SAICA
THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS
develop.influence.lead.

Ref: #771845
Submission File

3 December 2021

National Treasury
Private Bag X923
PRETORIA
0001

BY E-MAIL: 2022AnnexCProp@treasury.gov.za
acollins@sars.gov.za

Dear National Treasury and Ms Collins

SUBMISSION - ANNEXURE C 2022 BUDGET REVIEW

1. We present herewith our written submission on the request for Annexure C 2022 issues on behalf of the South African Institute of Chartered Accountants' (SAICA) National Tax Committee (NTC), as set out in Annexure A.

2. Our submission includes a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification or suggestions for potentially ambiguous provisions, in relation to either existing sections or the latest proposed amendments to various sections of the Income Tax Act, No. 58 of 1962 (the ITA), the Value Added Tax Act, No 89 of 1991 (the VAT Act), the Employment Tax Incentive Act, No. 26 of 2013 (the ETI Act) and the Tax Administration Act, No. 28 of 2011 (the TAA), as contained in the Taxation Laws Amendment Bill, 2021 (TLAB2021) and the Taxation Administration Laws Amendment Bill, 2021 (TALAB2021), respectively.

3. In Annexure A, we enclose a copy of our prior year (2020) 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 or in creating alignment between tax policy and legislation.

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.

International Federation of Accountants
NPO-020-050 VAT No. 4570104366
17 Fricker Road, Illovo, Sandton, Johannesburg, 2196 POSTAL ADDRESS Private Bag X32, Northlands, 2116
TEL +27 11 621 6600 FAX +27 11 622 3321 CALL CENTRE 08610 SAICA (72422) EMAIL saica@saica.co.za
WEB saica.co.za | accountancysa.org.za
Member of the International Federation of Accountants (IFAC), Pan African Federation of Accountants (PAFA), Global Accounting Alliance (GAA), Chartered Accountants Worldwide (CAW) and Investors in People.
Proudly South African
Chartered Accountants Worldwide Member

5. We have also highlighted in yellow, the areas that we feel require priority considering the impact that it would have on taxpayers/the fiscus.

6. 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

Table of Contents

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS 10

Section 1 – "Gross income" definition – Long service awards 10

Legal Nature 10

Section 23(m) & 23(b) – Home office allowances 10

Legal Nature 10

Factual Description 11

The nature of taxpayers impacted 12

Proposal 12

Section 7B – Timing of accrual and incurral of variable remuneration, ... 13

Legal Nature 13

Factual Description 13

The nature of taxpayers impacted 13

Proposal 13

Fourth Schedule: Paragraph 30(1)(b) – Criminal offence in respect of the use of funds 14

Legal Nature 14

Factual Description 14

The nature of taxpayers impacted 15

Proposal 15

Seventh Schedule: Paragraph 5 – Acquisition of assets at less than actual value 15

Legal Nature 15

Factual Description 15

The nature of taxpayers impacted 15

Proposal 15

Seventh Schedule: Paragraph 5 and 10 – Acquisition of assets at less than actual value and free or cheap services 15

Legal Nature 15

Factual Description 16

The nature of taxpayers impacted 17

Proposal 17

Seventh Schedule: Paragraph 7 – Right of use of motor vehicle 17

Legal Nature 17

Factual Description 18

The nature of taxpayers impacted 18

Proposal 18

Employment Tax Incentive Act – Section 6 19

Legal Nature 19

Factual Description 19

The nature of taxpayers impacted 20

Proposal 20

CATEGORY – DOMESTIC BUSINESS TAXES ... 20
Section 1 – Definition of “Contributed tax capital” ... 20
Legal Nature ... 20
Factual Description ... 20
The nature of taxpayers impacted ... 21
Proposal ... 21
Section 8F- Interest on hybrid debt instruments deemed to be dividend in specie ... 21
Legal Nature ... 21
Factual Description ... 21
The nature of taxpayers impacted ... 22
Proposal ... 23
Section 10(1)(cA)(i) – Exemptions for Institutions, Boards or Bodies ... 24
Legal Nature ... 24
Factual Description ... 24
The nature of taxpayers impacted ... 24
Proposal ... 24
Section 10(1)(e) – Exemptions for Body Corporates ... 25
Legal Nature ... 25
Factual Description ... 25
The nature of taxpayers impacted ... 25
Proposal ... 25
Section 30B(2)(b)(ix) – Associations and Trade Unions ... 25
Legal Nature ... 25
Factual Description ... 26
The nature of taxpayers impacted ... 27
Proposal ... 27
Section 11(e) – Wear and tear allowance ... 28
Legal nature of problem ... 28
Factual description ... 28
The nature of taxpayers impacted ... 29
Proposal ... 29
Section 23M – Limitation of interest deduction in respect of debts owed to a person not subject to tax ... 29
Legal nature of problem ... 29
Factual description ... 29
Business/Persons impacted ... 29
Proposal ... 29
Section 24BA – Transactions where assets are acquired as consideration for shares issued ... 29
Legal nature of problem ... 29
Factual description ... 30
Business/Persons impacted ... 30
Proposal ... 30
Section 25B – Taxation of trusts and beneficiaries of trusts ... 30
Legal nature of problem ... 30
Factual description ... 31

Business/Persons impacted ... 31
Proposal ... 31
Section 20 – Assessed losses ... 31
Legal nature of problem ... 31
Factual description ... 31
Business/Persons impacted ... 32
Proposal ... 32
Paragraph 43A of the Eighth Schedule – Dividends treated as proceeds on disposal of certain assets ... 32
Legal nature of problem ... 32
Factual description ... 32
Business/Persons impacted ... 33
Proposal ... 33

CATEGORY – VALUED ADDED TAX ... 33
Section 1 – Definition of "enterprise" ... 33
Legal Nature ... 33
Factual description ... 33
The nature of taxpayers impacted ... 33
Proposal ... 33

