Ref: #774913

31 August 2023

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

Per email: 2023AnnexCProp@treasury.gov.za
acollins@sars.gov.za

Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT 2023 TAXATION LAWS AMENDMENT BILL, TAX ADMINISTRATION LAWS AMENDMENT BILL AND REVENUE LAWS AMENDMENT BILL

The National Tax Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the National Treasury (NT) and the South African Revenue Service (SARS) on the 2023 Draft Taxation Laws Amendment Bill (DTLAB), Draft Tax Administration Laws Amendment Bill (DTALAB) and the Draft Revenue Laws Amendment Bill (DRLAB).

Our submission has addressed amendments to the following tax Acts –

- The Income Tax Act, 58 of 1962, as amended (the Income Tax Act);
- The Tax Administration Act, 28 of 2011, as amended (the TAA);
- The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and

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

On a more general note, we wish to raise the following points:

1. We express concern that the drafting standard of the Explanatory Memorandum (EM) on the DTLAB is not on a par with those of previous years. This is reflected in the repetition of content[1] and the incorrect referencing to provisions[2]. This suggests that the Bills were not subject to proper review procedures which is of concern given that these are in respect of proposed fiscal legislative changes. This enforces our concerns

[1] For example, page 5: the last two paragraphs; page 6: the first 8 paragraphs, and pages 23-24: the examples provided.

[2] For example page 5: Clause 1.1, reference in the heading to the definition of "remuneration" in the Fourth Schedule (as only section 7B is being amended); page 15: Clause 2.3, references to sections 8F, 8FA and 50A, and effective dates that were not in agreement with the DTLAB (for example, page 6: Clause 1.1; page 11: Clause 1.6; and page 31: Clause 5.4).

expressed earlier this year to the Minister of Finance (the Minister) on the resourcing challenges at National Treasury and the impact thereof.

2. A further concern is that it is unclear to what extent our submissions during the Annexure C process are in fact being considered. Many Annexure C submissions (i.e., mere technical corrections) that were made in previous years by various taxpayers and organisations (including SAICA) have not been attended to, without explanation. For this reason, we refer NT, once more, to SAICA's submissions made during the 2020 and 2021 Annexure C processes for ease of reference. We do, however, highlight in this current submission the areas of critical importance that we feel strongly should have been included but have not been considered in the 2023 DTLAB and DTALAB.

3. In conjunction with the above, NT's position (from its responses to stakeholders) that it will not engage on nor entertain matters outside of the Bills and that were not also included in the Budget Review is noted. However, to our knowledge, there does not appear to be a public record that confirms those matters, submitted by stakeholders, that have indeed been considered by NT and the Minister for inclusion in/exclusion from the Budget Review. As is self-evident, this results in stakeholders having no sense as to whether matters not included in the Budget Review are not a current policy or legislative imperative or whether its not within the relevant policy at all. Without this certainty of outcome, stakeholders repeat submissions in the hope of an eventual clear position or outcome from NT. As Parliament noted, if stakeholders take the time to make submissions, they can expect a short explanation as to why matters were considered or not. NT did accommodate a follow-up engagement for the first time on 3 November 2022 ("Recurring Tax Proposals") following our concerns expressed to ScoF on this matter. However, we submit that this engagement on the matters that will not be addressed in the bills should occur before the bills are released to ensure that the Minister has properly applied his mind as to what should or should not have been included in the bills. It also does not explain why technical errors, including spelling mistakes, are not corrected.

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

Yours sincerely

David Warneke

Chairperson: National Tax Committee

Tarryn Atkinson

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The South African Institute of Chartered Accountants

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DRAFT TAXATION LAWS AMENDMENT BILL 2023

INCOME TAX ACT

Section 1 – Definition of "contributed tax capital" (Clause 1(1))

1. Submission: The following grammatical matters contained in the proviso should be corrected:

*"…the total market value of shares held by that foreign company in **any** resident **company**"*

Subparagraph (i) should read *"that **is** a connected **person** in relation to that **foreign** company"*, rather than *"that company"* for consistency.

Subparagraph (ii) should read *"where the total market value of those shares held in the resident companies in **(i)** exceed**s** 50 per cent of the market value of all classes of shares in that foreign company".*

Section 1 – Definitions of "pension fund" and "provident fund" and paragraph 6A of the Second Schedule (Clause 1(1))

2. NT has proposed an amendment which will enable pension or provident fund members who have reached normal retirement age in terms of the fund rules but have not yet opted to retire from their respective fund, and are subject to an involuntary transfer, to transfer their retirement interest from a less restrictive to a more restrictive retirement fund without incurring a tax liability.

3. The proposed amendments are welcomed and fair. However, the numerous and frequent changes to the taxation of retirement interests results in a complicated landscape for members and there is a risk that members are not able to keep track of the timelines (including when which rules/regimes are phased in and out) and differing tax treatments of their funds.

4. Submission: Considering the various different pension and provident fund regimes introduced in recent years, we propose that NT provide a separate guide setting out clear and detailed timelines stipulating the various regimes and treatments applicable for each period.

5. This will avoid misalignment and incorrect legislative application.

6. Additionally, clarity is required on whether the proposed amendment purposely excludes transfers from retirement annuity funds (RAFs) to other retirement annuity funds.

Section 6C – Solar energy tax credit (Clause 2(1))

7. The draft Explanatory Memorandum on the Initial Batch of the DTLAB notes that one of the reasons for the introduction of the tax incentives mentioned therein (i.e., sections 6C and 12BA) is to "*lower pressure on the grid… in order to encourage households to invest in clean electricity generation capacity which can supplement electricity supply…*"

8. NT noted in Chapter 4 of the Budget Review that the rooftop solar panel tax incentive for individuals would only apply to solar photovoltaic (PV) panels and exclude batteries and inverters because the goal is to focus on the additional generation of electricity. A further point made in this regard was that although batteries and inverters reduce the impact of loadshedding, they do not generate additional capacity[3].

9. The preceding statements by NT, respectfully, disregard the fundamental reality that, without an inverter which converts the DC power emanating from the PV panels to grid-usable AC power,

    a. the electricity generated from the PV panels cannot be used on home appliances; and
    b. the electricity generated from the PV panels cannot be distributed back into the electricity grid.

10. There is simply no escaping these facts.

11. It is therefore submitted that the inverter is just as important to (and more importantly, cannot be delinked from) the process of electricity generation.

12. While we accept that the expansion of the incentive is a policy matter, we nevertheless consider the concession to include the cost of inverters to be all the more reasonable given that the fiscal risk for the tax revenue forgone will only be for a one-year period.

[3] https://pmg.org.za/committee-meeting/36462/

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Furthermore, it aligns with the “generation of new electricity” policy requirement as inverters are essential to the generation of usable electricity.

13. In our view the current stated policy objective will not be achieved by the narrow incentive proposed.

14. Submission: Given the principle of “incentive for generation”, we submit that the section 6C solar tax credit should be extended to include the cost of inverters as well as the installation cost of both PV panels and inverters. All potential obstacles to the investment in the generation of electricity from PV panels should be removed.

15. The 1 March 2024 deadline for the credit should be moved to 1 March 2025 or preferably 1 March 2026 for the following reasons:

16. This credit was only announced in the Budget Speech on 22 February 2023, with the first batch of draft bills being published for comment on 1 April 2023 and with submissions requested by 15 May 2023.

17. This revised version has only been published for comment with the Draft Taxation Laws Amendment Bill on 31 July 2023, in respect of which comments are due by 31 August 2023. 6 months have therefore passed since the first mention of an incentive, which still has to be finalised and promulgated.

18. Based on the last 5 years, the tax bills are generally only promulgated in the first or second week of January. Should the final bills be promulgated in early January 2024, taxpayers would only have approximately 2 months to properly understand the incentive and consider whether the rebate is worth the cost of acquiring such solar power panels.

19. It is also noted that, apart from the current challenges posed by the South African economy in general, January and February are generally the most difficult financial periods for middle to low-income households considering the December festive season and the opening of schools which require the payment of school fees, purchasing of school uniforms and stationery etc.

20. This is an important consideration if the policy objective is to be achieved as we are of the view that a significant number of higher-income households had already installed PV panels and inverters prior to 22 February 2023 when the announcement of a credit was made.

21. It is therefore likely, in our view, that low- and middle-income taxpayers would most benefit from the proposed credit, but these taxpayers will require adequate time to arrange financing/save in order to invest in PV panels and inverters.

22. Submission: Based on (i) the legislative process and time frames noted above, (ii) the uncertainty around the final legislation and its sunset date of 2 months following promulgation, and (iii) the financial challenges faced by low- and middle-income

households, we recommend that consideration be given to extending this incentive over a 2- or 3-year period.

23. In our view this is more realistic for the incentive to be effective and achieve the policy objective of easing the burden with respect to the current energy crisis.

24. Section 6C(4) deals with instances where more than one person incurs cost in respect of the acquisition of a PV panel.

25. The cost for purposes of calculating the tax credit in such instances is held to be:

    "…. the amount of the cost for purposes of subsection (2)(b)(i) must be an amount that bears to the total amount in respect of the acquisition of that solar photovoltaic panel in subsection (2)(a) the same ratio as the amount of the <u>cost incurred by the natural person</u>… ".

26. This wording appears elsewhere in the Act and its meaning is generally understood by tax practitioners but is difficult for the public to understand.

27. For the sake of clarity, it is suggested that the EM, the SARS website and FAQ include an example of how the credit would be calculated/apportioned where more than one person incurs the cost of acquiring the PV panels.

28. This is particularly important where a permanent union (e.g. marriage) determines how the joint estate pays for the costs of the PV panels (i.e. marriage in community of property) as the law deems the spouse's estate to equally procure the panels.

29. This may create uncertainty as to whether the spouse purchasing the panels incurs the cost for tax purposes or whether both spouses equally incur such cost where such cost is incurred from the joint estate.

30. In respect of income, section 7(2A)(b) ITA has a similar provision.

31. <u>Submission</u>: We propose, therefore, that the "cost incurred by the natural person", be the default position, with an exception (proviso) that where the cost is incurred from the joint estate of persons married in community of property, that the cost be deemed to be incurred 50/50, similar to section 7(2A)(b).

<u>Section 7C – Loan, advance or credit granted to trust by connected person (Clause 3(1))</u>

Debt denominated in foreign currency

32. Whilst we agree that foreign loans bearing no or low interest should be included within the ambit of section 7C, we are of the view that the proposed wording does not achieve the correct intention with regard to determining the deemed donation amount and the translation to rands of such deemed donation.

33. We are of the view that subsection 3, as it currently reads, makes it clear that –

a. Interest free and low interest-bearing loans are included within the ambit of section 7C;

b. The deemed donation is calculated as the interest differential (i.e., the actual interest charged vs interest calculated using the SARS official rate of interest);

c. The timing of the deemed donation being the last day of the year of assessment of that trust or company.

34. Clause 3(1)(a) is incorrectly drafted.

35. Subsection (3A) stipulates that the trust or company must translate the loan, advance or credit or interest to the currency of the Republic by applying the spot rate.

36. However, it is the lender who has extended the loan, advance or credit and who must do the translation – not the borrower.

37. <u>Submission</u>: To simplify and expand section 7C to foreign loans, we recommend that subsection (3A) should be reworded as follows:

38. "*If the loan, advance or credit referred to in subsection (1), (1A) or (1B) is in any currency other than that of the Republic, the amount determined in subsection (3) must be translated to the currency of the Republic by applying the <u>average exchange rate</u> for that year of assessment*."

39. In our view the average exchange rate is more appropriate as there may be loan movements throughout the year of assessment along with changes to the official rate of interest, hence the rate applied should not be the spot rate at year end.

