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

Per email:
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Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT 2026 TAX ADMINISTRATION LAWS AMENDMENT BILL

The National Tax Committee (NTC), 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 2026 Draft Tax Administration Laws Amendment Bill (DTALAB).

Our submission has addressed amendments to the following tax Acts –

- The Income Tax Act, 58 of 1962, as amended (the Income Tax Act);
- The Customs and Excise Act, 91 of 1964 (the C&E Act);
- The Value Added Tax Act, 89 of 1991, as amended (the VAT Act);
- The Tax Administration Act, 28 of 2011, as amended (the TAA); and
- The Promotion of Access to Information Act, 2 of 2000, as amended (PAIA)

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. Public Consultation

SAICA has consistently raised concerns about NT's practice of issuing draft tax bills without prior consultation on the underlying proposals – and, more concerningly, tabling versions in Parliament before meaningful engagement has taken place. This issue was again evident in 2025 during the withdrawal of the section 8E proposals. At that time, the Minister committed that:

> *"Any future proposals on structural changes to the taxation of hybrid equity instruments will follow a consultative process with all stakeholders to identify a balanced tax approach that takes into consideration the concerns of both stakeholders and government before draft tax legislation is published".*

We welcome this commitment. However, we emphasise that the principle should apply to **all Budget proposals** reflected in draft tax bills. Proceeding to Parliament without first considering public input may:

- Force stakeholders to raise issues in parliamentary hearings that NT has already contemplated.
- Result in avoidable amendments during the legislative process.
- Consume time for both Parliament and the public that could have been used more effectively.
- Undermine the credibility of South Africa's public participation framework.

We propose that NT consider embedding consultation at the proposal stage – i.e. before drafting legislation, similar to the way national and international standard setters engage stakeholders prior to releasing an exposure draft. This would ensure that the Minister has had the opportunity to fully consider which proposals merit inclusion and would allow for parliamentary hearings that focus on refining policy, as opposed to revisiting matters that could have been resolved earlier.

2. Lack of Transparency in Consideration of Submissions

There does not appear to be any publicly available record confirming that all matters submitted by stakeholders have been duly considered by NT and the Minister for inclusion in or exclusion from the Budget Review.

This absence of transparency leaves stakeholders uncertain as to whether the omission of certain matters reflects:

- A deliberate policy or legislative decision, or
- An indication that such matters fall entirely outside the scope of the relevant policy

framework.

We believe it would be helpful if NT could establish a clear mechanism to document and communicate how stakeholder submissions are evaluated, ensuring that exclusions are understood as intentional policy choices rather than procedural oversights.

3. Repetition of Submissions Due to Uncertainty

In the absence of clarity regarding the outcome of their submissions, stakeholders are often compelled to resubmit the same proposals in the hope of eventually receiving a definitive response from NT.

As Parliament has previously noted, stakeholders who invest time and effort into making submissions should reasonably expect at least a brief explanation as to why their proposals were accepted or rejected.

We do, however, acknowledge and appreciate NT's facilitation of a follow-up engagement on 3 November 2022 ("Recurring Tax Proposals"), which was in response to concerns we raised with the Standing Committee on Finance (ScoF).

We propose that NT consider formalising a transparent feedback mechanism that provides stakeholders with concise explanations of submission outcomes. This would reduce duplication, strengthen trust in the consultation process, and ensure that engagements such as the 2022 follow-up become a norm rather than the exception.

4. Quality of Drafting

The current process does not account for the correction of technical errors, including typographical mistakes, which undermines the overall quality and credibility of the legislative drafting process.

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

Yours sincerely

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ANNEXURE A

DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2026

INCOME TAX

Para 1, Fourth Schedule – Definition of "provisional taxpayer" (Clause 1)

1. The proposed amendment inserts paragraph (hh): "a company that is **fully exempt** from normal tax under sections 10(1)(*c*A), 10(1)(*d*)(ii) or 10(1)(*t*)(ix)". The Explanatory Memorandum (EM) (paragraph 2.1), however, states that the intended beneficiaries include *"certain partially exempt entities"* and section 10(1)(*c*A)(ii) bodies are precisely that: exempt only up to a threshold or excluding trading income. Read literally, the word 'fully' excludes from relief the very *c*A(ii) bodies the reform is aimed at, defeating its purpose.