CATEGORY – TAX ADMINISTRATION ACT (TAA) ... 34
Chapter 2 – New Part G: Taxpayer Bill of Rights ... 34
Legal Nature ... 34
Factual Description ... 34
The nature of taxpayers impacted ... 34
Proposal ... 34
Section 96 – Notice of assessment ... 34
Legal Nature ... 34
Factual Description ... 35
The nature of taxpayers impacted ... 35
Proposal ... 35
Section 98 – Withdrawal of assessments ... 35
Legal nature of the problem ... 35
Detailed factual description ... 35
Nature of the business / persons impacted ... 35
Proposal ... 36
Section 190(2) of the TAA – Refunds of excess payments ... 36
Legal nature of the problem ... 36
Detailed factual description ... 36
Nature of the business / persons impacted ... 37
Proposal ... 37
Chapter 17 – Criminal offences ... 37
Legal Nature ... 37
Factual Description ... 37
The nature of taxpayers impacted ... 37

Proposal ... 38
Decisions not subject to objection or appeal ... 38
Legal Nature ... 38
Factual Description ... 38
The nature of taxpayers impacted ... 39
Proposal ... 39

2020 ANNEXURE C SUBMISSION ... 40
CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS ... 40
Section 10(1)(o) – Exemptions for remuneration earned whilst outside the country ... 40
Legal Nature ... 40
Factual Description ... 40
The nature of taxpayers impacted ... 41
Proposal ... 41
Fourth Schedule: Definition of "remuneration" – Non-executive directors' fees ... 42
Legal Nature ... 42
Factual Description ... 42
The nature of taxpayers impacted ... 43
Proposal ... 43
Fourth Schedule: Paragraph 17(5) – First provisional tax payment (expatriates) ... 43
Legal Nature ... 43
Factual Description ... 44
The nature of businesses impacted ... 45
Proposal ... 46
Seventh Schedule: Paragraph 2(d) – Residential accommodation fringe benefit ... 46
Legal Nature ... 46
Factual Description ... 46
The nature of taxpayers impacted ... 47
Proposal ... 47
Seventh Schedule: Paragraph 2(l) – Employer contributions to foreign retirement funds ... 47
Legal Nature ... 47
Factual Description ... 48
The nature of taxpayers impacted ... 49
Proposal ... 49
CATEGORY – DOMESTIC BUSINESS TAXES ... 49
Sections 7C and 56 – Loans to a trust by a connected person and donations tax ... 49
Legal Nature ... 49
Factual Description ... 49
The nature of businesses impacted ... 49
Proposal ... 49
Sections 12R – Special Economic Zones (SEZs): Reduced corporate tax rate ... 49
Legal Nature ... 49
Factual Description ... 50
The nature of businesses impacted ... 50
Proposal ... 50

Sections 12R – SEZs: Qualifying companies 50
Legal Nature 50
Factual Description 50
The nature of businesses impacted 50
Proposal 50
Sections 12R – SEZs: Monitoring of the Department of Trade and Industry (DTI) ... 51
Legal Nature 51
Factual Description 51
The nature of businesses impacted 51
Proposal 51
Sections 12R – SEZs: Interaction of Income Tax Act and SEZ Act 51
Legal Nature 51
Factual Description 51
The nature of businesses impacted 51
Proposal 52
Section 42(1)(a)(ii)(cc) – Intragroup transactions 52
Legal Nature 52
Factual Description 52
Proposal 52
CATEGORY – INTERNATIONAL TAX 53
Sections 7(5), 7(8) and 31 – Low or interest-free loans to offshore trusts 53
Legal Nature 53
Factual Description 53
The nature of businesses impacted 53
Proposal 53
Section 7(8) – Donation, settlement or other disposition to a non-resident 53
Legal Nature 53
Factual Description 53
Proposal 54
Section 7C and section 31 – Clarity on interaction 54
Legal Nature 54
Factual Description 54
Proposal 55

CATEGORY – VALUED ADDED TAX and CUSTOMS 55
Sections 8(23) and 11(2)(s) – Deemed supply to a National Housing Programme 55
Legal Nature 55
Factual Description 55
The nature of businesses impacted 56
Proposal 56
Section 23 – VAT registration threshold 56
Legal Nature 56
Factual Description 57
The nature of businesses impacted 57
Proposal 57
Electronic Service regulations 57

Legal Nature 57
Factual Description 58
The nature of businesses impacted 58
Proposal 58

CATEGORY – TAX ADMINISTRATION ACT (TAA) 59
Section 18(6) – Review of complaint received by the OTO 59
Legal Nature 59
Factual Description 59
The nature of businesses impacted 59
Proposal 59
Section 20(2) – Resolutions and recommendations by the OTO 60
Legal Nature 60
Factual Description 60
The nature of businesses impacted 61
Proposal 61
Section 42 – Keeping the taxpayer informed (verifications) 61
Legal Nature 61
Factual Description 62
The nature of businesses impacted 63
Proposal 63
Section 89 – Binding private rulings 64
Legal Nature 64
Factual Description 64
The nature of businesses impacted 64
Proposal 64
Definition of "date of assessment" & Sections 251 -255 – Electronic delivery 65
Legal Nature 65
Factual Description 65
The nature of businesses impacted 66
Proposal 66
Section 104 – Grounds to object 66
Legal Nature 66
Factual Description 67
The nature of businesses impacted 67
Proposal 67
Section 125 – Appearance at a hearing of the tax court 67
Legal Nature 67
Factual Description 68
The nature of businesses impacted 68
Proposal 68
Section 164(3) – Payment of tax pending appeal 68
Legal Nature 68
Factual Description 69
The nature of businesses impacted 69
Proposal 69

Sections 172 – Civil judgments **69**
Legal Nature 69
Factual Description 70
The nature of businesses impacted 70
Proposal 70
Section 234 – Removal of requirement of "wilfulness" from certain statutory offences. **71**
Legal Nature 71
Factual Description 71
The nature of businesses impacted 72
Proposal 72
Section 240 – Grounds for disqualification as a registered tax practitioner (violent crime) **72**
Legal Nature 72
Factual Description 72
The nature of businesses impacted 72
Proposal 72
Section 240 – Tax practitioner registration and impact of suspension of membership **73**
Legal Nature 73
Factual Description 73
The nature of businesses impacted 73
Proposal 73

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

Section 1 – "Gross income" definition – Long service awards

Legal Nature

Section 23(m) & 23(b) – Home office allowances

Legal Nature

1. Section 23(b) provides for a limitation of deduction for home office expenses that an individual can claim.

2. In May 2021 SARS issued an updated Draft Interpretation Note 28 for public comment and in November 2021 it issued a revised version of this draft interpretation note. The revised version provides further clarity in response to the public comments submitted and addresses the deductibility of interest incurred in connection with a home office.