40. The above wording also ensures that all the criteria equating the deemed donation to the interest differential, will be aligned with rand denominated loans.

Funding of improvements to a primary residence

41. The wording of the proposed amendment refers to *"paragraph 44 of the Eighth Schedule, read together with paragraph 46 of the Eighth Schedule".*

42. However, paragraph 46 of the Eighth Schedule only applies where a primary residence and the land on which it is situated is disposed of.

43. The current wording of the proposed amendment will thus not have the desired effect of applying prior to the disposal of the primary residence, while it is held by the trust or company.

44. <u>Submission</u>: The wording should instead specifically reproduce the portions of paragraph 46 which are sought to be included.

45. To achieve NT's objective, section 7C(5)(d) should be drafted as follows:

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46. *'…that trust or company used that loan, advance or credit wholly or partly for purposes of funding the acquisition **or improvement** of an asset and…'*

Section 8EA – Dividends on third-party backed shares (Clause 5(1))

47. The proposed amendment seeks to introduce an ownership requirement of the equity shares in the operating company by the person that acquired those equity shares.

48. Conceptually, in many instances, the recipient of the dividend or foreign dividend would not know whether the company paying the dividend still holds the equity share in the relevant operating company when the dividend or foreign dividend accrues. The same issue arises in relation to the question of whether the operating company is still an operating company at the time of the receipt or accrual of any dividend or foreign dividend in respect of the preference share.

49. This lack of visibility may result in erroneous disclosures and tax treatments in respect of affected dividends and may expose taxpayers to understatement or underestimation penalties.

50. The proviso, as it currently reads, creates confusion by implying that the dividend targeted by the proposed amendment is the one that accrued to the person who acquired the equity shares in the operating company. Whereas the amendment is actually targeted at the dividend accruing to the preference shareholder.

51. Submission: Additional wording (underlined) should be added to the proposed wording to the proviso such that it reads as follows:

52. *": Provided that where an equity share in an operating company is acquired by any person as contemplated in paragraph (a) or (b) of the definition of "qualifying purpose" and the share so acquired is no longer held by that person at the time of the receipt or accrual of that dividend or foreign dividend **in respect of a preference share**, this subsection must not apply.".*

53. In order to realise economies of scale, increase internal efficiency and/or accommodate changing circumstances or new commercial opportunities, it is not uncommon for a group of companies to regularly effect restructures per the corporate reorganisation rules Part III of the Act.

54. The proposed "ownership requirement" impedes on such reorganisations where the ownership of the shares in the operating company may be transferred to another group company within the same group of companies.

55. Submission: The proviso should not apply where the equity share held in the operating company has been transferred to another company within the same group of companies by means of the corporate reorganisation rules in PART III of the Act.

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56. It would also be prudent for the proviso to exclude instances where an equity share in one operating company has been disposed of and the proceeds used to acquire equity shares in another operating company. We submit that the policy rationale of the ownership requirement would still be met in such instances.

57. The proposed amendment also seems to penalise the winding-up of a preference share structure.

58. Typically, at the end of the preference share term, the shares in the operating company (or part thereof) are sold to provide funding to settle the accumulated preference dividends and to redeem the preference shares.

59. In terms of the proposed amendments any dividend paid in these circumstances would be unfairly characterised as 'income'.

60. Submission: The proposed amendment should exclude such instances.

61. The proposed amendment will be deemed to have come into operation on 31 July 2023 and apply in respect of any dividends or foreign dividends received or accrued during years of assessment ending on or after that date. This would have a retroactive impact, essentially applying to dividends or foreign dividends that have already been declared and paid before both the draft Bill was issued and the final legislation enacted.

62. Submission: The amendment should be deemed to come into operation on 1 March 2024 and apply in respect of any dividends or foreign dividends received or accrued after that date.

63. Alternatively, it should only apply to dividends or foreign dividends received or accrued after 31 July 2023.

Section 9D – Clarifying the foreign business establishment exemption for controlled foreign companies (Clause 7(1))

64. The proposed amendments to subparagraph (1) seek to modify the economic substance requirements that govern whether or not a controlled foreign company ("CFC") has a foreign business establishment ("FBE") and accordingly whether income that is attributable to that FBE qualifies to be disregarded under the so-called "FBE exemption". The amendments are aimed at replacing references in the FBE definition to the "primary operations of that business" to a requirement that the economic substance must be such that the business of a CFC in a particular country performs "all the important functions of that business for which the CFC is compensated". This is said to be in response to specific abuse which NT is concerned about.

65. As a starting point, it is important to note the policy rationale for the original introduction of section 9D.

66. In June 2002, NT released a document titled "*National Treasury's Detailed Explanation to Section 9D of the Income Tax Act*" (the "NT 9D Document"). The purpose of the NT 9D Document was to facilitate a better taxpayer understanding of section 9D in both technical and policy terms and to describe the technical basis of, and policy rationale behind the 2000 and 2001 changes to section 9D.

67. The policy rationale, as explained in the NT 9D Document, behind the exemption (such as the FBE exemption), can be summarised as follows.

68. Section 9D should allow South African groups to remain internationally competitive by following the international norm of favouring a balanced approach. It is for this reason that section 9D did not introduce a pure anti-deferral regime that immediately deems back all South African owned foreign company income. Rather, and as dictated by international competitiveness and in line with other similar international regimes, section 9D contains certain rules that exclude or ignore foreign company income in specific circumstances with the aim to ensure that South African multinationals can compete on an equal basis with their foreign rivals.

69. The FBE exemption is, as a matter of policy, intended to promote international competitiveness and to apply in contexts where the income in question poses no threat to the South African tax base. Generally, this will be the case if the income of a CFC is:

   a. attributable to a FBE, i.e. the income results from economic substance and real non-tax business reasons for generating and maintaining such income offshore;

   b. does not result from sales and services with connected persons and/or related to South African residents (in a manner that may most likely lead to transfer pricing concerns) (so-called "diversionary foreign business income")); and

   c. the income is not of a passive nature (such as interest, royalties, rental income and dividends from portfolio bonds and shares) (i.e. so-called "mobile foreign passive income").

70. The FBE exemption was thus designed to not exempt the income of 'paper businesses' from taxation in South Africa and contains anti-avoidance measures to that effect. In this respect, a CFC will only satisfy the FBE test if it has:

   - a business located in the foreign jurisdiction with (a) some locational permanence and (b) economic substance to conduct the primary (or core daily) operations; and

   - a non-tax business reason for operating abroad rather than in South Africa.

71. Under the existing FBE definition, the generally accepted view is that the primary operations of the CFC should first be determined and, secondly, once this has been determined, the question is whether the CFC maintains the required economic substance

in the foreign jurisdiction in which its fixed place of business is located to conduct its primary operations.

72. In this respect, it has always been accepted that a CFC would be allowed to outsource activities which it considers to be non-core or non-primary. From a policy perspective, this principle was reconfirmed in the NT 9D Document and practically illustrated in example 2 on page 10 thereof (the "NT Example").

73. In the NT Example, it is confirmed that a CFC, which established its warehousing activities in a tax-haven country which operates as a central delivery point for products shipped to customers in Southern Europe and the Middle East, would satisfy the requirements of the FBE definition, despite it outsourcing the trucking and airline transportation portion of its business to independent contractors.

74. This conclusion was based on the factual position that:

- the warehousing operations qualify as a business establishment (and is presumably considered to be the primary operations of the CFC, with the outsourced transportation services being ancillary or non-core to the operations conducted by the CFC);

- the CFC is suitably equipped (leasing a warehouse in the foreign jurisdiction) and staffed (7 permanent employees handle the storage and shipment contracts) to conduct the primary operations in the foreign jurisdiction; and

- the CFC was established in the foreign jurisdiction for non-tax reasons (offering significant shipment cost advantages when compared to being located in South Africa).

75. In the NT Example, it is reasonable to assume that the compensation paid by customers to the CFC includes the compensation for the cost of the outsourced transportation.

76. In addition, it is reasonable to assume that the outsourced transportation cost, and the transportation function itself, would constitute a significant part of the compensation paid to the CFC and service delivered by the CFC to its customers. The outsourced transportation function, albeit non-core and not the primary operation of the CFC, is however undoubtably an "important function" within the context of the CFC's business.

77. Of major concern in the proposed amendments is that the term "important functions" is not defined and, as can be appreciated, extremely subjective.

78. Furthermore, it is unclear what is meant by the term 'for which the controlled foreign company is compensated'. If a CFC sells goods and derives sales revenue from a third party, one would not say that it was being 'compensated for an important function of its business'. The word 'compensation' means 'something, typically money, awarded to someone in recognition of loss, suffering or injury'. So the proposed wording means that, in that case, the place of business would not have to be specifically equipped for deriving sales revenue, since deriving sales revenue is not 'compensation' derived by the CFC. However, deriving sales revenue in the posited example is the main business of the CFC. This result is clearly unintended. If the amendments are retained (with which we do not

agree for the other reasons mentioned in our submission), then instead of the words 'for which the controlled foreign company is compensated' we suggest the words 'from which the controlled foreign company derives consideration from the supply of goods or services'.

79. Instinctively, "primary operations" are understood to be the main income producing activities of the CFC or its main reason for existing.

80. The dictionary meaning of "primary" includes "of first rank, importance or value". "Important functions" will capture a much broader range of activities which may be seen as "important" in the eyes of NT/SARS.

81. Applying the proposed amendments to the FBE definition to the abovementioned NT Example, it would be reasonable to assume:

    - that the compensation received by the CFC for the transportation of the products constitutes a significant (or important) portion of the overall compensation received by the CFC; and

    - that the transportation of the products would be considered an "important function" of the CFC.

82. The CFC in the NT Example would therefore not satisfy the proposed new FBE test as contained in the proposed amendment to section 9D(1).

83. Where the aforementioned is accepted, in order for the CFC to satisfy the FBE test, it would be required to create an inhouse transportation function (i.e. establish its own airline and shipment business).

84. Commercially, this is a highly unrealistic and probably impossible, expectation. Since a business, such as the CFC in the NT Example, competes on an international basis, the revised FBE test would likely result in it being uncompetitive compared to other multinational companies established in jurisdictions with an FBE definition similar to the existing definition.

85. Another example is an online business-to-consumer marketplace which sells its own products online but makes use of (i.e., outsources to) third parties to deliver these products to its customers.

86. While this last-mile delivery leg is undoubtably an "important function", it is not the CFC's "primary operations". It would be completely inappropriate to deny the FBE exemption to the online B2C marketplace on this basis if there is substantial substance (staff, facilities, equipment, etc.) offshore, and no risk to the SA fiscus.

87. In this scenario, the FBE exemption would force this business to have/create its own (or within another group company) delivery function in order to not pay tax in South Africa on its legitimate operations in a foreign country.

88. Consider also a business model where a CFC owns an office block that sub-contracts various functions (leasing, collections, property management, maintenance, facilities management and cleaning).

