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6 September 2019

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Parliamentary Standing Committee of Finance
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Dear Sirs

COMMENTS ON THE DRAFT TAXATON LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL 2019

1. The National Tax Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the Standing and Select Committees of Finance (SCoF) on the Draft Taxation Laws Amendment Bill 2019 (DTLAB) and the Tax Administration Laws Amendment Bill 2019 (DTALAB).

2. We attach in **Annexure A** (DTLAB), **Annexure B** (DTALAB) and **Annexure C** (VAT DTLAB and DTALAB) our submission to the National Treasury (NT) as substantively the same concerns remain.

3. For ease of reference we set out below an executive summary of our main points as will be presented in the oral hearings.

Yours sincerely

David Warneke
Chairperson: National Tax Committee

Pieter Faber
Senior Executive: Tax legislation and practitioners

The South African Institute of Chartered Accountants

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EXECUTIVE SUMMARY

Policy certainty and investor confidence

1. South Africa's economy is under severe pressure – high unemployment followed by growing income disparity and inequality are two of the most pertinent problems the country is faced with. To add to this, outbound investments are four times larger than money coming into the country in 2018. In this context, it is essential that the President instil confidence in the economy, not only to South African taxpayers and investors, but to foreign investors as well. One way to instil this confidence, is by making sure that taxpayers and investors have *certainty* about economic policy. The classic cannons (characteristics) of a good tax system, as devised by Adam Smith in 1776, and that are applied today by most modern governments, include the characteristic of "certainty".

2. Despite this essential characteristic, certain proposals contained in the DTLAB and DTALAB, seem to ignore this important principle and have left taxpayers with no policy certainty and in some cases, the amendments have been applied retrospectively or retroactively, to the detriment of the taxpayer. These changes will be discussed next.

Retrospective/retroactive legislation

3. Taxpayers should know in advance how much tax is to be paid to the government, at what time the tax is to be paid, and in what form. As mentioned above, amendments that have retrospective effect infringed on the canon of certainty and should only be made when it is clearly justifiable. Croome[1] extends this view and states that the introduction of fiscal legislation with retrospective effect constitutes a deprivation of property as envisaged in section 25 of the Constitution. He states further that a change to tax legislation, if it relates to past events, constitutes the confiscation of property held by the taxpayer before the change is enacted.

4. Bearing this in mind, the following sections have been made to apply retrospectively in the current DTLAB and DTALAB:

    4.1 Section 11(jA) – doubtful debts allowance for banks

    4.2 Section 22B/par 43A – dividends treated as income on disposal of certain shares

    4.3 Section 24O – interest deductions for debt financed acquisitions for start-up businesses

    4.4 Paragraph 6(1)(a) of the Second Schedule – neutral transfers between retirement funds

    4.5 Section 72 of the VAT Act – Hardship 'rulings' (see section for further details)

    4.6 Section 6 – Employment Tax Incentive (ETI) interaction with SEZ provisions

    4.7 Section 3 of the Estate Duty Act – Retirement Annuity Contributions

[1] Croome, B. 2010. Taxpayer's Rights in South Africa, Kenwyn: Juta & Co, Ltd

5. Certain of these sections (paragraph 6(1)(a) of the Second Schedule, Section 6 of the ETI Act) have resulted in the taxpayer being put in a non-compliant tax position retrospectively. This could lead to the taxpayer having underpaid tax and also to the levying of interest and penalties. This clearly goes against the canons of a good tax system as explained above.

6. The effective date of implementation of the proposed amendments to section 12R is years of assessment ending on/after 1 January 2019, however, there is uncertainty regarding how the effective date will be practically applied for companies who do not have a December year end and are no longer regarded as "qualifying companies", as defined, on or after 1 January 2019.

7. When considering the reasons for introducing retrospective legislation, Bentley[2] argues that it is justifiable when it corrects wrongs done to taxpayers, confers benefits that do not prejudice taxpayers and rectifies errors in legislation. Taking this into account, it would have been prudent if section 10C was made to apply retrospectively as currently it applies only from 1 March 2020. The proposed changes have the effect that members of provident funds and provident preservation funds with compulsory annuitisation are not being treated the same as other retirement fund members as the amendments will only become effective in six months' time. This appears to go against the intention of the policy to align the treatment of the various retirement funds.