3. It stipulates that the consequence of bond interest being deductible under section 24J(2) and not under section 11(a), is that bond interest incurred in respect of a home office premise is prohibited from deduction by section 23(m).

4. The Draft Briefing Note to the revised interpretation note states the following: "*The interpretation discussed above represents a significant change, and, accordingly, the updated draft IN 28 is being released for a second round of comment.*"

5. Furthermore section 23(b) requires that "such part" of a premise must be "*regularly and exclusively used*" for the purposes of such trade.

6. The reason for inserting this limitation was explained in the 1991 Income Tax Act Explanatory Memorandum as:

CLAUSE 23

Deductions not allowed in the determination of taxable income: Amendment of section 23 of the principal Act

Section 23(b) of the principal Act prohibits the deduction of domestic and private costs as well as expenditure incurred in connection with premises not occupied for the purposes of trade. However, if any part thereof is used for the purposes of trade, a deduction is nevertheless allowed. The test as to whether any premises are used for the purposes of trade, is a question of fact and often very difficult to establish. In the past, various disputes have arisen in this connection, especially with regard to expenses relating to the maintenance of a study at home. The amendment introduced by this clause now requires that in order to qualify for a deduction, the relevant part—

(*a*) must be specifically equipped for purposes of the person's trade; and

(*b*) must be used regularly and exclusively for purposes of trade.

7. In this regard it should be noted that it was particularly "a study at home" and not home offices *per se* that was problematic to SARS as the former rather than the latter was actually the practice.

Factual Description

8. SARS has in practice, since the inception of section 23(b) taken the interpretation that pro rata interest on a bond of a premises, used partially for trade, is a cost of such premises and is deductible.

9. Factually interest on a bond to purchase a premise is directly connected to carrying on such a trade and is no different from a cost such as rental to enable use of a premises.

10. Section 23(b) was created in circumstances when a "home study" was for a few and something that was not that common as it was commonly used for ancillary work (self-study) or after hour work.

11. Today our reality is a lot different. Our work, clients and homes are digitally connected and many people can now perform their full and primary work from their "home office".

12. It is highly unlikely that many employers will require all employees to return to the offices or on a full-week basis, meaning that the home office will become a permanent location of work for many employees regardless of the lockdown restrictions.

13. This applies across job levels and sectors in the economy which means that it also applies to those who do not have the luxury of large suburban homes and a stand-alone "home study". These new "work from home" taxpayers mostly only have shared family space.

14. This "home office" migration is not only COVID driven but is a result of changes brought about the digital economy and how people work. However, as the digital and "gig economy" expanded more, especially younger taxpayers have moved away from the traditional employment model and now have multiple "gigs" that vary from Uber services to part time employment and multiple short term contractor work. Even their payment model has migrated away from cash and money. This has resulted in exponentially more "individual small business taxpayers" conducting business that not only share personal and business moveable assets such as cars and cell phones but also their place of home and work.

15. This needs to be considered when contemplating amendments to section 23(b) and/or 23(m) in order to enable an equitable tax regime relating to the future working environment. Section 23(b) has an extremely narrow application and should be expanded to accommodate the "new normal".

16. We strongly suggest that there should have been a certain degree of relaxation in the legislation especially in relation to the requirement in section 23(b) that the home office be "exclusively" used for the purposes of trade. Furthermore, the prohibition of the bond interest which will be effective for years of assessment commencing on or after 1 March 2022 will further prejudice those employees forced to work from home.

The nature of taxpayers impacted

17. All taxpayers required to work from home or conducting services/trade from home, which has significantly expanded since COVID 19 and we believe will remain significant even after the pandemic.

Proposal

18. Consideration needs to be given to amending the definition of "exclusively used" to "used mainly as a home office". It is submitted that by increasing the requirement from "regularly and exclusively" to "mainly", the deductions scope is limited to persons who use the space more than 50% for trade purposes but not exclusively as opposed to used less than 50% but in regular intervals of the time but exclusively when in such use.

19. Consequently, the requirement for remunerated taxpayers to receive commission or variable income in section 23(m) should be deleted. There seems to be no policy rationale to distinguish between commission and other remuneration earners when in both instances they are required to work from home. This seems a historically factually limitation when most persons who factually worked from home were earning such types of income. That is not true anymore.

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

21. In addition to the above, the scope of qualifying expenses for purposes of section 23(b) should be expanded to align to the changing factual reality that employees now have to incur necessary and not convenience business expenses for the purposes of conducting their trades.

22. An example of items that should be included in the section and allowed as a deduction, would be a salaried employee meeting all the other requirements of sections 23(m) and 23(b), having to incur costs such as printing paper, cartridges, stationery, fast/stable internet (such as fibre), security costs, UPS etc. relating to working from home. These costs would be subject to the same normal apportionment rules if not exclusively used for trade purposes.

23. In respect of the bond interest, section 23(b) should refer to interest which is deductible under section 11(a) and section 24J(2).

24. Regarding internet costs and telephone costs, taxpayers have had to use their internet and telecommunications systems in order to carry out their employment duties effectively, including participating in virtual meetings/video conferences and being available on their cell phones (sometimes requiring the installation of boosters etc). Currently a disparity exists between those whose employers are willing to pay these costs versus those who are already disadvantage by not having this benefit as paragraph 6(4)(bA) and 10(2)(bA)

of the Seventh Schedule **correctly in our view** already places a zero value on these costs for employees. We submit that section 23(m) should mirror these provisions.