89. Whilst the CFC does have management on the ground who manage and oversee the various sub-contracted functions, signs contracts, oversees the finances of the CFC (including making payments to subcontractors and other suppliers), it is not clear in these circumstances whether the activities of management would constitute performing all the important functions of that business for which the CFC is compensated.
90. Under the proposed amendment, many businesses may effectively be relegated to the original version of section 9D where only the high-tax exemption was available to taxpayers (and this has its own limitations and significant complexities).
91. The proposed amendments place a commercially untenable burden on South African multinational companies and will have the result of those entities becoming internationally uncompetitive.
92. Furthermore, since the proposed amendment to the FBE definition constitutes a major policy change and will require significant restructures for multinational companies to remain competitive, an effective date of 1 January 2024 is not achievable.
93. The effective date of the proposal leaves no time for a South African multinational with CFCs to meet the new requirements if it wants to continue to rely on the FBE exemption.
94. The proposed amendment comes into operation on 1 January 2024 and applies to foreign tax years of CFCs ending on or after that date. This means that the proposal applies to all CFCs with financial years ending on or after 1 January 2024. CFCs with a financial year ending on 29 February 2024, 31 March 2024 or 30 June 2024 (which are common financial year-end dates) would already be subject to the new proposals

95. <u>Submission</u>: The amendments should be withdrawn and the existing concept of "primary operations" should be retained in the FBE definition.

96. The onus of proof remains on the taxpayer as to what would constitute "primary operations" in its particular circumstances and that it has the required economic substance to perform such operations.

97. In addition, the rules dealing with diversionary foreign business income and mobile foreign passive income provide additional safeguards against abuse of the FBE exemption (i.e. most "bad income" is in any event scoped back into the section 9D computation).

98. It is also submitted that a comparative review of CFC legislation be undertaken to align South Africa's CFC legislation to international best practice, including considering the recommendations of the OECD's BEPS Action Plan 3, the impact of the pending OECD Pillar 2 Global Minimum tax, and the extent that the current legislation is administratively burdensome for most taxpayers.

99. A new amendment may then be drafted, based on consultation with stakeholders, which will ensure clarity.

100. Should the proposed amendments be enacted in their current form, it will have significant commercial impact on South African multinational companies. The proposed effective date is therefore unrealistic, and taxpayers should be afforded more time to restructure their businesses to allow them the opportunity to remain commercially competitive.

101. The effective date of the amendment should thus be postponed to after the above analysis has been performed or at least to 24 months after the bill is enacted to enable companies with CFCs to align their business models to NT's new policy stance.

Section 11D – Research and Development (Clause 12)

102. The wording of clause (zF) which introduces subsection (22) that contains the new sunset date only refers to applications received after 31 December 2033. It does not explicitly state that no deduction shall be allowed in respect of qualifying expenditure incurred after this date.

103. This leaves the impression that, as long as the application is submitted before 31 December 2033, a deduction may still be claimed for expenditure incurred thereafter.

104. Submission: If it is truly the intention of Government to cease the research and development tax incentive by 31 December 2033, the wording in clause (zF) should be amended as follows:

105. *"(22) No deduction shall be allowed under this section in respect of applications received and expenditure incurred after 31 December 2033."*

106. The effective date of the amendments to section 11D is 1 January 2024 and applies in respect of applications received and expenditure incurred on or after 1 January 2024. The wording in clause (k), which amends subsection 2(a)(iv), does not make it clear that the 6-month grace period only applies to qualifying expenditure incurred after 1 January 2024.

107. It is further unclear why all applicants should not be treated the equally, being that all expenditure incurred in 6 months prior to an application submitted on or after 1 January 2024 should be included.

108. The example in the table on page 34 of the EM is confusing.

109. As a start, it is suggested that all applications submitted after 1 January 2024 should qualify to claim expenditure incurred in the 6 months prior to the date of submission.

110. Submission: Should it remain Government's intention that the grace period only applies to expenditure incurred after 1 January 2024, then the table in the explanatory memorandum should be amended as follows:

Apply	Approval	Spend
1 Nov 2023	5 Dec 2023	All expenditure from 1 Nov 2023
1 Nov 2023	22 Jan 2024	All expenditure from 1 Nov 2023
15 Jan 2024	2 Mar 2024	All expenditure from 1 Jan 2024 (effective date of TLAB 2023)
15 Mar 2024	1 July 2024	All expenditure from 1 Jan 2024 (effective date of TLAB 2023)
15 Aug 2024	1 Nov 2024	All expenditure from 15 Feb 2024

111. Lastly, the section 11D tax incentive is proposed to come to an end on 31 December 2033.

112. The draft legislation states that no deduction shall be allowed in respect of applications received after 31 December 2033. This means that an application that is submitted on 31 December 2033 would still be required to be adjudicated and considered by the Department of Science and Innovation, as the applicant would be entitled to claim qualifying expenditure incurred from 1 July 2033 to 31 December 2033.

113. Submission: We express concern as to whether Government will have the capacity and ability to adjudicate such submissions (in 2034) in order to enable applicants to benefit from the 6-month period and whether government is planning to expand its capacity to adjudicate these matters timeously.

Sections 11F and 12T – Apportioning the tax-free investment contribution limitation and limiting the retirement funds contribution deduction when an individual ceases to be a tax resident (Clause 13 and 19)

114. Whilst we are in agreement with the concept that these amounts do require apportionment, we do not agree with the proposed wording of these sections insofar as it makes reference to 365 days as this creates an anomaly in leap years where there are 366 days.

115. We make reference to section 10(1)(i) that was amended in the 2022 TLAA and note the proviso to the annual interest exemption also makes mention of the 365 days, yet the proviso in paragraph 5 of the Eighth Schedule has a completely different wording but achieves the overall result that no more than a total exclusion of R40 000 may apply within the same 12-month period.

116. Furthermore the section 12T contribution cap of R36,000 which is generally not a monthly contribution will also cater for situations where a person makes the full R36,000 earlier in the year of assessment (assume on 1 March of the relevant year of assessment) and then at some point later in that year that person decides to emigrate and cease his/her tax residency.

117. In applying the current proposed wording, the annual limit would be applied on a pro-rata basis. Hence, if a person ceased tax residency in the middle of the year of assessment, that person would have a limit of R18,000.

118. Therefore the proposed amendment would penalise the taxpayer depending on whether the taxpayer paid any or all or the whole or majority of the contributions in each of the 2 tax years before and after becoming non-resident. This occurs as it incorrectly assumes contributions are made for each month and are of equal value each month. That is why the wording paragraph 5 of the Eighth Schedule is more appropriate as it does not require this incorrect assumption to operate fairly.

119. Submission: We would recommend that the amendments to sections 11F and 12T and if possible (section 10(1)(i) – although it is noted that this is not part of the bills and may be required to be submitted as an Annexure C submission) be aligned with the wording of the proviso contained in paragraph 5 of the Eighth Schedule which reads as follows:

120. *"Provided that where a person's year of assessment is less than a period of 12 months, the total annual exclusions for years of assessments during the period of 12 months commencing in March and ending at the end of February the immediately following calendar year must not exceed R40,000"*

121. If this recommended wording is adopted for sections 10(1)(o), 11F and 12T, it is a simplified manner of ensuring that none of the "annual/12-month thresholds" are exceeded.

122. The taxpayer would also be subject to a penalty on the excess contribution of R18,000 at a rate of 40% (i.e., R7,200) in terms of section 12T(7). This would be grossly unfair if such person did not make any further contributions to the tax-free investment upon ceasing tax residency during that 12-month period.

123. Submission: It should be clarified that section 12T(7) does not apply where a taxpayer ceases residency and the pro rata threshold is exceeded for the portion of the 12-month period in which 1 of the 2 years of assessment fall. The taxpayer should however still only receive the pro rata exemption.

Section 11G – Deduction of expenses incurred in the production of interest (Clause 14)

124. NT has proposed that Practice Note 31 of 1994 ('PN31') be withdrawn and that legislative guidance be provided to the extent that deductions dealt with in terms of PN31 align with the currently prevailing policy.

125. The intention to legislate PN31 is appreciated. However, for the reasons below, we believe the proposed section 11G is too narrow in its scope.

126. This draft legislation proposes to introduce a new section 11G to allow for an income tax deduction for expenditure incurred by a company in the production of interest income

accruing from another group company (as defined in section 1 of the Income Tax Act), provided certain requirements are met.

127. Submission: There is a grammatical error. The word “where” in “*Where that interest income arises*” (s11G(1)(b)(ii)) should be deleted.

128. PN31 was a recognition by SARS that businesses in many instances require shareholders or related entities to obtain financing on behalf of such entities due to commercial and legal realities such as the shareholder having an asset base to provide debt security or the financing entity requiring a presence in a particular market to enable borrowings. This applies even where such shareholders or finance entities are not trading. PN31 is therefore, at its core, a corporate finance enabler and seeks to enable the commercial reality of many businesses in obtaining finance without adding an unfair tax cost to the financing by taxing the interest repayment cashflow to the shareholder/finance entity.

129. Although the draft EM refers to alleged ‘abuse’ of PN 31, to date no examples of the abuse referred to have been provided by SARS or NT. This is surprising given that, conceptually, whether a loan is made to a person (P1) who on-lends the amount to the ‘end user’ of the funds (P2) or whether the loan is made directly by the provider of funds to the end user of the funds, there should ideally be no difference in overall tax treatment. This is what PN 31 sought to achieve.

130. While it is true that our income tax system has always had a ‘trade’ test in addition to the ‘in the production of income’ and “non-capital” tests in determining the general deductibility of expenditure, no comparative requirement to the trade test exists with respect to income.

131. An amount forms part of a taxpayer’s ‘gross income’- and is therefore potentially subject to taxation if it is received by or accrues to the taxpayer during the year of assessment and it is not of a capital nature. There is no requirement that, prior to inclusion in a taxpayer’s gross income, an amount must be derived from a trade carried on by the taxpayer.

132. Although it can be accepted that safeguards are required on the deductibility of expenses to protect the *fiscus*, arguably the ‘in the production of income’ test serves that purpose and so one may validly question whether, in addition to the ‘in the production of income’ and “non-capital” tests, the taxpayer should be required to overcome the additional hurdle presented by a ‘trade’ test.

133. The PN31 mitigates this risk. The requirement that deductions or set-offs have to be in respect of a trade results in a variety of inequitable situations, not only those addressed by PN31.

134. For example, a non-trading holding company that holds a foreign-denominated debt may find itself in the position that if foreign exchange losses are realised in a year of assessment, it is prevented from carrying forward the resulting assessed loss to the following year for offset against foreign exchange gains realised in that year, because it does not carry on a trade (and consequently forfeits the assessed loss). It would then have

to pay tax on the foreign exchange gains in that subsequent year without being able to offset the foreign exchange losses it incurred in the earlier year.

135. Since PN31 was issued in 1994, it has assisted taxpayers in achieving equitable results in situations where otherwise deductible expenditure (i.e., had it not been for the “trade” requirement) is incurred by taxpayers in earning interest income.

136. For example, A and B are spouses and B carries on a small business. A owns the asset base acceptable to a South African bank for a working capital loan required by B’s business. Therefore, the bank extends a loan to A who in turn lends it, at an equivalent interest rate, to B’s business.

137. In terms of PN31, A has an inclusion in gross income of the interest earned from B’s business and is allowed to deduct the interest expenditure paid to the bank even though such interest has not been expended in the furtherance of a trade. If PN31 is withdrawn and section 11G is not expanded to include taxpayers other than companies, the result will be that A will be taxed on the interest income earned but will not be permitted to deduct the corresponding interest paid to the bank. This will result in both the bank and A being taxed on the same amount of interest income, with only one taxpayer obtaining a deduction – B’s business. This is clearly inequitable.

138. It is difficult to understand why SARS and NT would wish to disallow the deduction by A of the interest expenditure incurred against (and understandably limited to) interest income in the above scenario.

139. An appeal to the theoretical ‘purity’ of our income tax system – that for consistency reasons the ‘trade’ test should apply in all circumstances – ignores the clear inequity that would be created by an application of the trade test to A in the above scenario.