2. Submission: Delete 'fully' or replace it with wording that captures both fully and partially exempt entities in the listed categories, so that the operative text matches the stated intent.

Paragraph 20 of Fourth Schedule (Clause 3)

3. Clause 3(1)(*c*) deems a provisional tax estimate to be equal to the amount actually paid in respect of it, or nil where no payment was made. The consequence is that a taxpayer who submits a perfectly accurate estimate but fails to pay is treated as having estimated a nil liability and so becomes liable for the 20% underestimation penalty rather than the lower late-payment penalty. The provision converts a payment default into an estimation penalty by legal fiction.

4. This proposed amendment effectively removes reliance on the "basic amount" if payment is late, even if the estimate submitted was accurate.

5. The two different penalty regimes seek to address two different objectionable conducts, the one is to dissuade and recover financial loss through lateness by a penalty and interest, the other is to penalise inaccurate information through low estimates. This proposal conjoins the purpose.

6. SARS is essentially seeking to address a late payment and debt concern by conjoining the issue with the more egregious transgression of inaccurate estimates.

7. This results in misalignment with the rest of the Pay-As-You-Earn (PAYE) and VAT 'late payments' penalty regime which attracts a 10% penalty. Provisional tax late payments will effectively attract a 20% penalty, creating inconsistency across tax types.

8. In terms of the effective date, the provision is deemed to have come into operation on **25 February 2026**. Retroactivity in the fixing of a rate or threshold is problematic; retroactively imposing a *penalty* is a materially stronger rule-of-law objection. It seeks to

punish taxpayers for conduct that was not subject to that penalty at the time they acted and for which a lesser penalty applied.

9. The EM's assurance that existing rules prevent duplication of the underestimation and late-payment penalties should be tested against the actual mechanics of the deeming provision, which appears to relabel rather than merely sequence the penalties.

10. Submission: Reconsider whether a payment failure should attract the underestimation penalty at all, given that a separate late-payment penalty already addresses non-payment. SARS debt collection challenges cannot be solved by undermining the penalty regime structure.

11. If the decision is for the amendment to be enacted, we propose removing the retroactive operation of clause 3(*c*), and propose it apply to estimates after enactment.

CUSTOMS AND EXCISE

Amendment of section 54D of the Customs and Excise Act: Carbon budget compliance refunds – alignment of refund timeframes (Clause 7)

12. The DTALAB proposes amending section 54D of the Customs and Excise Act to provide that, notwithstanding the ordinary period for claiming refunds under that Act, carbon tax refunds must be claimed in accordance with the timeframes contemplated in section 17A of the Carbon Tax Act.

13. The EM explains that this amendment is necessary because carbon tax refunds are administered under the Customs and Excise Act, which ordinarily has a two-year prescription period, whereas section 17A provides for carbon budget compliance refunds at later stages of the five-year carbon budgeting period.

14. We support the proposed amendment to ensure that the ordinary Customs and Excise refund prescription period does not prevent taxpayers from claiming carbon budget compliance refunds within the timeframes contemplated in section 17A of the Carbon Tax Act.

15. However, the effective administration of these refunds will nevertheless depend on coordination between the Department of Forestry, Fisheries and Environment (DFFE) and SARS. Delays in DFFE verification may in turn delay the processing of the refund by SARS.

16. The practical concern for taxpayers is that of working capital, as amounts ultimately refundable may be retained for extended periods pending DFFE verification and SARS processing. Effective coordination and defined processing timeframes are therefore important not only administratively but also from a cash-flow management perspective.

17. Submission: We recommend that the administrative framework accompanying the amendment clearly provide for:

18. the process by which DFFE verification will be communicated to SARS;

19. a defined timeframe within which SARS must process the refund once the requirements of section 17A have been satisfied;

20. the treatment of a claim where DFFE verification is delayed for reasons outside the taxpayer's control; and

21. the payment of interest where a valid refund is not processed within the prescribed SARS processing period.