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

26. It is submitted that legislation should be amended to accommodate the deduction of these costs, considering the "new normal".

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

Section 7B – Timing of accrual and incurral of variable remuneration,

Legal Nature

28. Section 7B deems certain amounts received by an employee from an employer to accrue only when they are paid (or payable) by the employer.

29. Paragraph (d)(i) of the definition of 'gross income' deems certain amounts received by a person in respect of the relinquishment, termination, loss, repudiation, cancellation or variation of any office or employment, if the amount becomes payable in consequence of or following upon the death of any person to be an amount which accrued to such person immediately prior to his or her death.

Factual Description

30. In terms of amounts subject to section 7B, the obligation to withhold employees' tax does not arise when it accrues to the employee, but when it is paid or payable. For a deceased employee this is problematic.

The nature of taxpayers impacted

31. Individuals receiving variable remuneration on death.

Proposal

32. The Explanatory Memorandum in 2012 explaining the section 7B amendment stated the following: "*Mere accruals and incurrals will be disregarded. From a practical perspective, this change should alleviate the need for complex interpretation (thereby reducing the number of unintended SARS-taxpayer disputes) and pay-as-you-earn mismatches without violating the integrity of the tax system overall*."

33. Although we note the above, in the case of variable remuneration accruing to a deceased employee, we submit that these payments should be excluded from section 7B.

Fourth Schedule: Paragraph 30(1)(b) – Criminal offence in respect of the use of funds

Legal Nature

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

Factual Description

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

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

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

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

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

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

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

The nature of taxpayers impacted

42. All employers.

Proposal

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

Seventh Schedule: Paragraph 5 – Acquisition of assets at less than actual value

Legal Nature

44. Paragraph 5(2)(*b*) of the Seventh Schedule to the ITA makes provision for the granting of a long service award (which can be provided as an asset or now also in the form of a cash benefit) to an employee as a no value fringe benefit, provided that the value of such long service award does not exceed R5 000.

Factual Description

45. We are very thankful for the recent amendment that long service awards are not only limited to non-cash assets but now also apply to other reasonable awards granted for long service.

46. Despite the above positive amendment, the requirement that the value of the long service award should not exceed R5 000 still applies. This limit has not been changed since 2002 (19 years ago).

The nature of taxpayers impacted

47. All employees receiving long-service awards.

Proposal

48. The amount R5 000 should be increased to R10 000 to allow employees to be more realistically rewarded without suffering taxation, for remaining in service to their employers. This is a benefit not only to the employers but also to the economy as a whole.

49. A similar amendment as that mentioned above for long service awards, should be enacted for bravery awards as well.

Seventh Schedule: Paragraph 5 and 10 – Acquisition of assets at less than actual value and free or cheap services

Legal Nature

50. Paragraph 5 of the Seventh Schedule stipulates that where an asset has been acquired by an employee, the value of the taxable benefit shall be the difference between the value of the asset less any consideration given by the employee.

51. Paragraph 10(1) stipulates the value that needs to be placed on any taxable benefit derived from the rendering of a service to any employee and paragraph 10(2) the services for which have no value for employees' tax purposes.

Factual Description

52. Although there are certain instances where no value is placed on the fringe benefit mentioned above, these don't cater for situations where an employer gives a small gift or 'assistance' to an employee, especially as relates to the recent unrest and resultant looting for instance.

53. Companies with staff members in the affected areas (especially KZN) provided basic necessities and other support (e.g. ambulance service for staff in distress, food parcels, security support, evacuation, temporary accommodation, clothes etc.) to their employees that were affected by the recent unrest. Of concern are the fringe benefits tax implications of this support and the administrative burden related to it.

54. Other jurisdictions also have similar provisions in their legislation, such as the UK that provides exemption for "trivial benefits", (Tax on trivial benefits - GOV.UK (www.gov.uk):

Tax on trivial benefits

You don't have to pay tax on a benefit for your employee if all of the followi apply:

- it cost you £50 or less to provide
- it isn't cash or a cash voucher
- it isn't a reward for their work or performance
- it isn't in the terms of their contract

This is known as a 'trivial benefit'. You don't need to pay tax or National Insurance or let HM Revenue and Customs (HMRC) know.

You have to pay tax on any benefits that don't meet all these criteria.

If you're not sure whether a benefit counts as a trivial benefit call the employer helpline.

55. Similarly, Lesotho also has a provision exempting small benefits to employees (FBT Public Ruling (lra.org.ls):

> ***What Fringe Benefits are Exempted or Excluded?***
>
> As indicated above meals and medical fringe benefits provided on an equal basis are exempt from FBT. The following are some of the benefits that, for practical and policy considerations, are not subject to fringe benefit tax.
>
> - Private use of motor vehicle by an employee provided on special occasional hardship circumstances, for example, to take care of funeral or bereavement and emergency situations.
> - Common transportation operated by or on behalf of the employer to transport employees outside the normal 8 am to 5 pm working hours, to remote places where the employer's business is conducted.
> - Small common benefits that are difficult to quantify and place value received by each individual employee, for example, use of an employer's recreational and sporting facilities. Staff parties and functions are typical examples.
> - Accommodation provided on a remote employer camp site.
> - Uniform and similar employer branded attire or clothing.
> - Passage granted to an employee at the commencement or termination of employment if such passage is the actual expenditure incurred for transportation by the employer or represents a reimbursement of actual expenditure. A cash allowance in lieu of passage is taxable.

The nature of taxpayers impacted

56. Employers providing assistance or small gifts to employees.

Proposal

57. A *de minimus* threshold of R1 000 should be inserted into paragraph 5 and 10 to provide relief from the fringe benefit arising from the provision of services or goods to employees, especially in emergency situations such as the recent unrest in KZN and Gauteng.