140. It is nevertheless understood that our income tax system is not ‘pure’ in that sense because there are instances of deductions which are expressly allowable in the absence of trade: contributions to retirement funds are allowed as deductions from an individual’s taxable income, irrespective of whether the individual carries on a trade and the same is true for donations by taxpayers to approved public benefit organisations as well as for foreign exchange losses.

141. The need for an exception to the trade requirement was recognized when PN 31 was implemented in the 1990s and this need remains to the present day. Then, albeit probably even less than now, credit was the lifeblood of many businesses.

142. The same inequitable result outlined in the inter-spousal example above would result in relation to the funding of professional practices through back-to-back lending arrangements. These arrangements are also common in owner-managed start-ups and small to medium sized businesses which require funding but are unable to obtain it directly from financial institutions.

143. In many of these situations, either the lending institution or the business would prefer the loans to be advanced to the individuals, who then on-lend to the business, rather than

directly to the business, for commercial reasons, such as the relative ease of attachment against the assets of the individual by the lending institution and the more favourable interest rate that may therefore result for the individual and therefore, for the business.

144. If such arrangements are to be restructured, there would be an impact on the cost of lending and/or the ability of businesses to raise further credit.

145. There does not appear to be a compelling policy reason for these existing arrangements needing to be restructured.

146. Any perceived mischief is completely absent in the above-mentioned arrangements, which are sensible and businesslike in the light of economic realities.

147. Submission: The principles in PN31 should be formalised in the proposed section 11G, which should be extended to other taxpayers, besides groups of companies.

148. Additionally, the extension of a proposed 'carve-out' only to certain groups of companies is far too narrow in its scope.

149. A "group of companies" is defined in section 1 of the Act as meaning two or more companies in which one company (hereinafter referred to as the "controlling group company") directly or indirectly holds shares in at least one other company (hereinafter referred to as the "controlled group company"), to the extent that –

   a. at least 70 percent of the equity shares in each controlled group company are directly held by the controlling group company, one or more other controlled group companies or any combination thereof; and

   b. the controlling group company directly holds at least 70 per cent of the equity shares in at least one controlled group company.

150. The definition of "group of companies" in section 1 of the Act requires a holding threshold of at least 70 percent.

151. Submission: We consider this 70 percent threshold too high a benchmark as it disregards companies that may be less than 70 percent held but are more than 50% held, notwithstanding that those companies fall within the same control and are typically consolidated for financial reporting purposes.

152. It may be more appropriate to reduce the 70 percent threshold to 50 percent, as has been done in other sections of the Act.

153. The 'carve-out' for certain group structures also excludes certain business structures that are not arranged by way of a 'group of companies' as defined in section 1.

154. This includes incorporated "firms" and small businesses where the "partners" and "shareholders" own the personal assets that act as security against which finance to the

business is provided and without which the business would not secure such operational funding.

155. Furthermore, some ownership structures comprise of a non-trading trust as the common shareholder of several companies.

156. Such a trust would have sufficient trust capital accumulated over many years and can access funding much easier than its 'subsidiary' companies, based also on the assets on its balance sheet, (which comprise of the investments in the aforementioned subsidiary companies). The funding would then be on-lent to its companies and interest charged.

157. This trust would not qualify for the section 11G deduction in respect of interest incurred on loans obtained from third-party lenders.

158. Other problems with the proposed section 11G include the following:

a. Any deduction of interest in terms of this section would be in terms of section 11(x) and thus would still be subject to a trade requirement.

b. It does not refer to section 24J as the basis for calculation of interest and hence, in terms of the decision in, *Cactus Investments (Pty) Ltd. v Commissioner for Inland Revenue (1/97) [1998] ZASCA 98; 1999 (1) SA 315 (SCA); [1999] 1 All SA 345 (A) (20 November 1998)* interest may in certain cases be fully incurred in the year of assessment in which the loan is granted rather than spread out over the term of the loan, as the proposed new section seems to envisage.

c. It should be provided as an alternative to the existing tests for deductibility and it is not clear how it would apply in conjunction with section 24J where interest is sought to be deducted where the taxpayer is carrying on a trade.

d. It is unclear how this section would interact with section 23M.

159. Submission: Given that the withdrawal of PN31 will significantly restrict the deductibility of expenditure incurred to produce interest income, this will have a negative financial and commercial impact on many taxpayers. As noted above, we are of the view that PN31 should not be withdrawn. If it is withdrawn, section 11G should be extended to other taxpayers and situations and, in any case, to provide these taxpayers sufficient opportunity to prepare for the change in practice we recommend that NT delays the effective date to apply in respect of years of assessment commencing on or after 1 January 2025.

Section 12BA – Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in production of renewable energy. (Clause 15)

160. Section 12BA provides for a deduction

"In respect of any new and unused machinery, plant, implement, utensil, or article owned by the taxpayer… which was or is brought into use for the first time by that taxpayer for the purpose of that taxpayer's trade on or after 1 March 2023 and before 1 March 2025 to be used by that taxpayer <u>in the generation of electricity</u> from:

(a) wind power;
(b) photovoltaic solar energy
(c) concentrated solar energy
(d) hydropower to produce electricity, or
(e) biomass compromising organic wastes, landfill gas or plant material."

(our emphasis)

161. Whilst National Treasury has been clear on the fact that the s6C tax credit will not apply to costs incurred in the acquisition of inverters and batteries, uncertainty remains among stakeholders regarding whether the same is true of the s12BA deduction. Though it may be argued that inverters and batteries are included within the meaning of "machinery, plant, implement, utensil, or article", this is not explicitly clear.

162. <u>Submission</u>: We request that clarity be provided in this regard by the insertion of a definition as to the assets "that are used in the generation of electricity" in both section 12B and section 12BA.

163. Binding Class Ruling 085 provides a useful example by providing a list of what these "eligible assets" may be as far as solar energy is concerned. The relevant part reads:

164. *The generation assets will consist of the following types of assets:*

photovoltaic solar panels;
voltage solar cells and panels;
inverters;
power optimizer;
charge controllers;
storage batteries;
bi-directional utility meter;
racking;
distribution board;
cabling; and
foundations and / or supporting structures for the various equipment.

165. <u>Submission</u>: Additionally, a definition to clarity should also be provided in the wording in s12BA(1) as follows:

"(1) *In respect of any new and unused machinery, plant, implement, utensil, or article owned by the taxpayer… which was or is brought into use for the first time by that taxpayer for the purpose of that taxpayer's trade on or after 1 March 2023 and before 1 March 2025 to be* *used by that taxpayer in the generation of electricity, **<u>storage and conversion of electricity so generated</u>** from –*

166. Furthermore, many manufacturing entities operate at night and would require the storage batteries to continue their operations without any disruptions.

167. It is contended that due to the limited time frame of this incentive, and to rapidly accelerate the uptake of businesses to make use of this incentive and assist government in alternate energy sources, that costs of all the assets, including the storage batteries and installation costs, should be included in cost amount upon which the incentive is determined.

168. We welcome this new section which is meant to be temporary (i.e., currently only applicable for a 2-year period) however on the basis that this incentive applies to assets brought into use for the first time on or after 1 March 2023 and before 1 March 2025.

169. We once again reiterate the concerns noted above, with regards to the tax credit available to individuals in terms of section 6C whereby been 6 months has already passed since the announcement of this incentive yet, the final legislation is likely only going to be promulgated in January next year.

170. Businesses will only have just over one year to properly assess whether they are able to invest in such renewable energy assets.

171. Submission: We therefore request that this incentive be extended to 1 March 2026 to encourage businesses possibly invest more funds to further alleviate their reliance on the grid and assist government with the current energy crisis.

172. In the draft EM, NT notes the overriding policy rationale of s12BA:

…government is proposing to enhance the attractiveness of the tax incentive to encourage greater private investment in renewable energy. To encourage rapid private investment to alleviate this energy crisis[4]… (own emphasis)

173. Since rapid private investment to alleviate the energy crisis is the main goal, we submit that it ought not matter whether the deduction can be claimed by
    a. the business itself which makes the investment in owning the renewable energy assets, or;
    b. someone else who is prepared to make the investment and sell the electricity or lease the equipment to the business.

174. There are a number of individuals and companies that are prepared to invest via limited partnerships, where the latter will lease the plant to businesses or sell the electricity under

[4] Page 35

power purchase agreements. The policy initiative requirements will be met and there is no reason why these investors should not enjoy the 125% allowance.

175. We note that the section 12BA allowance is also included in section 23A. This forces solar asset operators to enter into power purchase agreements with building owners and operators, and not lease the solar assets as the section 12BA deduction available would be ring-fenced to the taxable income derived from the rental income. This defeats the purpose of the accelerated interim allowance.

176. Submission: We recommend the deletion of the reference to "s12BA" in the proposed amendment to section 23A, which will allow lessors to obtain the full 125 percent deduction in the year of assessment in which the asset is brought into use for the first time by the lessee, which seems aligned to the policy intent.

Section 12H – Learnership Allowances

177. The sunset clause for section 12H is 31 March 2024.

178. No extension is noted in the bill even though no announcement was made in the Budget Review that this incentive would be discontinued.

179. NT merely noted that it was reviewing all incentives and accordingly it was expected that NT would do public engagements before any allowances were discontinued.

180. Submission: If the omission of extension of this incentive was in error, we submit that it should be inserted to enable NT sufficient time to finish its review of the effectiveness of the allowance and to publicly engage stakeholders impacted.

181. If the omission was not in error, we submit that it should be extended for 12-24 months to enable NT sufficient time to finish its review of the effectiveness of the allowance and to publicly engage stakeholders impacted.

182. SAICA has conducted independent research on the impact of the section 12H allowance and we would welcome an engagement with NT to discuss possible changes to the incentive that would make it more effective in achieving its intended policy outcome.

Section 23M – Limitation of interest deductions in respect of debts owed to persons not subject to tax (Clause 24)

183. The proposal seeks to clarify the application of the interest limitation rules and align the legislation to its intended purpose.

184. With regard to the amendment to the definition of "adjustment taxable income" it is noted that section 23N also contains fundamentally the same wording with regards to the addition of the assessed losses and balance of assessed loss allowed to be set of against income in terms of section 20.

185. However, this similar amendment has not been made to section 23N.

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186. Submission: It is noted that this may be an oversight on the part of National Treasury, however in the event that that it is not an oversight, clarity is sought as to why only section 23M was amended in this regard.

187. Furthermore, although not included in the Draft Bill, we note that there is a lack of clarity with respect to the order of calculation of taxable income in the case where s18A donations are made by a taxpayer.

188. The definition of 'adjusted taxable income' in section 23M(1) commences with 'taxable income calculated before applying this section'. Section 18A(1)(B) similarly uses as a limit, ten percent of the taxable income (with specified exclusions which do not include section 23M) calculated before applying section 18A.

189. Consequently, it is unclear whether section 23M should be applied before section 18A, or vice versa.

Section 25B – Taxation of non-resident beneficiaries of trusts (Clause 27)

190. The draft Explanatory Memorandum ("EM") states that proposed amendment primarily seeks to ensure that the relevant taxes are collected in respect of income paid or vested to non-resident beneficiaries.

191. The proposed amendment would, under SARS's interpretation of the phrase 'beneficial owner' in relation to dividends, interest and royalties, mean that if a trust vests the amount of dividends, interest or royalties in a non-resident, such non-resident would not be able to avail themselves of any favourable reduction in the rate of withholding tax that may apply under a double taxation agreement.

192. This is because, since the amount in question would be deemed to accrue to the trust, the trust and not the non-resident would be regarded as the 'beneficial owner' of the income.

193. Submission: We submit that a more equitable solution is that instead of deeming the income to accrue to the trust, the trust should be a 'withholding agent' in respect of the tax liability of the non-resident, arising from the vesting of income in the non-resident.