22. This will ensure that the intended alignment of the refund prescription provisions is effective in practice and that taxpayers are not prejudiced by interdepartmental administrative delays.

Related implementation issue – appeal process where DFFE verification affects a section 17A refund

23. In addition to the prescription and processing issues arising from the proposed amendment to section 54D, SAICA considers that the interaction between the DFFE and SARS appeal processes should be clarified to ensure that the section 17A refund mechanism can operate effectively in practice.

24. The section 17A refund mechanism depends on DFFE's verification of a taxpayer's cumulative actual emissions and carbon budget compliance before SARS can process the associated carbon tax refund.

25. SAICA acknowledges that appeal mechanisms exist under both the customs and excise and environmental regulatory frameworks. In relation to SARS decisions concerning carbon tax, the internal administrative appeal process is contained in Part A of Chapter XA of the Customs and Excise Act (sections 77A to 77H).

26. In relation to carbon budget decisions, the Draft National Greenhouse Gas Carbon Budget and Mitigation Plan Regulations provide that appeals are expected to be dealt with in terms of section 36 of the Climate Change Act. Section 36 in turn refers to the appeal process contemplated in section 43(4) of NEMA.

27. It is, however, unclear whether this environmental appeal route is intended to apply where a taxpayer seeks to challenge DFFE's verification of cumulative actual emissions or carbon budget compliance for purposes of establishing entitlement to a refund under section 17A of the Carbon Tax Act.

28. The uncertainty arises because the underlying verification is undertaken by DFFE, while the resulting refund is administered by SARS under the Customs and Excise framework. A taxpayer may therefore potentially need to challenge the underlying DFFE determination while also preserving its rights in relation to any SARS decision concerning the refund.

29. It is also unclear how an appeal against the DFFE verification would affect SARS's processing of the refund, including:

- whether SARS would suspend or defer its decision while the DFFE appeal is pending,
- how the applicable refund and appeal time periods would operate during that process, and
- what the position would be where the DFFE determination is subsequently revised or overturned.

30. Submission: We recommend that National Treasury, SARS and DFFE provide clear, coordinated guidance on the appeal and dispute-resolution process applicable where a taxpayer challenges the DFFE verification or determination relevant to a section 17A refund.

31. In particular, the guidance should clarify:

- whether the appeal mechanism contemplated in the Draft National GHG Carbon Budget and Mitigation Plan Regulations, read with section 36 of the Climate Change Act and section 43(4) of NEMA, is expected to apply to a DFFE verification or determination made for purposes of section 17A;

- how such a DFFE appeal interacts with the internal administrative appeal procedures applicable to SARS decisions under Part A of Chapter XA of the Customs and Excise Act;

- whether SARS must suspend or defer its refund decision while the underlying DFFE appeal or review is pending;

- how the taxpayer's refund and appeal rights, including any applicable prescription periods and procedural time limits, are preserved while the DFFE determination is under challenge; and

- the treatment of the refund where the DFFE determination is subsequently revised or overturned.

32. Clear guidance on these matters would provide taxpayers with certainty regarding the appropriate appeal pathway and reduce the risk of duplicated proceedings or procedural prejudice arising from the interaction between the DFFE and SARS processes.

TAX ADMINISTRATION ACT

Section 190 – Bank screening of refunds (Clause 11)

33. The proposed amendment seeks to extend the banks' obligations to not only screen refunds deposited but also refunds that 'will be' deposited into a bank account. It is notable that whilst the wording refers to screening of amounts deposited, it is understood that it is both the amount and taxpayer's bank account which is screened, which is a misalignment with the proposed text.

34. If this is not the case, it is not clear how the bank will foresee amounts that 'will be' deposited and the related EM does not provide guidance on this.

35. The proposal is also likely to give rise to practical and operational concerns for both financial institutions and taxpayers. In particular:

- Whilst not part of the proposed amendment, the concept of "reasonable suspicion" in the current version of the legislation is not clearly defined and may already result in inconsistent application across financial institutions.

