.

Factual Description

129. Paragraph 12A was amended during the 2017 legislative cycle and it now requires a taxpayer to recalculate a gain or loss in these circumstances. Thus paragraph 56(2)(a)(ii) will no longer apply.

The nature of businesses impacted

130. Where a creditor disposes of a debt owed by a debtor, who is a connected person in relation to that creditor.

Proposal

131. Paragraph 56(2)(a)(ii) should be amended to align with the changes to paragraph 12A.

CATEGORY – VALUED ADDED TAX & CUSTOMS

Section 2 – Financial Services

Legal Nature

398. Section 2(1)(d) deems the issue, allotment or transfer of ownership of an equity security or a participatory security to be a financial service.

Factual Description

399. Section 2(1)(d) does not cater for the cancellation of an equity security and share buy-backs.

The nature of businesses impacted

400. Taxpayers cancelling shares and undertaking share buy-backs.

Proposal

401. Section 2(1)(d) should include the cancellation of an equity security and share buy-backs.

Section 20(8) – Tax invoices

Legal Nature

402. Section 20(8) refers to an “identity document” as contemplated in section 1 of the Identification Act, 1997.

Factual Description

403. The Identification Act, 1997 does not contain a definition of an “identity document”. It does have a definition of an “identity card”.

The nature of businesses impacted

404. All businesses purchasing second-hand goods or repossessing goods where the supply to the recipient is not a taxable supply.

Proposal

405. The above mentioned reference should be corrected.

Section 21 – Credit and debit notes

Legal Nature

406. Section 21 of the VAT Act stipulates certain requirements for a valid credit/debit note. Any document which does not contain the particulars as envisaged in section 21(3)(a) or 21(3)(b) of the VAT Act, does not constitute a valid credit/debit note and as such a vendor is not entitled to claim an input tax deduction or an adjustment to output tax based on such document. One of the requirements in terms of section 21(3) is that the words "credit note" or "debit note" must be stipulated on the document. However, section 21(5) gives the Commissioner a discretion to accept a credit/debit note if one or more of the particulars are not contained on the document and if there are sufficient records available, or will be available, to establish the particulars of the supply and if it would be impractical to require a full credit/debit note.

Factual Description

407. SARS is currently regarding as invalid, any credit/debit notes that do not have the specific words "credit note" or "debit note" on the face of it. Disallowing valid credit/debit notes because of the specific wording on the document does not seem reasonable especially in light of the discretion given to the Commissioner in terms of section 21(5) and the *South Atlantic Jazz Festival (Pty) Ltd v Commissioner for the South African Revenue Service* [2015] ZAWCHC 8 court case ruling.

408. Furthermore, in 2015 changes were made to section 20 relaxing the particulars required for a tax invoice - that is, the words "tax invoice", "VAT invoice" or "invoice" were subsequently allowed to be stipulated on an invoice not just the words "tax invoice". This reason provided for this amendment was because it did not compromise the audit trail or policy intent for the requirements of the section.

The nature of businesses impacted

409. All vendors who issue credit/debit notes.

Proposal

410. It is recommended that section 21 be relaxed as was done for section 20 in cases were the only missing information from a credit/debit note is the words "credit note" or "debit note" and there are sufficient records available, or will be available, to establish the particulars of the supply.

Section 23 – Registration for VAT

Legal Nature

411. The proviso to section 23(1), provides as follows:

“*Provided that the total value of the taxable supplies of the vendor within the period of 12 months referred to in paragraph (a) or the period of 12 months referred to in paragraph (b) shall not be deemed to have exceeded or be likely to exceed the amount contemplated in paragraph (a), where the Commissioner is satisfied that the said total value will exceed or is likely to exceed such amount solely as a consequence of –*

(i) any cessation of, or any substantial and permanent reduction in the size or scale of, any enterprise carried on by that person; or

(ii) the replacement of any plant or other capital asset used in any enterprise carried on by that person; or

(iii) abnormal circumstances of a temporary nature”.

412. Section 23(1A) reads as follows:

“*Every person who carries on any enterprise as contemplated in paragraph (b)(vi) or (vii) of the definition of ‘‘enterprise’’ in section 1 and is not registered becomes liable to be registered at the end of any month where the total value of taxable supplies made by that person has exceeded R1 million in any consecutive 12-month period*”.

Factual Description

413. The proviso to section 23(1), in particular par (iii) of the proviso to section 23(1), does not currently apply to section 23(1A).