194. SARS would then, as in the proposal, recover the tax due from the trust but without denying treaty benefits to the beneficial owner of the income.

195. The proposed amendment to subsection 25B(1) of the Act would limit the flow-through of gross income to a non-resident beneficiary who has a vested right to that income. The proposal would result in all future gross income vested in non-resident beneficiaries remaining as gross income that has accrued to the trust.

196. This limitation could cause unintended and inequitable results with respect to past gross income distributed to non-resident beneficiaries where the deductions or allowances permitted to be deducted against that gross income exceeded that gross income and the remaining taxable income derived by the trust in the same tax year.

197. Currently, in terms of subsection 25B(3), a deduction or allowance which may be made under the provisions of the ITA in the determination of taxable income derived by way of an amount of gross income, that is deemed to accrue to the beneficiary through the application of subsection 25B(1), is permitted for the beneficiary in determining the beneficiary's taxable income. However, by reason of subsection 25B(4), such deductions or allowances available in a tax year are limited to the gross income accrued to that beneficiary.

198. Subsection 25B(5) then permits the excess deductions or allowances to firstly be applied against any remaining taxable income of the trust. Where the trust's taxable income is insufficient to utilise these excess deductions or allowances, subsection 25B(6) deems the remaining excess deductions or allowances to be a deduction or allowance available to the beneficiary in a subsequent year, that may be deducted against future gross income that accrues to that beneficiary as is contemplated in subsection 25B(1).

199. The aforementioned application would only apply to income where that beneficiary is subject to tax in South Africa.

200. Currently, the Act allows for deductions or allowances exceeding the aggregate of gross income vested in the beneficiary and remaining taxable income of the trust, to be carried forward to be deducted against future gross income vested in the beneficiary. This is an equitable result.

201. However, should subsection 25B(1) be amended as set out in the proposal, there would be no amount of gross income accruing to a non-resident beneficiary in a future tax year. The result would be that the prior year excess deductions and allowances would not be able to be applied against gross income derived by the trust in the following year. These excess deductions or allowances would therefore never be utilised. This result is inequitable.

202. A further amendment should be made to cater for any excess deductions or allowances available to non-resident beneficiaries, contemplated in subsection 25B(6), as determined at the end of the tax year of assessment preceding that in which the amendment to subsection 25B(1) comes into effect. These excess deductions or allowances should be deemed to be deductions or allowances available to the trust to be deducted in determining the taxable income of the trust. This is viewed as a more equitable outcome.

203. In addition to the above, there has been significant additional reporting requirements in recent months for companies and trusts to the Companies and Intellectual Property Commission ('CIPC'), the Masters' Office and SARS.

204. It is therefore contended that this proposed change is unnecessary as this additional information-gathering and sharing of information by the above-mentioned reporting authorities should allow SARS to identify the beneficial owners and any distributions made to non-residents that do not make such declarations to SARS.

205. The Common Reporting Standards ('CRS') are also available to enable third-party reporting of funds held, income earned, inflows of funds etc. in respect of South African citizens who hold bank accounts offshore.

206. Therefore, whilst such person may no longer be tax resident in South Africa, the CRS would still allow for this information be made available to SARS so as to monitor whether or not these taxpayers are being properly taxed on SA-sourced income.

207. We are of the view that the proposed amendment to enhance the collection process is not sufficient cause to deviate from the long-standing engrained flow-through (Armstrong) principle and that further consideration be given in this regard.

208. Submission: We recommend that this proposal be withdrawn in order for further public consultations to be held and for SARS to assess the additional information that will be in its possession from the 2023 filing season going forward.

209. We also note that the effective date of this proposed amendment is for years of assessment ending on or after 31 July 2023 and is therefore applicable to the 2024 year of assessment for trusts.

210. Submission: If it is decided to retain the current form of the amendment (with which we disagree for the above reasons), the amendment should apply to years of assessment commencing on or after 1 March 2024.

Paragraph 64B – Eighth Schedule (Clause 40(1))

211. In relation to the proposed amendment to paragraph 64B(1)(a), there is no concept in the Act of a "non-resident company". It is not defined anywhere in the Act.

212. With regards to the proposed subparagraph (1)(b)(ii), it is unclear at which stage the non-resident company must have 'formed' part of the same group of companies as the company disposing of the shares. Presumably, the test would be immediately prior to the disposal of the shares.

213. Submission: Clarity is needed in this regard.

214. Regarding the proposed subparagraph (1)(b)(iii), it is not clear how wide the phrase "substantially the same…" ought to be interpreted in relation to the relevant shareholders. Are indirect shareholders taken into account in determining the "substantially the same shareholders" requirement? The proposed wording is too vague to be applied.

215. Submission: We also consider the addition of the proposed subparagraph (1)(b)(iii) to be unnecessary given that the recipient of the shares already cannot be the extremely wide range of persons connected to the disposer and recipient of the shares, as listed in (i) or (ii).

216. Subparagraph (1)(b)(iii) should thus be deleted.

217. In relation to the proposed amendment to subsection (4), there is a grammatical error. It refers now to the *person who "holds" an interest of at least 10% for more than 18 months prior …".*

218. Submission: The addition of the underlined phrase is suggested so that the proposed amendment now reads as follows:

219. *"(4) A person must disregard any capital gain determined in respect of any foreign return of capital received by or accrued to that person from a "foreign company" as defined in section 9D… where that person (whether alone or together with any other person forming part of the same group of companies as that person) holds an interest of at least 10 per cent of the total equity shares and voting rights in that company* ***and held such interest*** *for more than 18 months prior to the receipt or accrual of that foreign return of capital.".*

VALUE ADDED TAX ACT

Section 8(8) – Deemed supply in respect of indemnity payments under a contract of insurance (Clauses 45(1)(a))

220. It is proposed that the further proviso to section 8(8) be amended by the deletion of indemnity payments received by a vendor under a contract of insurance where the payment relates to the total reinstatement of goods stolen or damaged beyond economic repair in respect of goods where the vendor was denied an input tax deduction under section 16(3) read with section 17(2).

221. This section is proposed to be replaced by providing that the provisions of section 8(8) does not apply to the extent that the indemnity payment is made to another person as consideration for the supply of goods or services being reinstated under a contract of insurance.

222. It is not clear why the further proviso to section 8(8) as it currently reads is being deleted, and it seems that such deletion is made in error.

223. The further proviso to section 8(8), as it currently reads, is to prevent double taxation and to eliminate inequity in instances where goods for which an input tax deduction is denied under section 17(2), are reinstated.

224. By way of an example, if a motor car, for which an input tax deduction is denied under section 17(2), with an insured value of R575 000 is stolen or damaged beyond economic repair, the insurer will make an indemnity payment of R575 000 to the insured. Under the current wording of the further proviso to section 8(8), the insured will receive R575 000 and will not be liable for the section 8(8) output tax.

225. When the insured replaces the motor car for R575 000, the insured will not be entitled to any input tax deduction. The indemnity payment made by the insurer of R575 000 therefore fully indemnifies the insured for the loss.

226. However, under the proposed revised wording of the proposed further proviso to section 8(8), the insured will now be liable for output tax of R75 000 on the indemnity payment of R575 000 received, and when the insured replaces the vehicle for R575 000, it will not be entitled to any input tax deduction, which means the insured will have a shortfall of R75 000.

227. The insured will therefore incur output tax of R75 000, and will be denied an input tax deduction of R75 000 when the vehicle is replaced. In order to fully indemnify the insured under the contract of insurance, the insurer will be required to make an indemnity payment of R661 250 (being R575 000 plus 15%) to also indemnify the insured for its section 8(8) output tax liability.

228. The insurer will then receive R661 250 on which section 8(8) output tax of R86 250 is paid, which leaves the insured in a net cash position of R575 000 to replace the motor car, on which no input tax deduction is allowed.

229. The deletion of the current further proviso to section 8(8) will therefore result in an additional cost of the claim to the insurer, which will give rise to increased insurance premiums in respect of indemnity payments made in respect of goods stolen or damaged beyond economic repairs for which an input tax deduction is denied under section 17(2).

230. If the insurer limits the payment to the insured value (R575 000 in this example), the insured will suffer a loss equal to the section 8(8) output tax and the denied input tax upon replacement of the motor car.

231. Submission: We recommend that the current further proviso to section 8(8) be retained, and that an additional proviso be added to exclude from section 8(8) any payment made to another person as consideration for the supply of goods or services being reinstated under a contract of insurance, as proposed.

Section 8(8A) - Deemed supply in respect of indemnity payments under a contract of insurance (Clause 45(1)(b))

232. The proposed new section 8(8A) does not deal with the scenario where the insurer makes the payment of the total amount of the consideration for the supply to the third-party supplier, and then recovers the excess payment from the insured.

233. Submission: We recommend that the proposed section 8(8A)(b) be amended to stipulate that the person supplying the reinstated goods may issue a tax invoice to each person liable to make a payment of consideration, or who makes the actual payment of consideration in respect of the reinstated goods.

234. Section 16(3) can also be amended to stipulate that the insurer's input tax deduction is limited to its liability under the contract of insurance.

235. The insured, if a vendor, will be entitled to make a deduction of the VAT charged on the excess in terms of the current provisions of section 54(2) and 54(3).

Section 18D – Temporary letting of residential property (Clause 47)

236. A developer who lets a fixed property as contemplated in section 12(c) for a period less than 12 months is required to make an output tax payment under section 18D(2).

237. It remains unclear what the position is when a developer already made an adjustment in terms of section 18D(2) based on the initial intention to only let the property for a period not exceeding 12 months but, due to a change in circumstances, the lease period is extended for a further period that exceeds 12 months.

238. It seems then that the developer is required to make a further adjustment in terms of section 18(1) by virtue of the proviso to the term "temporarily applied" in section 18D(1)(b).

239. In this instance, the developer will have already made a deemed supply in terms of section 18D(2) and accounted for output tax equal to the tax fraction of the adjusted cost.

240. The developer should not be required to make another payment in terms of section 18(1) of the tax fraction of the open market value as well, because the deemed supply will then be taxed twice.

241. Submission: In summary, the VAT position where the developer already paid output tax under section 18D(2) and then extends the lease for a period which is in the aggregate longer than 12 months, needs to be clarified with regard to the output tax adjustments to be made.

VALUE ADDED TAX ACT REGULATIONS ON DOMESTIC REVERSE CHARGE RELATING TO VALUABLE METAL, ISSUED IN TERMS OF SECTION 74(2) OF THE VALUE-ADDED TAX ACT

Amendment of Regulation 1 (Clause 2)

Definition of "residue"

242. According to the Draft Explanatory Memorandum to the Proposed Amendments to the Regulations on Domestic Reverse Charge ("the Draft Explanatory Memorandum") the definition of "residue" is amended to clarify that the term as envisaged is aligned with the Mineral and Petroleum Resources Development Act, No 28 of 2002 ("MPRDA") and only relates to residue as a result of mining operations carried out by a "holder" as defined in the MPRDA.

243. Metal refiners may purchase goods that contain gold that may fall within the meaning of the "residue" as defined in the DRC Regulations. Such goods typically include supplies by jewellers of swabs, sandpaper, dental waste and filings.

244. It seems that these items will no longer fall within the definition of “residue” following the amendment to the term “residue” because they are not supplied by a “holder” as defined in the MPRDA Act, and they are also not goods which comprise “similar forms” to the goods listed in the definition of “valuable metal”, and they also do not comprise “ancillary goods”.

245. Submission: We recommend that SARS confirms this position in the Draft Explanatory Memorandum and/or in the SARS Frequently Asked Questions publication on the Domestic Reverse Charge Regulations.