Seventh Schedule: Paragraph 7 – Right of use of motor vehicle

Legal Nature

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

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

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

Factual Description

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

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

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

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

65. Consequently, the full value of the taxable benefit is taxed in the hands of each employee. Tax is therefore collected by SARS from each employee on the private use of the same vehicle, regardless of the fact that the access that each employee has to the vehicle for private use is limited to its availability of the vehicle at the time.

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

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

The nature of taxpayers impacted

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

Proposal

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

Employment Tax Incentive Act – Section 6

Legal Nature

70. Section 6 of the ETI Act contains the following proviso inserted in terms of section 59 of the Taxation Laws Amendment Bill (TLAB), 2021:

> ''*Provided that the employee is not, in fulfilling the conditions of their employment contract during any month, mainly involved in the activity of studying, unless the employer and employee have entered into a learning programme as defined in section 1 of the Skills Development Act, 1998 (Act No. 97 of 1998), and,* ***in determining the time spent studying in proportion to the total time for which the employee is employed, the time must be based on actual hours spent studying and employed*****.**'' [our emphasis]

Factual Description

71. The wording in bold may give the impression that if the employer and employee have entered into such a learning programme, even if in fulfilling the conditions of the employment contract during any month, as long as they are not mainly involved in the activity of studying, this proviso would not apply.

72. However, we are not certain that this is the intention of National Treasury or that addresses the potential tax avoidance schemes that resulted in these amendments. We note below the comments made by the public in relation to the proposed changes to the ETI Act contained in the first batch of the TLAB as well as National Treasury's response in relation to this:

    Comment: The proposed amendments to section 6 of the ETI Act result in what are actually legitimate ETI claims no longer qualifying for the incentive. As a result, instances where the employer provides on the job training, where the employer and employee have entered into a learnership or apprenticeship programme, or where the employee is on a secondment may no longer qualify for the incentive. Consideration should rather be given to clarifying that the employee should be given a cash payment in lieu of services rendered.

    Response: Accepted. The incentive is intended to apply to all legitimate arrangements where the employee is not only engaged in the activity of studying, but rather gaining valuable work experience. In the event that some of the employee's duties involve some sort of training or studying, the costs of said training or studying should ideally be borne by the employer. To ensure that the employee's remuneration package is not solely allocated to costs associated with any required training or studying, qualification for the incentive shall further be based on the employee receiving a cash payment in lieu of services rendered. Changes will be made in the 2021 Draft TLAB to reflect this intention.

73. In our view, based on the above comment and response, it seems that the where the employee is registered for a learning programme as defined in section 1 of the Skills Development Act, 1998 (Act No. 97 of 1998), any costs incurred for such programme must be borne by the employer and should not in any way impact the cash wage that the

employee is entitled to in terms of the employment contract and in line with the Basic Conditions of Employment Act.

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

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

The nature of taxpayers impacted

76. All employers wanting to claim the ETI.

Proposal

77. The wording in bold requires clarification to correctly reflect the principle to be applied. Specifically, the waiver or cession of the wage or salary in favour of the fees **after accrual** for the learning programme should result in a disqualification of the arrangement for receiving the ETI.

78. Furthermore, the term “wage” as defined in section 1 of the ETI Act should be clarified to provide that this must be a cash payment received from the employer by the employee (although this can be inferred from the definition in the BCEA, it’s not clear as the BCEA also has separate references to remuneration).

CATEGORY – DOMESTIC BUSINESS TAXES

Section 1 – Definition of “Contributed tax capital”

Legal Nature

79. Changes were made in the 2021 TLAB to amend the definition to “contributed tax capital” (CTC) in section 1 of the ITA by adding a proviso in order to clarify the principle that shareholders within the same class of shares should equally, in relation to their shareholding, share in the allocation of CTC as a result of distribution.

Factual Description

80. The maximum amount of CTC that can be allocated to any particular shareholder is thus limited to the shareholder’s pro-rata share of the CTC. However, SAICA raised various concerns in regard to this change – see our submission dated 22 November 2021.

81. The changes made will effectively prevent targeted share buy-backs from taking place in which CTC is sought to be returned to a particular shareholder, despite these share buy-backs being valid commercial transactions which are catered for in section 48 of the Companies Act.

82. Furthermore, in many situations not allowing a taxpayer to sell the shares using CTC will lead to inequitable treatment in the hands of shareholders as was illustrated in our submission.

83. A further concern is that the interaction of this change with the provisions of paragraph 43A of the Eighth Schedule, could result in further possible anomalies as this paragraph would require the dividend to be taken into account as part of the proceeds from the disposal of the share (held as a capital asset).

The nature of taxpayers impacted

84. Taxpayers entering into targeted share buy-backs.

Proposal

85. In order to prevent an unfair tax situation from arising with targeted share buy-backs as a result of the amendment to the definition of "contributed tax capital", these share buy-backs should be expressly excluded from the new proviso.

Section 8F- Interest on hybrid debt instruments deemed to be dividend *in specie*

Legal Nature

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

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

Factual Description

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

89. The purpose of an audit is to enhance the degree of confidence of intended users in the financial statements. This is achieved by the expression of an opinion by the auditor on whether the financial statements are prepared, in all material respects, in accordance with an applicable financial reporting framework. In the case of most general purpose frameworks, that opinion is on whether the financial statements are presented fairly, in all

material respects, or give a true and fair view in accordance with the framework. An audit conducted in accordance with ISAs and relevant ethical requirements enables the auditor to form that opinion. (Ref: Para. A1) (ISA 200. 3.)

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

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

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

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

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

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

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

The nature of taxpayers impacted

96. Taxpayers entering into subordination agreements.

Proposal

97. National Treasury should engage with IRBA on the proposed wording of the exclusion so that it aligns with the auditing standards framework and also as to what a registered auditor can do in such capacity as opposed to what is expected from management to do and verify which remains exclusive to them.

98. The legislation could be worded such that, to the extent that a company is factually insolvent and a subordination agreement has been entered into, the portion of the subordinated loan required to make good the net asset deficit would fall outside the scope of section 8F but any balance of a subordinated loan in excess of the net asset deficit would be included within the scope of section 8F. This would then result in management only entering into subordination agreements in response to the factual insolvency of a company and not for any other tax avoidance purpose.