- The proposal is likely to increase compliance and monitoring costs for financial institutions as systems and processes are enhanced to identify and report potentially suspicious transactions.

36. Submission: The wording of the legislation should reflect the process in practice – i.e. screening of the account and deposit vs just screening of the deposit.

37. We recommend that NT and SARS provide detailed guidance on the practical implementation of the wording "reasonable suspicion" and the proposal before its effective date.

38. This guidance should include:

- clear criteria and objective indicators to help banks determine when "reasonable suspicion" exists;

- detailed operational guidance on reporting procedures, including documentation requirements, timelines and escalation processes; and

- a mechanism for taxpayers to obtain information and resolve matters promptly where transactions have been delayed or reported in error.

39. We further propose that a limited liability provision be added to limit the liability of the banks to SARS in the performance of this function on behalf of SARS.

40. Providing greater certainty regarding the scope and operation of the reporting obligation will support the policy objective of combating tax offences while minimising unintended consequences for taxpayers and financial institutions.

41. Whilst not specific to the amendment itself, we wish to raise our concerns about the apparent lack of transparency with respect to the process and agreement between SARS and banks in this regard. There have been instances in the past where 'special stoppers' have been placed on refunds due or refunds paid have been reversed. In such cases, there is no communication between SARS and taxpayers, and SARS instructs the bank not to inform its client. For the latter there seems to be no legal basis in law (i.e. an unlawful instruction and possibly a breach by the bank of its contractual obligations to its client). It is only when the taxpayer or tax practitioner follows up on an outstanding refund that they

may be informed that a stopper is in place. With long waiting times for appointments, this may exacerbate the issue and prevent timely resolution. To note, there are also special stoppers placed directly by SARS.

42. With respect to bank stoppers, if it is indeed the account being 'screened' by the bank before a refund is released by SARS, then SARS would not suffer any harm as refunds would only be payable once all the boxes have been ticked. As such, it would appear that any instruction(s) not to keep the taxpayer in the loop may be both unlawful and unjustified.

43. We understand that where a bank stopper is in place, the bank may inform the taxpayer of what transpired, after the event. However, it is not clear what level of detail is shared. This is not necessarily the case with SARS 'special stoppers'.

44. SAICA has raised concerns for many years, but despite this, the issue remains where taxpayers are kept in the dark with no clear process to resolve the matter. In some instances, the special stoppers were due to a system error and therefore unjustified in those cases.

45. In the minutes of a SARS national stakeholder meeting (27 October 2022), SARS representatives noted that "in terms of section 195A, SARS can instruct the bank to hold the funds or in terms of section 195B, SARS can issue notice to the bank and pull the money back from the bank account. This process leads to verification and SARS do acknowledge that they are not notifying the taxpayers about this process but this needs to be fixed. SARS is working on ensuring that the taxpayer is notified of this process." (Note, references should be 190(5A) and 190(5B)).

46. Despite this commitment, the challenge remains. Even where the stoppers have been unjustified and the refund released, it seems that there is no adequate communication to taxpayers as to what resulted in the stopper or reversal.

47. Whilst we appreciate that it is not always possible to communicate the process to taxpayers especially where fraud is detected, once the refund has been paid to the rightful taxpayer, there should be an obligation from SARS to communicate what transpired and reassure the taxpayer as to the process.

48. A further concern is that there is no transparency with respect to what the bank is communicating to SARS in relation to the taxpayer. In principle and following due process, the taxpayer should be entitled to be made aware of such information, even immediately after the fact so that it can enforce any rights it may have. SARS' concern that unscrupulous taxpayers will 'work out' what SARS is asking and why these questions are being asked does not justify this perceived non-transparent approach to tax administration.

49. <u>Submission</u>: We propose that a process be introduced to ensure that SARS communicate to taxpayers following the withholding or screening of a refund.

50. A SARS request should not prevent the bank informing the taxpayer immediately after the fact, and this should be included as a legislative safeguard.

51. It is also necessary to put safeguards in place to prevent misuse of fraud detection provisions for system errors, which undermines transparency and accountability.