The nature of businesses impacted

414. A person supplying electronic services from a place in an export country as defined in paragraph (b)(vi) and the activities of an intermediary as defined in paragraph (vii) of the definition of ‘‘enterprise’’ in section 1.

Proposal

415. The proviso to section 23(1), in particular par (iii) of the proviso to section 23(1), should also apply to section 23(1A).

Section 52 – Pooling arrangements

Legal Nature

416. In terms of section 52 of the VAT Act, any Pool managed by anybody for the sale of agricultural, pastoral or other farming products and any rental pool managed or operated by a person for the benefit of its members is regarded as a separate enterprise carried

on by the operator/manager separately from the members and shall be registered separately for VAT, provided certain requirements are met.

Factual Description

417. Since the implementation of section 52, vendors have been applying and receiving VAT rulings in terms of section 72 allowing them to register the Pool as a separate enterprise, resulting in the Pool accounting for VAT for all supplies made by the Pool members and deducting all the VAT incurred by the Pool members. With a pooling arrangement, the members will not be required to register, thus reducing the administration of the registration of various entities managed and operated by an Operator.

418. On 21 July 2019, National Treasury proposed amendments to section 72 of the VAT Act which will result in the Commissioner being unable to continue to provide the dispensation previously provided (see comments on this section below).

419. The proposed amendments to section 72 of the VAT Act will have a negative impact on various vendors that have been granted a dispensation for section 52 of the VAT Act as it would mean that all vendors who have been granted a section 72 ruling will no longer have that dispensation and the Pool would have to deregister as a VAT vendor and all the members of the Pool would have to register for VAT individually. The members would have to account for the VAT and deduct the VAT incurred by each individual member.

420. The above process would be an administrative and costly exercise for the Pool, its members and SARS. In this regard, all the members of the Pool would have to go through the registration process without any benefit to the fiscus despite them operating like rental schemes and agricultural pools.

421. As early as 2013, there have been submissions to NT and SARS to amend section 52 of the VAT Act to include other vendors that operate pooling arrangements similar to those defined in section 52 of the VAT to be included in that section.

The nature of businesses impacted

422. Various vendors that have been granted relief in terms of section 72 for a dispensation for section 52 of the VAT Act.

Proposal

423. It is proposed that section 52 of the VAT Act should be amended to include all vendors that have pooling arrangements similar to those currently contained in section 52 of the VAT Act.

Section 67(1) – Contract price or consideration may be varied according to the rate of VAT

Legal Nature

424. The second proviso to section 67(3) of the VAT Act provides as follows:

"… Provided further that this subsection shall not be construed so as to permit any further increase or require a further decrease, as the case may be, in a fee, charge or other amount referred to in this subsection, where such fee, charge or other amount is calculated as a percentage or fraction of another amount which represents the consideration in money for a taxable supply of goods or services, other than a taxable supply charged with tax at the rate or zero per cent or a supply which is an exempt supply."

425. Section 67(1) reads as follows:

"Whenever the value-added tax is imposed for the first time in terms of this Act or the rate of tax applicable under section 7(1) is increased in respect of any supply of goods or services in relation to which any agreement was entered into by the acceptance of an offer made before the tax was imposed for the first time in terms of this Act or the rate of tax applicable under section 7(1) was increased, as the case may be, the vendor may, unless agreed to the contrary in any agreement in writing and notwithstanding anything to the contrary contained in any law, recover from the recipient, as an addition to the amounts payable by the recipient to the vendor, a sum equal to any amount payable by the vendor by way of the said tax or increase, as the case may be, and any amount so recoverable by the vendor shall, whether it is recovered or not, be accounted for by the vendor under the provisions of this Act as part of the consideration in respect of the said supply."

Factual description

426. The second proviso to section 67(3) does not currently apply to section 67(1). Where section 67(1) applies, a vendor may currently increase its fees with the VAT rate (currently 15%) notwithstanding that its fees may already have been calculated with reference to another VAT inclusive amount.

The nature of businesses impacted

427. Taxpayers whose fees or commissions are calculated as a percentage of another VAT inclusive amount, most recently, foreign suppliers of electronic services who first became liable to register for VAT on 1 April 2019.

Proposal

428. To ensure all vendors are treated equally, it is suggested that the wording of the second proviso to section 67(3) should also apply to section 67(1).

Interpretation Note 92

Legal Nature

429. Interpretation Note 92 prescribes the documentary proof required under section 16(2)(f) that must be obtained and retained by a vendor to substantiate the vendor's entitlement to a deduction as contemplated in section 16(3)(c) to (n).