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

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

1. <u>The auditor's report:</u>

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

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

c. In the new auditor's report (effective for periods ending on/after 15 December 2016), this may be included as a key audit matter.

2<u>. In the management report:</u>

<u>This is </u>issued by the auditor to the management of an entity. It would be assumed that if there is uncertainty relating to going concern, this will be included in such report.

Section 10(1)(cA)(i) – Exemptions for Institutions, Boards or Bodies

Legal Nature

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

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

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

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

Factual Description

103. Section 10(1)(cA)(i) states that Commissioner may withdraw the exemption of any institution, board or body if satisfied that such institution, board or body has during any year of assessment failed to comply with section 10(1)(*c*A)(i). The exemption will be withdrawn with effect from the commencement of the year of assessment in which non-compliance or failure by an institution, board or body occurred.

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

The nature of taxpayers impacted

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

Proposal

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

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

Section 10(1)(e) – Exemptions for Body Corporates

Legal Nature

108. Section 10(1)(e)(i) exempts *any levy* received by or accrued to any body corporate established in terms of the Sectional Titles Act, No. 95 of 1986 from its members.

109. Section 10(1)(e)(ii) exempts any receipts or accruals, *other than levies*, derived by a body corporate to the extent that the aggregate of those receipts and accruals do not exceed R50 000.

110. The Sectional Titles Schemes Management Act No. 8 of 2011 requires the body corporate to maintain a 10-year plan for maintenance, repair and replacement of capital items. This must be supported with a reserve fund sufficient to cover the cost of future maintenance and repair of common property.

111. The minimum level for this reserve fund has been set at 25% of the previous financial year's "administrative fund" (the fund for operating costs) levies.

Factual Description

112. In light of the requirement to keep a large reserve fund, body corporates will now earn additional interest income that will no longer be exempt in terms of section 10(1)(e)(ii).

The nature of taxpayers impacted

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

Proposal

114. In order to mitigate the additional interest income that the body corporates are likely to earn from the above statutory requirement, we suggest that the s10(1)(e) exemption limit of R50,000 should be based on the amount of the available reserves at the end of the year multiplied by the repo rate.

Section 30B(2)(b)(ix) – Associations and Trade Unions

Legal Nature

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

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

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

118. Thus, the exemption provision would not integrate with the administrative provision in the legislation in terms of SARS interpretation as section 30B seems to supersede section 10(1)(d)(iv) instead of section 30B being read in the context of section 10(1)(d)(iv), the latter being the actual exemption provision.

Factual Description

119. Funding: SARS recently issued a draft Interpretation Note (IN) on "Associations: Funding Requirements" that provided guidance on the interpretation and application of the "funding" requirement.

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

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

122. Appropriations from government: SARS' interpretation is that the exemption should be interpreted narrowly and therefore "sphere of government" should also be interpreted narrowly. For the legal reasons set out in our submission we do not agree with SARS' interpretation or that the case law they cite is applicable.

123. Furthermore, this mismatch would cause absurd situations where entities would have to consider refusing to receive government grants or capital receipts so as not to jeopardise their exemption status when the receipt of such amounts should not raise concern as it does not create trading or competition and it still must be aligned to the objectives of the entity. This would purely be driven due to the fact that the three spheres of government habitually use agencies and entities to disperse funds for service delivery.

124. It could never have been the intention of the legislature in context of the legislation as drafted to prevent bodies from receiving funds from a sphere of government to perform a public good just because a sphere of government decided to appropriate the monies in a particular way through a particular state-controlled organ. Such an interpretation would result in a glaring absurdity.

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

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

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

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

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

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

The nature of taxpayers impacted

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

Proposal

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

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

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

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

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

137. Withdrawal of approval: We accept that if the withdrawal is only applicable after notice provided by SARS, compliant taxpayers are at a disadvantage as many taxpayers will now

"ride the system" till caught, but similarly if SARS is compelled by the current legislation to compel the association or union to correct historical positions that they can't, that is also impractical. The legislation should thus be amended to make it clear from what date the withdrawal of approval is effective – preferably from the period after the notice is provided by SARS.

138. It is also suggested that the legislation is amended so that the sanction for non-compliance is not only withdrawal (not retrospective), but that other sanctions such as penalties be introduced. This would ensure a balance between SARS ability to regulate the industry and also sanction historical non-compliance without creating an incentive for noncompliance.

Section 11(e) – Wear and tear allowance

Legal nature of problem

139. Section 11(e) provides for the wear and tear allowances on assets and SARS' Interpretation Note 47 and Binding General Ruling 7 (BGR 7) contain the considerations and write-off periods for determining the useful life of a qualifying asset and therefore the annual value of the allowance available to a taxpayer.

140. An amendment was made to section 11(e) in 2018 that provided that the amount of the wear and tear allowance must be determined on the basis of the periods of use listed for this purpose in a public notice issued by the Commissioner, or a shorter period of use approved by the Commissioner on application in the prescribed form and manner by the taxpayer.

141. This amendment comes into effect from a date determined by the Minister of Finance in the Gazette. This date has not yet been determined.

Factual description

142. The proposed amendments to section 11(e) have removed the Commissioner's discretion to determine the just and reasonable amount by which qualifying assets have depreciated in a given year and therefore the amount of the allowance. This amount is now to be determined on the basis of the periods of use listed for this purpose in a public notice issued by the Commissioner, or a shorter period of use approved by the Commissioner on application in the prescribed form and manner by the taxpayer.

143. Although Interpretation Note 47 was updated in February 2021 to include an Annexure with the write-off periods that are acceptable to SARS and the formalised process for applying to the Commissioner for a shortened write-off period, the Minister of Finance has not made the law effective to implement the proposed solution set out in the amendment to section 11(e) – that is, no public notice has as yet been issued or published in the Gazette.

144. Interpretation Note 47 refers to "small" items (cost of less than R7 000) that may be written off in full in the year of assessment in which they are acquired and brought into use. This amount has applied since 2009 and has not been increased since.