8. Submission: Retrospective changes that are detrimental to taxpayers' positions should not be implemented. It is clearly preferable and more equitable for an amendment to take effect prospectively so that it applies to years of assessment commencing on or after a specific date. Hence, we suggest that the retrospective dates should, at a minimum, be changed to be at least prospective (at least after publication of the proposed amendments). This is particularly pertinent in instances where adverse practical and financial implications arise for the taxpayer. Tax compliance costs

9. When considering one of the other canons of a good tax system – effectiveness/efficiency – it is imperative that amendments to legislation be effective and efficient so as to ensure that the benefits thereof (broadly conceived), outweigh the costs of complying with them.

10. Taking this into consideration, it is concerning that the amendments to the following sections will result in considerable time and costs having to be spent by taxpayers in order to comply with the legislation:

    10.1 Section 22 – Trading stock

    (Taxpayers will have to maintain separate accounting and tax records to record the value of the stock)

    10.2 Section 30/30A – Public Benefit Organisations/ Recreational Clubs

[2] Bentley, D. 1998. Taxpayer's Rights: An International Perspective, Revenue Law Journal, Queensland: Bond University

(PBOs/Recreational Clubs will be required to register as a taxpaying entity, complete returns as such, pay tax as such and potentially pay penalties, before being allowed to be apply for exemption status)

10.3 Section 31 – "Associated enterprise" definition

(Refer to discussion under point 22 – the amendment will increase the complexity of our tax system, which is already extremely complex for a developing country and further increase the cost of doing business in South Africa for potential foreign investors)

10.4 Section 72 – VAT hardship 'rulings'

(Costly systems changes will be required in some instances to ensure compliance with the changes to the law should the hardship 'rulings' no longer be valid)

11. Tax compliance costs not only diminish business resources without raising income for the government, resulting in a waste of economic resources, but research has proved that these costs also affect the economic behaviour of both individuals and businesses and seem to be connected to the level of compliance – in that they could result in an increase in tax evasion.

12. Submission: A reduction in tax compliance costs could facilitate and enhance the productivity and competitiveness of taxpayers' businesses, which in turn would allow these businesses to apply more resources to essential business activities and increase their employment capacity and wage rates. The amendments should be reconsidered in order to ease the compliance for taxpayers by ensuring that their compliance costs are not excessive.

Investment stability

13. Investors require policy certainty and stability. South Africa is in desperate need of economic growth, trade and investment. In this regard, the proposed changes to the SEZ and VCC regimes seem to go against these intentions.

SEZs – Section 12R

14. When considering the SEZ regime, the amendments currently only allow for new businesses and the expansion of existing businesses after the SEZ Act was introduced (9 February 2016), to benefit from the SEZ incentive. These amendments are overly restrictive and inequitable towards new businesses that were established in the SEZ's during the time period when it was still operating under the IDZ rules. This appears to be contrary to initial intention of the SEZ Act where it envisaged that those businesses should still be entitled to the same incentives as new businesses under the SEZ Act.

15. Submission: The SEZ provisions should be available to all new businesses and expansions of existing business operations within the SEZ from the date that section 12R was promulgated. Businesses under the IDZ regime, that meet the qualifying criteria, should not be excluded from the incentive.

16. The requirement that the gross income of a qualifying company must have increased by at least 100% when compared with the highest gross income derived in respect of that trade during any of the three years of assessment immediately preceding that date, is also extremely stringent. These types of increases will most likely only be achieved in respect of completely new trades, in which case no companies currently operating within an SEZ would meet this qualifying criteria for expansions.

17. Submission: In order to limit the negative effects on investor confidence, we recommend that 100% of gross income requirement be reconsidered.

VCCs – Section 12J

18. Many legitimate venture capital funds were set up on the basis of the legislation as it currently reads and investors have locked in their capital for a five-year period. Introducing an incentive and, after several years, changing the basis of the allowance by once again introducing a limit to the deduction, will have a detrimental effect on the viability of existing VCCs that were established with the valid objective of investing in small businesses.

19. If enacted, the proposal will result in many existing VCC arrangements becoming non-compliant with the requirements of section 12J. This non-compliance will result in a penalty and the lack of confidence that will result from this will jeopardise future investments into VCCs and small businesses. If the proposal is accepted, there is little doubt that potential investors will think twice in future when evaluating any VCC investments or any other investments that are offered by NT as tax incentives.