Factual Description

430. In Interpretation Note 92, in the table under point 3. and under Item H, the documentary proof required is reflected as "proof that the underlying supply of goods or services was taxable at 14%".

The nature of businesses impacted

431. All taxpayers who are VAT registered and who redeem tokens, vouchers or stamps (section 16(3)(i)).

Proposal

432. The VAT rate must be changed to 15% as it still makes reference to 14% instead of 15%.

CATEGORY – TAX ADMINISTRATION ACT (TAA)

Section 1 – Definition of "Official Publication"

Legal Nature

433. Section 1 of the TAA defines "Official Publication" as follows: "*a binding general ruling, interpretation note, practice note or public notice issued by a senior SARS official or the Commissioner*".

Factual Description

434. Currently the Business Requirement Specification (BRS) documents are not included in the section 1 definition of 'Official Publication' and these also do not form part of the section 5 TAA Practice Generally Prevailing and are listed and treated as 'Guides' or 'External Publications' by SARS.

The nature of businesses impacted

435. All taxpayers who are required to use the numerous BRS documents.

Proposal

436. Given that BRS documents contain instructions on the form and content of various different topics and are not guides (i.e SARS informal view) as taxpayers must follow them, they should be included in the definition of "official publication".

Section 34 – Reportable arrangements

Legal Nature

437. The term "reportable arrangement" is defined in section 34 of the TAA. Persons who enter into these arrangements must report the details of those transactions to SARS. A "reportable arrangement" does not in itself give rise to a tax liability, but may give rise to a report which is required to be submitted to SARS – the failure of which could give rise to significant penalties.

438. Section 35(1) sets out the legislative circumstances in terms of which an arrangement may be reportable. In addition, section 35(2) provides that an arrangement will be a reportable arrangement if it is listed by the Commissioner in a public notice.

439. Sections 36-39 deal with the excluded arrangements, disclosure obligations, information to be submitted by taxpayers to SARS when reporting these arrangements and the reference numbers required to be issued by SARS.

Factual Description

440. These provisions, and inclusion of public notices listing additional reportable arrangements, currently create a lot of uncertainty for both SARS and taxpayers. One example of this is when does the clock for the 45-day period in terms of section 37(5) start ticking, especially in the case of agreements that are void due to non-fulfilment of conditions that should be reported.

The nature of businesses impacted

441. All taxpayers who have fall within the provisions of reportable arrangements.

Proposal

442. These provisions should be rewritten in their entirety; alternatively, clear guidance should be provided on how these provisions are to be applied in relation to various practical scenarios.

Section 93 and 104 – Reduced assessments and objection against assessment or decision

Legal Nature

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

444. Section 93(1)(d) merely provides for a less formal remedy based on a much narrower circumstance; namely a readily apparent undisputed error in the assessment.

Factual Description

445. The law does not regulate the procedure or timelines in respect of section 104 when a remedy is sought under section 93. It is thus uncertain whether the one remedy delays the other or if the one remedy is subject to the other.

446. This results in taxpayers either losing the section 104 remedy should SARS not respond to the section 93 request within 30 days from the date of assessment, or it compels the taxpayer to make two separate submissions to two separate SARS channels (one to request a section 93 correction and the second one is the lodgement of an objection in terms of section 104). A withdrawal of the objection is then necessary if the section 93 remedy is successful.

447. Having to run two separate procedures is both time consuming and a waste of resources for both taxpayers and SARS.

The nature of businesses impacted

448. All taxpayers requesting a reduced assessment in terms of section 93 of the TAA.

Proposal

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

Section 104 – Objection against an assessment or decision (diesel rebates)

Legal Nature

450. Section 4 of the TAA states that the TAA is applicable to the provisions of a "tax Act". "Tax Act" is defined in section 1 but it specifically excludes customs and excise legislation.

451. Administration of the diesel refund system is done through both the Customs and Excise Act, 1964 (C&E Act), and the VAT Act. Part 3 of Schedule No. 6 of the C&E Act regulates the administration of the diesel refund system by SARS, while actual claims and refunds are administered through the VAT system.

Factual Description

452. It is unclear as to how one may object against the disallowance of diesel rebates where no assessment is issued, as the customs and excise legislation is specifically excluded from the provisions of the TAA.