The nature of taxpayers impacted

145. All taxpayers that own qualifying capital assets.

Proposal

146. Other than requiring the Minister of Finance to issue the Gazette to make the proposed amendment to section 11(e) effective, we request that the amount considered to be a "small" item for the purposes of section 11(e) as mentioned in Interpretation Note 47 should be increased to R25 000 considering inflation and the unprecedented increase in the purchase price of goods due to the global pandemic.

Section 23M – Limitation of interest deduction in respect of debts owed to a person not subject to tax

Legal nature of problem

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

Factual description

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

Business/Persons impacted

149. Taxpayers subject to section 23M.

Proposal

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

Section 24BA – Transactions where assets are acquired as consideration for shares issued

Legal nature of problem

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

Factual description

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

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

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

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

156. In other words SARS seems to ignore the true facts and taxes the transaction based on hypothetical facts.

Business/Persons impacted

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

Proposal

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

Section 25B – Taxation of trusts and beneficiaries of trusts

Legal nature of problem

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

Factual description

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

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

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

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

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

Business/Persons impacted

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

Proposal

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

Section 20 – Assessed losses

Legal nature of problem

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

Factual description

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

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

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

Business/Persons impacted

171. Companies with assessed and foreign losses.

Proposal

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

Paragraph 43A of the Eighth Schedule – Dividends treated as proceeds on disposal of certain assets

Legal nature of problem

173. Paragraph 43A of the Eighth Schedule to the Income Tax Act, 1962 is an anti-avoidance provision providing that any exempt extra-ordinary dividend that is received by a corporate shareholder 18 months prior to the disposal of shares, or in regard to or in consequence of a disposal of shares, would be reclassified as income or proceeds for capital gains tax purposes.

Factual description

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

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

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

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

Business/Persons impacted

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

Proposal

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

CATEGORY – VALUED ADDED TAX

Section 1 – Definition of "enterprise"

Legal Nature

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

Factual description

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

The nature of taxpayers impacted

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

Proposal

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

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

CATEGORY – TAX ADMINISTRATION ACT (TAA)

Chapter 2 – New Part G: Taxpayer Bill of Rights

Legal Nature

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

Factual Description

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

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

The nature of taxpayers impacted

187. All taxpayers interacting with SARS.

Proposal

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

Section 96 – Notice of assessment

Legal Nature

189. SAICA welcomes initiatives that makes it easier to comply with tax obligations.

190. SARS issues automated assessments to certain taxpayers based on data it receives from employers, financial institutions, medical schemes, retirement annuity fund administrators and other third-party data providers to create auto-assessments.

191. Taxpayers receive an SMS indicating that they have been auto assessed with a link to the e-filing website or SARS Mobi-app. Once taxpayers have clicked on the link, they can review the auto-assessment and choose to accept it or choose to edit the assessment. Should they fail to respond to the auto-assessment, SARS will make an estimated assessment based on the data at SARS' disposal.

Factual Description

192. Not accepting or responding to the auto-assessment, could result in taxpayers missing out on allowable deductions and refunds or could result in taxpayers omitting additional income (such as capital gains, foreign investment income etc) and then being subject to penalties and interest.

193. Chapter 8 of the TAA deals with assessments, however, the issuing of automated assessments is not legislated for in the TAA.

194. Section 96 of the TAA deals with notice of assessments, and section 96(2) states that SARS must give the person assessed in the case of an estimated or an assessment not fully based on a return submitted by the taxpayer, a statement of the ground for the assessment.

195. This does not occur when issuing automated assessments.

The nature of taxpayers impacted

196. Taxpayers receiving auto-assessments.

Proposal

197. Chapter 8 of the TAA should incorporate the issuing of auto-assessments by SARS and stipulate SARS' as well as the taxpayers' responsibilities in this regard.

Section 98 – Withdrawal of assessments

Legal nature of the problem

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

Detailed factual description

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

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

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

Nature of the business / persons impacted

202. All taxpayers issued with blatantly incorrect assessments by SARS.

Proposal

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

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

Legal nature of the problem

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

Detailed factual description

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

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

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

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

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

210. As was evidenced in the Tax Ombud's 2019 report on Systemic Issues at SARS, one of the issues identified was that refunds for one period were being withheld whilst an audit/verification was in progress for another period. Withholding of the refund should be relevant to the period under audit or investigation and not to unrelated periods. This mostly applies to VAT refunds.

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

212. Though not part of this specific matter, we have also previously raised concerns with SARS' involvement in the criminal justice system, how constitutional rights are protected and how powers are given within the constitutional mandate. This ranges from search and seizure, sanction, overlap of civil and criminal investigations, who decides on criminal

investigation and prosecution if not SAPS and the NPA and who oversees the legality of all these processes as they are outside of the jurisdiction of the Independent Police Investigative Directorate.

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

Nature of the business / persons impacted

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

Proposal

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

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

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

Chapter 17 – Criminal offences

Legal Nature

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

Factual Description

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

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

The nature of taxpayers impacted

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

Proposal

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

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

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

Decisions not subject to objection or appeal

Legal Nature

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

Factual Description

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

227. These include:

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

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

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

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

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

227.6 <u>Section 167(1)/(4) of the TAA</u> – A Senior SARS official may enter into an agreement with a taxpayer under which the taxpayer is allowed to pay a tax debt in one sum or in instalments *if the official is satisfied* of certain criteria stipulated in section 167(1). A senior SARS official may also terminate an instalment payment agreement *if satisfied that* certain requirements are met in section 167(4).

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

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

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

<u>Proposal</u>

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

ANNEXURE A

2020 ANNEXURE C SUBMISSION

CATEGORY - INCOME TAX: INDIVIDUALS, EMPLOYMENT AND SAVINGS

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

Legal Nature

1. 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.

2. 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.

3. 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.

4. 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

5. 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.

6. 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*.

7. 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.

8. 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

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

Proposal

10. 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.

11. 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.