Section 229 – Interest remission as part of voluntary disclosure programme (VDP) (Clause 14)

52. The proposed new section 229(2) is welcomed.

53. It seeks to make provision for a voluntary-disclosure applicant to apply simultaneously for remission of interest, addressing the *second issue* of the Constitutional Court's decision in *Commissioner for SARS v Medtronic International Trading*. The *first issue* that a concluded VDP agreement cannot be varied, is left unaddressed; the EM acknowledges that only the second aspect is dealt with.

54. With respect to the proposal that this amendment will apply in respect of VDP applications received on/after 1 March 2026, this may have the effect of disadvantaging taxpayers who applied on/after 1 March but reached settlement agreements before promulgation of the amendment Act.

55. For example, SARS could have received applications for voluntary disclosure relief for two taxpayers (A and B) on or after 1 March 2026. SARS and Taxpayer A may have concluded an agreement with SARS before promulgation date, but after the effective date (with interest remission not considered), whereas Taxpayer B may still be awaiting agreement and will presumably still have the opportunity to amend the application to include a request for interest remission in terms of the legislative amendment. There may also be applications made before 1 March 2026, where no agreement has been reached and this proposal would then not be available to this kind of taxpayer (say, Taxpayer C).

56. Given that the proposed amendment and current legislation is silent on variations to agreements, there appears to be no remedy to Taxpayer A in such circumstances. With respect to Taxpayer C, the application would have been made before the effective date, but there would still be no opportunity to request the interest remission even though no agreement has been signed by promulgation of the proposed amendment. This could result in unfair treatment between taxpayers based on the timing of applications and settlement agreements.

57. Submission: SARS to clarify how it will address inequities between the different taxpayers in the scenarios described above.

58. Given the current wording, it would seem that those who applied on/after 1 March 2026, would be entitled to the relief even if the agreements were finalised before promulgation date. SARS to clarify.

59. SARS to further clarify whether the agreements – not yet finalised – can currently be legally finalised before enactment of the relief or whether these agreements will need to be postponed until after enactment.

MATTERS NOT ADDRESSED IN DTALAB 2026

OTHER MATTERS THAT WE BELIEVE SHOULD HAVE BEEN CONSIDERED IN THE 2026 DTALAB

60. In addition to the various matters mentioned above, there are other areas of importance that we feel should have been considered in the 2026 DTALAB, as raised in prior years including our 2025 DTALAB submission. These include the following and are briefly discussed below:

    a) Constitutionality of various provisions in the legislation
    b) VAT refunds
    c) Information gathering (Chapter 5 of the TAA) – Verification process
    d) Section 104 of the TAA – Decisions subject to objection
    e) Section 190(2) of the TAA – Refunds of excess payments
    f) Section 252 – 255 of the TAA – Electronic delivery of documents

Constitutionality of various provisions in the legislation

61. 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 the below (refer to relevant extracts in Annexure B).

    a) The constitutionality of the default judgement 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 https://saicawebprstorage.blob.core.windows.net/uploads/resources/SAICA_submission_on_List_of_qualifying_disability_expenses.pdf dated 24 May 2019 and 31 May 2021) allowing CSARS to determine what is tax deductible or not.

62. 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 said bank.

63. 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.

64. 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.

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

VAT refunds

66. 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.

67. 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 thereof;
- 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.

68. A further concern is that SARS is unable to make any part payments of VAT refunds withheld as the legislation currently doesn’t allow for this, even if the taxpayer is able to provide partial security.

69. The requirement is for the taxpayer to provide security for 100% of the VAT refund withheld, before SARS will similarly pay 100% of the refund. There is no mechanism to allow for a partial refund, and such rigidity can have serious consequences for businesses that may rely on payment of refunds for cash flow purposes.

70. Submission: In cases where a taxpayer can provide partial security, there should be allowance for SARS to refund an amount proportionate to that security.

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

71. 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”.

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

73. Procedurally this has become untenable as SARS practice has become the use of verification as the catch all process, covering “desk audits, verification and even forensic audits”.