The nature of businesses impacted

453. All taxpayers wanting to object against the disallowance of a diesel rebate.

Proposal

454. Clarity should be provided in the customs and excise legislation on how to object against the disallowance of a diesel rebate.

Section 164 – Payment of tax pending objection and appeal

Legal Nature

455. Section 164(5) provides for a SARS official to deny a request to suspend a payment of tax due. It also provides for a SARS official to revoke a decision to suspend payment with immediate effect if certain criteria are met.

Factual Description

456. Other than relying on the provisions of the Promotion of Administrative Justice Act (PAJA) on the basis that these decisions/actions constitute unreasonable administrative action, there seems to be no remedy for taxpayers should SARS decide to deny a request for suspension of payment or should it decide to revoke a decision to suspend payment in terms of subsection (3).

The nature of businesses impacted

457. All taxpayers who request a suspension of payment of tax due and whose requests are denied or decisions to allow the suspension are revoked.

Proposal

458. Taxpayers should be provided with an option to object to such decisions if they believe that the position taken by the senior SARS official is not justified. This would prevent taxpayers from having to rely solely on the provisions of the PAJA which is often a long and costly option of dispute resolution.

Section 210 (read with section 208) – Definition of "preceding year"

Legal Nature

459. In terms of 210 of the TAA, where the SARS is satisfied that non-compliance by a person (as detailed in section 210(2)) exists, SARS must impose the appropriate penalty in accordance with the table in section 211 (Fixed Amount Penalty Table).

Factual Description

460. Non-compliance in terms of section 210(2) includes the failure to comply with an obligation that is imposed by or under a tax Act, subject to certain exclusions. For example, the failure by a company to submit a tax return would constitute non-compliance, subject to which a penalty may be imposed.

461. The Fixed Amount Penalty Table prescribes that the penalty should be calculated with reference to the assessed loss or taxable income for the 'preceding year'. The term 'preceding year' is defined in section 208 to mean "the year of assessment immediately prior to the year of assessment during which a 'penalty' is assessed".

Problem statement

462. As an example, a company has a December year-end, and both its 2016 and 2017 returns are outstanding, SARS now levies the fixed amount penalty in the 2019 calendar year. From the existing definition of 'preceding year', because the penalty is assessed in 2019, 2018 is the year immediately prior the year in which the penalty is assessed. However, as this year has not yet been assessed, SARS would not know what the assessed loss / taxable income is and can therefore not determine the penalty. Where it was the intention of the legislator to mean the last assessed year of assessment, it is submitted that this may be more appropriate.

Proposal

463. It is proposed that the definition of the term 'preceding year' be amended to clarify that "the year of assessment immediately prior to the year of assessment during which a 'penalty' is assessed" is in fact intended to refer to the last assessed year of assessment.

Section 223 – Understatement penalty percentage table

Legal Nature

464. Section 223 of the TAA imposes penalties for an "understatement" made by a taxpayer in certain circumstances. Column 5 and 6 of the penalty table reduces the penalty depending on whether there was a voluntary disclosure by the taxpayer before or after a notification of an audit or criminal investigations.

Factual Description

465. Section 223 does, however, not refer to "Voluntary Disclosure Programme" as contained in Part B of Chapter 16 of the TAA and uncertainty remains as to whether the words "voluntary disclosure" in section 223 means "Voluntary Disclosure Programme" as contained in Part B of Chapter 16 of the TAA or if it is just the normal grammatical meaning of term "voluntary disclosure" should be applied.

466. From SARS' website it seems that the SARS' position is that the taxpayer must have applied under Part B of Chapter 16 of the TAA. However, in practice it seems that there are differing approaches followed by SARS and taxpayers – those ranging from the normal grammatical meaning of the term, to those *applied* under Part B, to those *qualifying* under Part B and even to the extreme of having a signed contract under Part B.

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

The nature of businesses impacted

468. All taxpayers who are subject to an understatement penalty in terms of section 223 and to whom columns 5 and 6 of the understatement penalty percentage table apply.

Proposal

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

Section 240 – Registration of tax practitioners

Legal Nature

470. Section 240(3) lists the circumstances under which a person cannot register as a tax practitioner.

Factual Description

471. Section 240(3) does not mention a person that is insolvent meaning that an insolvent person can register as a tax practitioner.

The nature of businesses impacted

472. All insolvent or rehabilitated insolvents.

Proposal

473. SARS and NT should clarify what their position is with regard to the registration of a person who is insolvent or a rehabilitated insolvent as a tax practitioner.