246. We also point out that the Draft DRC Regulations incorrectly refer to the Mining and Petroleum Resources Development Act, 2002 (Act No 28 of 2002), whereas it is the Mineral and Petroleum Resources Development Act, No 28 of 2002.

Definition of “valuable metal”

247. the Draft DRC Regulations incorrectly refer to the Mining and Petroleum Resources Development Act, 2002 (Act No 28 of 2002) whereas it is the Mineral and Petroleum Resources Development Act, No 28 of 2002.

Amendment to Regulation 2 (Clause 3)

248. The new proposed paragraph (g) of Regulation 2 transfers the obligation for declaring the percentage of the gold content within a valuable metal supplied from the recipient to the supplier of the valuable metal.

249. In many instances, the suppliers of valuable metal do not have the necessary equipment to determine the percentage of the gold content contained in the valuable metal and they rely on the recipient to determine such percentage.

250. Submission: We therefore propose that paragraph (g) of Regulation 2 be amended to stipulate that the suppliers of valuable metal should only be responsible for stipulating the gold content of the valuable metal in instances where the recipient is unable to determine the gold content.

251. The recipient is in terms of Regulation 3 required to issue a statement to the supplier reflecting the information as set out in paragraph (e) and is required to issue a tax invoice where the recipient has been granted approval to issue tax invoices under section 20(2) of the VAT Act.

252. In such case, the supplier does not issue any document to the recipient. It is not clear from the proposed paragraph (g) of Regulation 2 how, and in what form the supplier should communicate the full and proper description of the valuable metal and the percentage of the gold content contained within the valuable metal in instances where the supplier does not issue any document to the recipient in relation to the supply.

253. Submission: We recommend that Regulation 2 be amended to clarify how the supplier must communicate this information to the recipient in instances where the supplier does not issue any document to the recipient.

254. We further recommend that the proposed paragraph (g) of Regulation 2 be amended to stipulate that the percentage of gold content contained within the valuable metal to be provided is the percentage measured in gross weight and not volume.

Amendment to Regulation 3 (Clause 4)

255. It is proposed that paragraph (e)(iii) of Regulation 3 be amended to transfer the obligation to stipulate the percentage gold content in the valuable metal from the recipient to the supplier of the valuable metal.

256. There are instances where the suppliers of valuable metal do not have the necessary equipment to determine the percentage of the gold content contained in the valuable metal, and they rely on the recipient to determine such percentage.

257. Submission: We therefore propose that paragraph (e)(iii) of Regulation 3 be amended to provide that the recipient of valuable metal should stipulate on the statement issued to the supplier the percentage of gold content contained within the valuable metal where the supplier is not able to determine such percentage.

258. We further recommend that paragraph (e)(iii) of Regulation 3 be amended to clarify that the percentage of gold content contained within the valuable metal to be provided is the percentage measured in gross weight and not volume.

Effective dates

259. The Draft Explanatory Memorandum stipulates that the proposed amendments to Regulations 1, 2 and 3 will come into effect on the date of promulgation of the amendments to the DRC Regulations.

260. The amendments to the Draft DRC Regulations will require system amendments for both suppliers and recipients to comply with the amended Regulations.

261. Submission: To avoid complexities in the accounting systems and to ensure that transactions are treated the same in the same VAT accounting period, we recommend that the Draft DRC Regulations stipulate that Regulations 1,2 and 3 become effective on the first day of the month following the month in which the amendments to the DRC regulations are promulgated.

DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL 2023

INCOME TAX ACT

<u>Section 30, 30A, 30B & 30C – Clauses (6), (7), (8) and (9))</u>

262. The following provision will be inserted in the above sections:

- *"A person may not act in a fiduciary capacity as referred to in subsection (1)(d)(i)(aa) if that person is disqualified in terms of section 6 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), section 25A of the Nonprofit Organisations Act, 1997 (Act No. 71 of 1997), or section 69 of the Companies Act.*

- *A person who acts in contravention of subsection (7A) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months*

263. The purpose of the amendment is to implement the FATF recommendations. It is however unclear whether NT seeks to impose a disqualification on all or only certain people who act in a fiduciary capacity at these entities?

264. The proposal references a "similar" (but not same) clause in the various sections to impose the disqualification. However the scope of the sections referenced differ.

265. Section 30(3)(i) and section 30A(2)(a)(i) refer to at least 3 people that will take fiduciary responsibility and in practice they sign an affidavit to this extent on registration with SARS. Arguably a fiduciary responsibility towards SARS is therefore only created as relates these persons and in practice, that is how it is tabled for adoption of such decisions to nominate such persons.

266. Section 30B(2)(b)(i) and 30C(1)(d)(i) however requires the entity to have a committee or board of management or similar governing body, who are at least 3 people, to take the fiduciary responsibility i.e. the whole board or committee has to take responsibility.

267. The scope of exclusion also seems unclear when section 30(11), 30A(9), 30B(10) & 30C(7) is concerned. These sections extend fiduciary responsibility to persons "*responsible for the management and control of the income and assets*", i.e. it extends to the Executive/Top management as well.

268. Therefore for section 30 & 30A, only 3 people with the fiduciary responsibility will be possibly subject to disqualification whereas for section 30B & 30C, the whole committee, board or governing body can be subject to disqualification.

269. <u>Submission</u>: It seems that the intent was to disqualify all persons with a fiduciary responsibility that hold certain "office" at the exempt entity. It is submitted that the scope of

the disqualified persons be clarified and that section 30 & 30A be aligned to section 30B & 30C to cover the whole Board or Committee.

270. It should be clarified whether the intention is to apply the disqualification to Executive/Top management as well who are usually responsible for the management and control of the income and assets.

271. The Trust Property Control Act and the Companies Act, which have both been incorporated by reference, both disqualify a person that *"has been removed from an office of trust, on the grounds of misconduct involving dishonesty".*

272. Submission: The scope of this provision seems unclear and needs to be clarified as well as to the forum and sanctions that are in scope as to "what is an office of trust?" and "what forum should have removed the person?". An example of this is an employee removed as social fund treasurer for lying about being on sick leave.

273. In particular, would "office" only be a formal office held e.g. trustee or director or does it include any form of "leadership role" such as at a voluntary body that does not have a formal "office to be held"? Would "removed" include a settlement agreement or just disciplinary hearing in the context of a voluntary association or other unincorporated entity?

274. The proposed amendment makes the holding of an office while being disqualified an offence. Invariably SARS will be requiring these entities to annually monitor and report on the status of such individuals.

275. However given the seriousness of such a bar, it would be legally prudent that the disqualified person has an obligation to report their disqualification to the relevant entity as well so that the entities tax exemption is not placed at risk due to the individuals conduct.

276. Submission: It is submitted that a person who holds such a fiduciary position must within 7 days of becoming disqualified, notify the entity where such position is held, of such disqualification.

Part IA – Advance Pricing Agreements (Clause 10)

General

277. We commend SARS on including draft legislation on this matter as APAs are definitely needed in South Africa. Although we are in agreement that the implementation of the APAs will not be easy, taking into consideration the lack of expertise in this area in the country, the sooner the process is started the better. SAICA remains committed to consult and engage with SARS to make APAs a success.

278. In this vein and following our meeting of the 22 August 2023 with SARS, we provide below some suggestions for inclusion in a supporting guidance document to the draft legislation.

279. The guidance stipulates a specified number of days for specific steps by SARS and/or the applicant, but it is not clear whether this reference is to business or calendar days. The applicable sections referred to are:

d. Section 76F (2) and (4)
e. Section 76G(1);
f. Section 76H (1);
g. Section 76K(5);
h. Section 76N(1)
i. Section 76O(3) and (4);

280. Submission: It is recommended that these sections refer to 'business days' as already defined in the TAA.

281. The confidentiality of agreed APAs has not been discussed in the document.

282. Submission: SARS should include guidance as to how it will ensure that agreed APAs will be kept confidential and it should also clarify in what instances the tax authorities can obtain external industry experts to assist with the APA process.

283. The proposed implementation outline also does not address instances where an APA between the tax authorities is not reached.

284. Submission: This aspect should be addressed in the guidance. Moreover, it is recommended that a suitable mechanism to ensure that an APA can be reached is developed. The lack of some level of certainty that an APA will be reached results in taxpayers deciding against pursuing an APA application.

285. We understand that the APA unit will require independence from the transfer pricing audit unit as the two have different purposes. This was discussed with SARS at the meeting on 22 August 2023. We understand SARS is building capacity in its Competent Authority for transfer pricing matters who are currently handling a number of MAPs, this is welcomed.

286. Submission: SARS should confirm in its guidance that APAs will be handled by the Competent Authority currently tasked with MAP application and not referred to the transfer pricing audit team.

287. Furthermore, if the application for an APA is rejected, SARS should indicate how it will assure taxpayers that the information will not be used to audit the relevant transaction.

288. It is imperative that conflicts of interest are managed effectively.

289. A pilot project for APA implementation is planned as soon as possible after the draft legislation is promulgated. It is further stated that the APA pilot will only accept bilateral APA applications.

290. We appreciate that the initial applications will be limited to bilateral APAs only in order to ensure SARS gains the valuable training through the process. We also acknowledge the draft legislation remains flexible to allow incorporation of unilateral and bilateral APAs in the future. We recommend that the program be extended as soon as possible.

291. Submission: We submit that the guidance in support of the legislation also be flexible to allow the implementation of unilateral and multilateral APAs.

Section 76A – Definitions

292. The definition of 'affected transaction' in section 76A is an "affected transaction" as defined in section 31 of the Income Tax Act, excluding paragraph (b) of the definition.

293. Submission: This definition is confusing in that the term "affected transaction" as defined in Section 31 of the Income Tax Act and the definition in the proposed Section 76A of the Tax Administration Act are different. It may provide more certainty to refer, in the proposed new Chapter IV to part (a) of the 'affected transaction' definition only, as contained in section 31 of the Income Tax Act. The definition in the Public Notice 1117, which refers to potentially affected transactions excludes subsection (5), (6) and (7) of Section 31 of the Income Tax Act and would therefore not be suitable.

294. 'Critical assumptions' are defined in section 76A as meaning the fundamental factors that are necessary for each party to an APA to remain bound by the APA.

295. Submission: SARS should provide guidance on what factors will be included in these critical assumptions.

Section 76E – Fees for APAs

296. The Commissioner may, by public notice, prescribe fees payable for an APA by an applicant. Included in these fees is a cost recovery fee for processing an application.

297. Submission: SARS should give some indication of the proposed fee structure. The fact that there are fee levels could create some concern without knowing the proposed amounts.

298. We also suggest that SARS considers international best practice on fees. Our understanding is that pre-filing fees are uncommon, and a once-off fee at the time of formal application seems to be the norm.

299. SARS should also clarify whether the cost recovery fees will include international travel of SARS officials and/or other indirect costs and if the taxpayer will be consulted on this.

Section 76F(1) – Pre-application consultation

300. After an application is submitted by an applicant, SARS has 60 days to arrange a pre-application consultation meeting with the prospective applicant (section 76F(2)). SARS then has 90 days from the last pre-application meeting to notify the applicant if the applicant may submit an APA (section 76F(4)).

301. The number of days afforded to SARS above appear skewed in favour of SARS. If the 60 days is business days, then that’s approximately 3 months, and the 90 days will be four and a half months that a taxpayer is required to wait.

302. Submission: Consideration should be given to shortening the time periods to 30 and 60 business days respectively in due course as SARS builds capability.