12. 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, the presence of an individual in South Africa, if such presence is shown to result from travel restrictions related to COVID-19, be disregarded. 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.

13. 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.

14. 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.

Fourth Schedule: Definition of “remuneration” – Non-executive directors’ fees

Legal Nature

15. 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).

16. 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 …*

17. *… 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: …

18. 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.

19. 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.

20. 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*.”

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

22. 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

23. 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.

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

25. 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.

26. 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.

27. 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."

28. 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.

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

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

<u>Proposal</u>

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

31. 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.

<u>Fourth Schedule: Paragraph 17(5) – First provisional tax payment (expatriates)</u>

<u>Legal Nature</u>

32. 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*.

33. 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*."

34. 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.

Factual Description

35. 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.

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

37. 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.

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

39. 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

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

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.

40. The PAYE will be calculated as follows:

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

41. 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)

42. 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

43. All South African resident expatriates.

Proposal

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

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

Legal Nature

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

46. 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.

47. 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

48. 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.

49. 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.

50. 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.

51. 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.

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

53. 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

54. 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

55. 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

56. Paragraph 2(l) of the Seventh Schedule to the ITA 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:

57. "*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.*"

58. 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.

59. 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:

59.1 **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).

59.2 **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.

59.3 **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.

59.4 **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

60. 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

61. Employers making contributions to foreign retirement funds.

Proposal

62. 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

63. 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

64. 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

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

Proposal

66. 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

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

Factual Description

68. 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

69. All qualifying companies operating in SEZs.

Proposal

70. 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

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

Factual Description

72. "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).

73. 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.

74. 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

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

Proposal

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

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

<u>Legal Nature</u>

77. 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.

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

<u>Factual Description</u>

79. 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.

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

80. All businesses operating in an SEZ.

<u>Proposal</u>

81. Clarification on the above issue is kindly requested.

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

<u>Legal Nature</u>

82. 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.

<u>Factual Description</u>

83. 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.

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

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

Proposal

85. 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

86. 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".

87. 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

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

The nature of businesses impacted

89. 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

90. 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.

91. 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

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

The nature of businesses impacted

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

Proposal

94. 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.

95. 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

96. 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

97. 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.

98. 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

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

Proposal

100. 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

101. 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."

102. 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

103. 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.

104. 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

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

Proposal

106. 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

107. 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

108. 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.

109. 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).

110. 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.

111. 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.

112. 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.

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

114. 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.

115. 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.

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

The nature of businesses impacted

117. 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

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

119. 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 23 – VAT registration threshold

Legal Nature

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

Factual Description

121. 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.

122. 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.

123. 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

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

Proposal

125. 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

126. 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".

127. 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.

128. 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

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

130. 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'.

131. 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.

132. 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.

133. 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 not a registered vendor, 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.

The nature of businesses impacted

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

Proposal

135. 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.

136. 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 non-registered supplier of electronic services, but that it be allowed to account for VAT on behalf of all non-resident suppliers of electronic services.

CATEGORY – TAX ADMINISTRATION ACT (TAA)

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

Legal Nature

137. 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

138. 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.

139. 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.

140. 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.

141. 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

142. Taxpayer submitting complaints to the OTO.

Proposal

143. 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.

144. 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

145. 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.

146. 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.

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

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

Factual Description

149. 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.

150. 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.

151. 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.

152. 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.

153. 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.

154. 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

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

Proposal

156. 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.

157. 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.

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

Section 42 – Keeping the taxpayer informed (verifications)

Legal Nature

159. 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.

160. 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.

161. 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.

162. 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

163. SARS in numerous instances, particularly with regard to individuals, notifies taxpayers of a “verification” of the taxpayer’s return following submission of that return.

164. 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.

165. Following submission of the documentation:

165.1 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.);

165.2 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.

166. 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.

167. 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]

168. 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.

169. 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.

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

What is verification?

Verification is a face-value verification of the information declared by the taxpayer on the declaration or in a return. This involves a comparison of this information against third party data gathered by SARS from various sources, the financial and accounting records and/or other supporting documents provided by taxpayers to ensure that the declaration/return is a fair and accurate representation of the taxpayer's tax position. Once you have submitted your declaration/return, your declaration/return could be selected for verification.

The nature of businesses impacted

171. All taxpayers subject to SARS' verification procedures.

Proposal

172. 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.

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

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

Section 89 – Binding private rulings

Legal Nature

174. 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.

175. 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

176. 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.

177. 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).

178. 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

179. All businesses applying for BPRs.

Proposal

180. 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

181. 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.

182. 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.

183. 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.

184. 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.

185. 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.

186. 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).

187. 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

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

189. 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.

190. 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.

191. 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

192. All taxpayers.

Proposal

193. 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.*

194. 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.

195. 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

196. 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.

197. 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.

198. 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.

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

Factual Description

200. 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.

201. 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.

202. 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

203. 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

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

Section 125 – Appearance at a hearing of the tax court

Legal Nature

205. 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.

206. 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.

207. 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

208. 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.

209. 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

210. All taxpayers.

Proposal

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

212. 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.

213. 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

214. 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.

215. 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

216. 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.

217. 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.

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

The nature of businesses impacted

219. All taxpayers requesting suspension of payments.

Proposal

220. 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.

221. 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.

222. 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.

223. 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

224. 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.

225. 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.

226. 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.

227. 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.

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

Factual Description

229. 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.

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

The nature of businesses impacted

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

Proposal

232. 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.

233. 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

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

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

234. National Treasury has categorised the criminal offences into those for which intent or negligence is required and those for which intent is required.

235. 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

236. Whilst SARS may choose not to lay a charge for prosecution 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.

237. 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.

238. 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.

239. 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.

240. 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.

241. 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.

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

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

The nature of businesses impacted

244. All taxpayers.

Proposal

245. 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*.

246. 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

247. 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

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

249. 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

250. All tax practitioners.

Proposal

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

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

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

Legal Nature

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

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

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

255. 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

256. 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.

257. 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.

258. 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

259. All tax practitioners.

Proposal

260. 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.

261. 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;”*