74. In practice and substance none of these procedures differ from “field audits”, other than in scope.

75. The primary concern is that the current verification processes create uncertainty for taxpayers, as the procedures are not always applied in a consistent or transparent manner. This lack of clarity and consistency undermines the principles of fair tax administration.

76. 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’ actions in this regard.

77. 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 in the case of inspections, field audits and criminal investigations.

78. 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

79. 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."*

80. 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.

81. 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*) in the 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

82. 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.

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

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

85. 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.

86. 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 due.

87. 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).

88. 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.

89. 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.

90. 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, sanctions, overlap of civil and criminal investigations, who decides on criminal investigation and prosecution if not SAPS and the National Prosecuting Authority (NPA), and who oversees the legality of all these processes as they are outside of the jurisdiction of the Independent Police Investigative Directorate.

91. In regard to criminal intelligence-gathering, which is part and parcel of criminal investigations, we note in the 2017 Organisation for Economic Co-operation and Development (OECD) report that SARS claims it conducts no criminal intelligence-gathering activities at a covert level1. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially, it is submitted, may put SARS on equal footing with the historical Scorpions unit.

92. Submission: "Criminal investigation" for the purposes of withholding refunds should be defined and limited to a particular taxpayer, clarifying how it differs to the process of the NPA. Given that SARS intends to retain the criminal investigation process, a reasonable timeline within which SARS must finalise the verification, inspection, audit and criminal investigation relating to the specific refund should also be included.

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

94. 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

95. 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).

96. 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.

97. We note the judgement 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*".

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

99. Of concern was, as held in the judgement, that the applicant's version that the letters were

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

not sent on the dates reflected therein remains accordingly unchallenged, and there can be no *bona fide* dispute of fact on this point.

100. This has been our members' experience as well.

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

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

102. 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 it on his e-Filing profile.

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

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

105. *"(2) A SARS electronic filing service must—*

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

(iv)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."

106. 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.

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

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

ANNEXURE B

EXTRACT FROM SAICA'S 2020 TLAB SUBMISSION

207. We have noted with concern the judgment in *Barnard Labuschagne Inc v CSARS & MoF CASE NO: 23141/2017 (15 May 2020)*.

208. Of much concern was both SARS and NT arguments that the tax default judgment procedure is one outside of judicial oversights and therefore is not subject to judicial review.

This concern is increased in that both SARS and NT at the inception of the TAA and subsequent to the *Stellenbosch Legal Aid Clinic* case[3] on garnishee orders dismissed concerns raised by the public, including at SCoF, that the provision 172 -176 TAA were unconstitutional on the basis that it was subject to the very same judicial oversight it denied existed in the *Barnard case*.

209. What is very clear is that these sections are in fact falling short of the Constitutional requirements set out in by the Constitutional Court in the Stellenbosch case namely at:

> *"[63] The Constitutional Court has emphasised the general principle that there must be judicial oversight where an applicant seeks an order to execute against or seize control of the property of another person. This principle has been reiterated in a number of Constitutional Court judgments."*
>
> *[108] Finally, I need to comment on the second judgment's revolutionary approach to execution. On that approach it means that from now onwards execution against movable and immovable property must involve judicial oversight.*
>
> *[129] It has been established in the jurisprudence of this Court that execution of court orders is part of the judicial process.[58] It requires judicial oversight. Though previous cases dealt with debtors' homes,[59] the principle underlying them was that judicial oversight of the execution process against all forms of property is constitutionally indispensable. Clearly then, the fundamental principles relating to the proscription against self-help flowing from the section 34 right of access to courts apply, with equal force, to the execution process. I would therefore affirm the breadth of the High Court's approach.*
>
> *[132] The broader approach takes fuller account of the harsh effects in the absence of judicial oversight, acknowledging that they threaten the livelihood and dignity of low-income earners, a distinctly vulnerable group in our society.*

210. It is a pity that the judge in the *Barnard* case did not subject his views and judgement to the principles of the Constitutional Court and merely narrowly focussed on the procedure at hand, notwithstanding that the taxpayer argued a constitutional point.