Section 76J – Rejection of an application

303. This section provides that SARS may reject an application if the application does not meet the requirements in the legislation including, *inter alia*, if the value of the affected transaction is less than an *amount prescribed by the Commissioner* by public notice or if the application is in respect of a *frivolous or vexatious issue*.

304. Submission: SARS should give some indication of the "minimal value of affected transactions" it proposes introducing. We suggest that this aligns to the Master File/Local File thresholds.

305. SARS should also provide clarity on how it will determine if an application is in respect of a frivolous or vexatious issue.

306. SARS should also give guidance on its interpretation of the level of complexity it requires for subsection (a) to be met.

307. Section 76J does not explain what the process is if an applicant disagrees with SARS' rejection of its APA application.

308. Submission: We suggest that before issuing a formal rejection notice, an opportunity is provided to the taxpayer to explain/present its case of why an APA should be allowed.

309. Clarity should be provided on what the process is if an application is rejected by SARS and the applicant disagrees with this, for instance, who can this be escalated to and would the disagreement be covered by a review process under section 9 of the TAA.

310. Clarity on whether SARS can still use the factual information that was disclosed as part of the APA application process should also be provided.

Section 76K – Processing an application

311. SARS is afforded 90-day intervals to inform the applicant of the progress of its application (section 76K(2)).

312. We are of the view that this period is too long.

313. No clarity is provided on what happens if this time period is not adhered to by SARS.

314. Submission: The period for SARS to provide an applicant with progress on an application should be reduced to 60 days over time.

315. Clarity should be provided on what happens if SARS does not adhere to the stated days.

Section 76L – Finalisation of an APA

316. Section 76L(4) provides that an APA will not come into effect until subsections 1), 2) and 3) of section 76L are met.

317. These subsections deal with signing of an APA by the applicant, SARS officials and the competent authority

318. Submission: Time limits should be inserted in respect of these processes.

Section 76M – Compliance report

319. It not clear if or how the proposed compliance reports will be shared with the other tax jurisdiction(s).

320. Submission: The guidance should clarify whether SARS will share the compliance reports with the other jurisdictions or whether the taxpayer must submit it separately.

Section 76O – Termination of an APA

321. In terms of section 76O(2)(c) a court can overturn or modify an interpretation of the legislation on which an APA is based in which case the APA will cease to be effective from the date of judgment unless—

(i) the decision is under appeal;

(ii) the decision is fact-specific and the general interpretation upon which the agreement was based is unaffected; or

(iii) the reference to the interpretation upon which the agreement was based was *obiter dicta*.

322. Submission: Section 76O should be deleted as in our view SARS is simply seeking to align this with section 85 of the TAA which applies to Advance Tax Rulings (ATR). Section 85 would make sense in the context of an ATR as the ATR relates to *an interpretation of law* that is sought by the taxpayer.

323. However, in the case of an APA the taxpayer is not seeking an interpretation of law but rather an *agreement on the price* of an affected transaction which is does not heavily rely on the interpretation of the legislation but rather the application of the OECD transfer pricing methodology.

Section 76P (2) – Record retention

324. This section only affords the applicant 30 days from receipt of written request from SARS to submit information to confirm compliance with the APA.

325. This information can be extensive and may result in additional time being required by a taxpayer.

326. Only ONE extension is available to the taxpayer which may be problematic where for example the initial request is sent to an incorrect address or is misplaced and does not reach the relevant person timeously. The final demand may then not be sufficient time for the applicant to collate and submit all information required.

327. Submission: The timeframe to submit additional information to SARS should be extended from 30 days to 60 days and there should be at least 2 extensions granted to taxpayers considering the current practical challenges with the delivery of SARS' communication to taxpayers.

Paragraph 2 of Fourth Schedule – Non-resident employers' obligation to deduct employees' tax (Clause 13(a))

328. The draft TALAB amendment proposes a removal of the distinction between resident and non-resident employers, thereby imposing a withholding obligation on both employers to deduct employees' tax ("PAYE") from remuneration paid to an 'employee' as defined.

329. It is intended that the change will level the playing field between resident and non-resident employers to align with skills development levies and unemployment insurance contributions which employers pay.

330. In this regard, we wish to highlight that foreign employees will never benefit from the contributions made to the UIF. The UIF does not facilitate the claim process for non-resident employees, which is the ultimate reason for the contribution.

331. Furthermore, there is no corresponding process for a foreign employer to benefit from the SDL contributions paid.

332. The new way of work, referred to as a 'remote/hybrid' working arrangement, has become the norm across the globe and creates employment opportunities for South African youth, who are seen as reasonably cheaper and skilled compared to their foreign counterparts.

333. The global talent pool is sought by many global employers who may never have a business activity in South Africa. The proposed legislation will add an administration burden on these employers, making South African labour resources less attractive. With unemployment in South Africa at record highs, this amendment may affect the ability of South African residents to participate in the global labour market.

334. Whilst we understand the need for levelling the playing field between resident employers and non-resident employers, the proposed amendment may in practice not work since SARS has no authority over offshore employers who may very well have no business activity/presence in South Africa.

335. Non-resident employers will now be required to register as an employer with SARS and account for payroll taxes on remuneration paid to "employees":

i. who live and work in South Africa; **and**

ii. <u>who remain SA tax residents but are "employees" who live and work outside South Africa.</u>

336. For example, regarding ii) above, individual A lives and is employed in the UK by UK Co and A is a tax resident in SA. The proposed amendment will require UK Co to register as employer in SA for employees' tax withholding purposes. Enforcement of this rule in another country may be challenging since an individual's tax resident status is very fact specific, and the facts are, to a large extent, unknown to an employer.

337. "Representative employers", i.e. any agent with the authority to pay remuneration on behalf of a non-resident employer, are also required to register as an "employer" with SARS.

338. In addition to the non-resident principal employer's registration with SARS, it is therefore unclear whether foreign banks and payroll companies located in other countries, which often act as agents of the non-resident employers (with authority to pay remuneration), will also be required to register as an employer with SARS.

339. The proposed expanded scope for a non-resident employer's PAYE registration and withholding obligations is overly broad and largely impractical. In its current iteration, the proposal seeks to make every employer of any employee that is tax resident in SA subject to PAYE regardless of where the employer or employee is based.

340. The proposed amendment also lacks a 'trigger clause' that would activate the withholding PAYE withholding requirement, and further does not indicate what the link to South Africa needs to be in order for a non-resident employer to be subject to the registration and withholding requirement in South Africa.

341. A further practical challenge is that the requirements for the PAYE registration of an employer with SARS are largely geared towards local employers. These include the employer's registration with the CIPC, as well as the opening of a local bank account, both of which may not be feasible or possible for a non-resident employer.

342. These impediments would undermine the purpose and effectiveness of NT's proposal and create an unworkable situation for foreign employers.

343. The following scenarios illustrate the practical difficulties of NT's proposal:

Scenario 1: '<u>Outbound' SA resident working remotely outside SA</u>

SA tax resident is employed by a company based in Germany and earns a total remuneration amounting to R1,9m with no representative employer in SA. The employee qualifies for the foreign remuneration exemption for R1,25m.

However, the foreign employer will now be expected to register, report the remuneration and withhold PAYE for employing a SA tax resident in Germany. That is because the SA tax resident earns gross income and income (s10(1)(o)(ii) exemption only partially applies) and therefore it will be remuneration by definition as well.

Scenario 2: '<u>Inbound' UK resident employed by UK entity, working remotely in SA.</u>

A UK tax resident who is employed by a UK entity with no presence in SA, is working temporarily in SA at a client for 2 months.

Based on the proposed amendment, the UK entity is required to register for PAYE purposes and possibly withhold accordingly. This is because the non-resident UK employee is receiving SA-sourced gross income (i.e. services rendered in SA) and it is unclear whether the DTA exemption should be considered before or after the obligation to register and withhold PAYE.

Scenario 3: '<u>Outbound' SA resident working remotely in SA for a temporary period.</u>

An SA tax resident is employed by a company based in Germany with no presence in SA and no representative employer in SA and the employee earns R1,9m. The employee is allowed to work remotely in SA for 1 month a year. Currently, the applicable taxes on the employee's foreign paid remuneration would be settled though provisional tax declarations.

With the proposed change, the German employer would be expected to register and withhold PAYE and pay over to SARS for the single month.

This will come at an additional cost to the employer as they would have to engage a third-party service provider/employer of record or employ additional staff to assist with the monthly PAYE obligations.

These costs may also include opening an SA bank account. Due to these additional costs, we may experience a reduction of such opportunities being afforded to SA residents and this will further contribute to the already high unemployment rate in SA, as noted earlier in this submission.

344. Submission: We suggest that a further amendment be effected via a change to the definition of 'employer' as contained in the Fourth Schedule, in addition to the proposed amendment to paragraph 2 of the Fourth Schedule.

345. A 'carve-out' for foreign employers of South African tax resident employees living and working outside South Africa on a full-time basis should be inserted in the definition of "employer".

346. In addition to this, there may be instances where a South African tax-resident employee is physically based abroad, where he works for a foreign employer (see scenario 1 above).

347. Where such a South African tax-resident employee is physically in South Africa (working remotely for such employer) for a certain number of days, we recommend a *de minimus* 'carve-out' rule (we suggest thirty days in aggregate)(scenario 3).

348. Where a foreign employer, whose non-resident employee is physically in the Republic for less than 183 days in a year of assessment , a further *de minimus* should apply so that the foreign employer will not be considered an 'employer', and consequently, not be required to withhold employees' tax in respect of remuneration paid to that foreign employee temporarily in SA. This will align the non-resident employees tax status with the DTA taxing rights.

349. We further recommend that the amendment be postponed for a year, i.e., 1 March 2025. . Given the far-reaching implications and foreseeable, practical challenges for non-resident employers, we further propose extensive consultation with stakeholders (in the interim), after which the proposed amendment may then be updated.

350. In addition, practical employer registration requirements for foreign employers will also need to be created that are more efficient and less onerous than the current registration and deregistration requirements (e.g. opening a SA Bank account and appointing a SA resident public officer), noting that some of the existing registration requirements may be challenging to obtain by virtue of the employer being non-resident.

TAX ADMINISTRATION ACT

Section 95(6) TAA – Extension of period to submit return for estimate assessment (Clause 28)

351. Section 95(6) TAA is proposed to be amended as follows:

"(6) The taxpayer in relation to whom the assessment under subsection (1)(a) or (c) has been issued may, within 40 business days from the date of assessment, or such longer period as the Commissioner may prescribe by public notice, request SARS to make a reduced or additional assessment by submitting a true and full return or the relevant material.

352. The amendment seeks to remedy part of the unlawful application of section 95 as pertains to SARS' current practice of issuing "auto assessments".

353. However, given the fundamental legal flaws in applying section 95 as the enabling legislation for auto assessments, this proposed amendment does not achieve the desired retroactive legislative fix.

354. As previously submitted, section 95 is a punitive provision applied to non-compliant taxpayers. For this reason it deviates from the normal compliance obligations of the law and imposes a harsher process on the taxpayer.

355. Auto assessments legally do not fall within section 95 as there is no non-compliance event by the taxpayer.

356. SARS' insistence to use a punitive provision to assess the most vulnerable taxpayers is therefore objectionable and explains the myriad of legal anomalies experienced in practice. This current also approach also contradicts SARS response to our Parliamentary concerns raised when auto assessments were first introduced and reinforces our concerns raised in the 2020 NT TALAB public consultations held on 10 Sep 2020.

357. In relation to section 95(6), the section (due to it being a punitive provision), requires the taxpayer to request SARS for extension. The section, even with the proposed amendment, still does not empower CSARS to issue a "notice to submit a return" similar to section 25 and which CSARS attempted to do for the 2023 filing season by extending the section 95(6) submission date to October 2023, but which he had no legal power to do.

358. The proposal will merely allow the CSARS to extend the period for the taxpayer to request to submit, it does not actually achieve extension of the submission date for the return based on a public notice.

359. Submission: The amendment should be withdrawn and SARS should refrain from its unlawful practice of issuing "auto assessments" under section 95. It is proposed that SARS and NT should rather draft a new section in Chapter 8 TAA that legally regulates the issuance of "auto assessments" and ensures it implements a fair and efficient law that aligns to the objects of the TAA and enhances voluntary compliance and public trust, rather than undermine it.

360. The above anomaly due to this unlawful practice by SARS is only one of a few negative consequences.

361. Another is the interaction of section 95(6) with section 95(8).

362. Where SARS have issued an incorrect auto assessment, the flawed process when using section 95 to correct this is that the taxpayer must submit the return (by law the one that was never submitted but that does not exist in this instance) within 40 business days from that date of the auto assessment. This "submission of return" is then used by SARS as the

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request for a reduced or additional assessment by the taxpayer ito s95(6). Where SARS requests verification information, the legal status of that request as relates this process remains unclear given the law never envisaged the normal assessment process within section 95.

363. SARS then, unlike the "normal" process, issue an immediate IT34 assessment followed by the verification request. With auto assessments the latter precedes any action given there is already an assessment (i.e. the estimate assessment).

364. Section 95 blocks a taxpayer from objecting to the incorrect assessment until SARS has made a decision to either reject the "return" or makes a reduced or additional assessment. There is however no time period prescribed within which SARS must make this decision.

365. To complicate matters further, section 95(8) deems the date of assessment for the purposes of any objection, not to be the date that SARS actually informs the taxpayer of the outcome of its "request to amend", but actually the date of the auto assessment.

366. Should SARS therefore make this decision after 80 days, the taxpayer would lose its rights to automatically object as the objection would be late in terms of section 104 TAA.

367. It should be noted that errors on auto assessment for 2023 and prior years ranged from incomplete information populated to third parties submitting incorrect/incomplete information (e.g. like the SA Post Office) to SARS' system populating incorrect information (2022 was interest and 2023 was rental "doubling"). The current SARS practice penalises taxpayers for others mistakes and prevents them from submitting the correct information whilst facing punitive consequences for these mistakes.

368. To remedy this injustice, SAICA are recommending taxpayers to take legal action against SARS after 21 days after the date of the auto assessment as the TAA provides no alternative remedy and they would risk losing their rights to object against the incorrect auto assessment (i.e. similar relief as recently award by the high court)[5].

369. Submission: Section 95(8) TAA should be amended to deem the date of the decision taken in section 95(6) as the date that the decision was actually taken ito of section 95(6) and not the date of the estimate assessment originally issued.

MATTERS NOT ADDRESSED IN DRAFT TAX BILLS 2023

370. In addition to the various matters mentioned above, there are other areas of importance that we feel should have been considered in the 2023 DTLAB and the DTALAB. These include the following and are briefly discussed below:

[5] Kusasa Refining (Proprietary) Limited v Commissioner for the South African Revenue Services (56820/2021) [2023] ZAGPPHC 640 (1 August 2023) (saflii.org)

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a. Home office allowances
b. Penalty for exceeding assigned carbon budget
c. Constitutionality of various provisions in the legislation
d. VAT refunds
e. Information gathering (Chapter 5 of the TAA) – Verification process
f. Section 104 of the TAA – Decisions subject to objection
g. Section 190(2) of the TAA – Refunds of excess payments
h. Section 252 – 255 of the TAA – Electronic delivery of documents

Home office allowances

371. In the 2021 National Budget, NT announced an initiative to explore the new ways of working which were accelerated by the COVID-19 pandemic. This was to incorporate a review of home office deductions, travelling, the gig economy etc. It was clearly indicated that this was not a quick process and would likely span multiple years.

372. Despite one informal request for input into the home office deduction, and SARS inviting comments on the interpretation note relating thereto (see SAICA's comments on this in 2021 and 2022), there has seemingly been no further progress on this initiative. No proposals were announced in the 2022 Budget and no draft amendments were proposed in either the 2021 legislative cycle or the current cycle on which comments have been invited.

373. Submission: SAICA is very supportive of this initiative and would like to actively participate in this process, however, clarity is needed on the policy direction that NT is considering in order for consultation to be valuable as well as estimated timing of implementation.

374. NT noted that it would issue a discussion paper on the matter to start the review of policy and legislation on home offices, however after 2 years nothing has been forthcoming and it is submitted that NT should commit to a date for this paper given the current significant change in how people work.

375. In the interim, our comments have not been considered and the strict requirements of section 23(b) still stand with no amendments/relaxations. We have also engaged with SARS on this matter, but their hands are tied as they need to comply with the requirements of the law, even if the legislation as they interpret it, leads to inequitable treatment (such as the denial of the interest deduction on a bond used to finance a home office – discussed in more detail below). We understand that this concern has been raised by SARS with NT, yet despite this, there are still no legislative amendments in the 2022 DTLAB in this regard.

376. Of most concern, is the disallowance of a tax deduction for the interest on a bond as this is usually the largest deduction for taxpayers that have a home office. The reason for disallowing this deduction, according to SARS, is that section 23(m) – a section that prohibits the deduction of certain expenses for salaried earners (other than a few expenses, such as those allowed in terms of **section 11(a)**, for example, the rent, repairs or other expenses incurred in respect of a home office that is allowed under section 23(b))

– does not allow the deduction of interest on a bond on a home office because the interest is deductible under **section 24J** and not section 11(a) as required in terms of section 23(m).

377. Section 23(m) only applies to expenditure, losses or allowances **contemplated in section 11** and which relate to any employment in respect of which the taxpayer derives any remuneration. This begs the question whether section 24J is a section 'contemplated' under section 11. If it is, then section 24J interest will be prohibited by section 23(m) as section 23(m) only allows interest deductible in terms of section 11(a) as a deduction (section 23(m)(iv)). If it is not, then section 24J interest will remain deductible as it is not prohibited by section 23(m)(iv) as it is not an expense contemplated in section 11 and thus the section 11(a) argument no longer applies.

378. SARS argues that section 24J is '**contemplated in section 11'** by means of section 11(x). Section 11(x) states that there shall be <u>allowed as a deduction</u> from the income of a person '*any amounts which in terms of any other provision in this Part (encompassing section 5 to 37G), are <u>allowed to be deducted</u> from the income of the taxpayer'*. This section, according to SARS thus includes section 24J, as it is 'contemplated in section 11', even though it is not deductible under section 11.

379. However, it is our understanding that section 24J is a standalone deduction provision under Part I of Chapter II and is not reliant on section 11(x) as the 'deduction' section. Should this not be the case, then interest would be deductible under both section 24J and section 11(x), which clearly cannot be.

380. In addition to the above, it seems inequitable from a policy perspective, that a person renting a house with a home office, would be entitled to deduct the rental paid (allowed in terms of section 23(m)(iv)), yet a person who owns the house would not be able to deduct the interest on the bond.

381. <u>Submission:</u> We are of the view that section 11(x) does not include section 24J and thus this interest in respect of a home office should be allowed as a deduction and not be prohibited by section 23(m)(iv). Legislative clarity is urgently required in this regard as the legislative interpretation concerns would impact various other section in the Income Tax Act as well.

382. We have also highlighted, in our previous submissions mentioned above, various other legislative concerns regarding the home office deduction and will not repeat them here, but we do urge NT to consider these as a matter of urgency.

<u>Penalty for exceeding assigned carbon budget</u>

383. In the February 2022 Budget documentation it was stated that in order to address concerns about double penalties from companies under the carbon tax and carbon budgets, a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill is enacted.

384. NT indicated in Parliament that because the Climate Change Bill has not yet been enacted, the proposed penalty was not included in the DTLAB.

385. Submission: As the mandatory carbon budgeting system comes into effect on 1 January 2023, at which time the carbon budget allowance of 5% will fall away, the penalty should have aligned with this date and the provision should have been made for this penalty in the current DTLAB. Furthermore, we note that the penalty cannot be included in the Climate Change Bill as it is not a money bill.

386. Thus, should the intention be that the Climate Change Bill and the mandatory carbon budgeting process will be implemented the same time (which will be after 1 January 2023), then the current carbon budgeting process should be extended, as it expires at the end of 2022.

Constitutionality of various provisions in the legislation

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

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

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

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

388. Added to this list is NT's power in terms of section 10(1)(r) as discussed in the previous SAICA submissions. Section 10(1)(r) of the Income Tax Act affords NT the power to declare free of tax, any gratuity (other than a leave gratuity) received by or accrued to any person from public funds upon his retirement from any office or employment, or from funds of the Land and Agricultural Bank of South Africa upon his retirement as a member of the board of the said bank.

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

390. Secondary legislation that prescribes tax deductible expenditure would therefore also be legislation of a "money bill" subject to section 77 of the Constitution and which the Executive

must excuse itself to allow the legislative authority of the Legislator - meaning that the Executive does not have the power to change the legislation and the proposed changes in the secondary legislation would need to follow the normal legislative process allowing the legislator (Parliament) to consider public comments before approving any changes to the law.

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

VAT refunds

392. In 2020 various concerns, including those raised by SAICA, were raised with SARS, NT and Parliament, regarding the delay in the payment of VAT refunds by SARS. Unfortunately, this situation is still problematic in many cases.

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

- a VAT audit must be completed within a maximum period of six months, provided that the taxpayer submits information and documents to SARS timeously;
- SARS' requests for relevant material must be clearly relevant to the audit at hand and not overly broad and onerous;
- while that audit is conducted, SARS may not continuously roll out further audits until the audit for the original periods has been finalised;
- only the VAT refunds for the original audit periods may be withheld;
- SARS at the outset must set a deadline with the taxpayer for the audit finalisation;
- any extension of the audit must be supported by a full motivation for the extension; and
- once the audit is finalised, SARS must issue an assessment within one month from the date of finalisation; and
- interest on VAT refunds withheld for the period exceeding 21 days from the verification or confirmation of banking details is payable without the taxpayer having to request such payment.

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

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

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

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

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

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

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

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

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

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

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

Decisions subject to objection – Section 104 of the TAA

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

"In my opinion, the fact that SARS allocated payments incorrectly and subsequently, made a decision to recover a debt based on an incorrect amount, was a legitimate reason for the applicant to have raised an objection. I find the applicant's contention opportunistic and mischievous as the applicant was bent over backwards to confer to itself its own

jurisdiction to hear its dispute and thereby disregarding the dispute resolution mechanism as set out in the TAA."

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

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

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

407. 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.

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

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

410. 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.

411. 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.

412. The verification, inspection, audit or criminal investigation in the section should refer to the specific refund in question and not any refund, as required in section 190(2).

413. 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. As stipulated in section 190(2), 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.

414. 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.

415. 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.

416. 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[6]. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially puts SARS on equal footing with the historical Scorpions unit.

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

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

419. 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.

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

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

(d) sent to the person's last known electronic address, which includes—

(i) the person's last known email address;

(ii) the person's last known telefax number; or

(iii) the person's electronic address as defined in the rules issued under section 255(1).

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

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

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

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

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

425. This has been our members experience as well.

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

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

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

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

429. It is submitted that the solution lies in the draft section 255 TAA rules that were issued in 2016 and never implemented, where it was proposed in a new clause 4(2)(a)(iii) that[7]:

(2) A SARS electronic filing service must—

(a) provide a registered user with the ability to—

(iii) <u>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.</u>

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

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

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