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

212.	<u>Submission</u>: It is submitted that NT and SARS review these provisions relating to default judgement to bring them within the scope of the Constitution and add amendments to the current DTALAB20.
213.	Similarly, a review of the agency appointment process should be reviewed to ensure that the fair administrative principles can and are adhered to in line with this judgment.

EXTRACT FROM SAICA'S 2021 BUDGET REVIEW COMMENTS

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

<u>*Legal Nature*</u>

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

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

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

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

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

<u>*Factual Description*</u>

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

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

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

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

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

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

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

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

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

The nature of businesses impacted

15. All taxpayers.

Proposal

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

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

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

EXTRACT FROM SAICA'S 2021 SUBMISSION: COMMENTS ON THE LIST OF QUALIFYING PHYSICAL IMPAIRMENT AND DISABILITY EXPENDITURE

Constitutionality of CSARS power to prescribe the List of Qualifying Physical Impairment and Disability Expenditure

91 We highlight once again SAICA's concerns, as raised in our submission to SARS on 24 May 2019, regarding the discretion afforded to the Commissioner of SARS in relation to the list of qualifying expenses.

92 SARS indicates that the list of qualifying disability expenditure is an "[interpretation of] the tax provisions governing these expenses within the wording of the legislation and tax policy intention." This statement is unfortunately patently incorrect.

93 Paragraph (c) of the definition of "Qualifying Medical Expenditure" in section 6B to the ITA is explicit that it is expenditure "<u>prescribed</u>" by the Commissioner.

94 It is secondary legislation arising from a power delegated to the Commissioner to prescribe what expenditure qualifies as disability expenditure. The result is that the Commissioner is given the power to decide what disability expenditure qualifies for the medical tax credit. This power is entirely unfettered, save for the requirement that the expenditure must be necessarily attached to the disability.

95 The Commissioner has therefore been given the delegated power to provide relief from taxation.

96 It is submitted that this delegated power is unconstitutional and invalid (and so is the list of qualifying expenditure prescribed in terms of this delegated power) having regard to the judgment in the case of *South African Reserve Bank and Another v Shuttleworth and Another (CCT194/14, CCT199/14) [2015] ZACC 17*. Only Parliament, may, in terms of the Constitution, levy taxes.

97 At para 42 the judgment states:

> "*A blissful starting point would be to affirm that the power to tax residents is an incident of, and subservient to, representative democracy. The manner and the extent to which national taxes are raised and appropriated must yield to the democratic will as expressed in law. It is the people, through their duly elected representatives, who decide on the taxes that residents must bear. <u>An executive government may not impose a tax burden or appropriate public money without due and express consent of elected public representatives. That authority, and indeed duty, is solely within the remit of the Legislature.</u> This accords with this Court's decision in Fedsure, as well as the Canadian*

Supreme Court decision in Eurig Estate. Both cases hold that the primary object of the limits on how to raise national taxes or appropriate revenue, as our Constitution does in relation to a money Bill, is to ensure that there is "no taxation without representation". It is plain that in our jurisdiction a decision or law that purports to impose a tax will be invalid to the extent of its inconsistency with the limits imposed by the Constitution or other law."

98 The court at [40] also reaffirms that it is not only legislation that levies a tax in the narrow sense that is the subject of Constitutional prohibition to the Executive and the court states:

"A Bill before the National Assembly is a money Bill if it imposes "national taxes, levies, duties or surcharges".49 However, the term "money Bill" covers more than just the raising of taxes, levies, duties or surcharges. It includes a Bill that appropriates money,50 or that abolishes, reduces or grants exemptions from taxes, 51 or that authorises direct charges against the National Revenue Fund."

99 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.

100 Plainly, section 6B, insofar as it relates to the prescription of what constitutes disability expenditure, is unconstitutional and invalid.

101 Submission: SAICA proposed to National Treasury that legislative changes be made to ensure that section 6B is brought within the ambit of Parliament. However, as Parliament did not amend the legislation, we urge SARS to be cautious of straying too far into policy and ensure that the list, as currently relevant to enable the tax credit, is sufficiently extensive to, at a minimum, meet the policy objective.

102 We trust that SARS will support our efforts to bring this legislation within the ambit of the Constitution.