20. Submission: The effect on investor confidence should not be underestimated. Having to continually modify business models to remain compliant does not provide policy certainty to investors who are seeking to improve economic growth and job creation.

21. Rather than limiting the tax deduction for capital investment into VCCs, limiting what a VCC can do with the investment money it receives should be considered as it seems the abuse is not the cash amounts but that it is not being used for what NT is attempting to incentivise.

Interpretation certainty

Definition of "associated enterprise" – Section 31

22. Tax policy should seek to make interpretation of the legislation clear to the ordinary person and provide for certainty. The current proposed amendment relating to the insertion of the term "associated enterprise" in section 31 of the Income Tax Act, appears to achieve the opposite.

23. Although it is a term used in the OECD's Model Tax Convention (MTC), the inclusion of the term "associated enterprise" as an alternative to the term "connected person" in the definition of "affected transaction" introduces a great deal of uncertainty into the interpretation of section 31 (besides vastly widening the scope of the definition of "affected transaction").

24. Furthermore, the OECD did not intend the term "associated enterprise" to be a defined term as recognised by SARS. It is a guideline for individual countries to consider in defining domestic related party provisions. SARS acknowledges this by referring to it as a term "contemplated" in the OECD Guidelines as opposed to "defined".

25. Overall, the term “associated enterprises” creates the broad common understanding between two DTA countries, but it requires domestic law clarification in order to be effective. Merely referring to the definition of “associated enterprises” as set out in Article 9 of the MTC would create undue uncertainty, unless further clarification is provided.

26. Submission: In order to provide certainty to taxpayers, the term “associated enterprise” should be defined with reference to clear parameters, for example, similar to the way the definition in other OECD member and non-member states is structured.

Dividend stripping – Section 22B/Par 43A

27. Submission: We refer you to our submission, entitled “Comments on the initial batch of the draft Taxation Laws Amendment Bill 2019” for our views on these proposed changes.

28. We remain on the view that the continual expansion in policy and scope of this provision is problematic and therefore unavoidably encroaches on legitimate transactions outside of the intended mischief.

Variable remuneration – Section 7B

29. The initial policy intention of the section was to match the timing between accrual and payment of various forms of variable remuneration. The proposed amendment replaces defined specific types of payments constituting variable remuneration with generic characteristics. This creates uncertainty as to what will now be included and seems to even exclude amounts that were initially included.

30. Submission: The principle underpinning the concept of ‘variable remuneration’ is not easily defined and the proposed amendments should be reconsidered in favour of the status quo with the addition of defined categories of remuneration that are sought to be included in section 7B.

Exclusion of interest bearing instruments and exchange items – Section 41(2)

31. The proposed amendment seeks to exclude adjusted gains or losses on redemption or transfer of interest-bearing instruments, as contemplated in s 24J, and exchange items, as contemplated in s 24I, from the corporate rules.

32. Submission: It is recommended that the rationale for the proposed position of excluding these items from the roll-over relief be reviewed in light of the purpose of the corporate rules, and, if not revised, that the policy rationale for not enabling tax neutral reorganisations be clearly explained in the Explanatory Memorandum (EM).

Section 72 of the VAT Act

Effective date

33. The amendments to section 72 are deemed to have come into operation on 21 July 2019 and apply to all applications made on or after that date. The impact of the proposed amendment on section 72 decisions *already issued* is not clear.

34. Decisions already issued by the Commissioner contain a proviso that the decision is only valid for as long as there is no change to the underlying legislation. This could have the undesirable effect that all decisions will no longer be valid from the date the proposed amendments to section 72 are promulgated. It is also our understanding that SARS' view is that the current ruling will in fact be withdrawn from date of release of the draft Bill namely 21 July 2019, making all such taxpayers non-compliant retrospectively. Conflicting decisions may then simultaneously be in force in relation to the same issue.

35. Submission: Explicit clarity should be provided on the status of existing section 72 decisions. We also suggest that the amendments be brought into effect from a future date in order to provide vendors or classes of vendors with current section 72 arrangements with sufficient prior notice as to whether their arrangement will be renewed or not, and they should be allowed sufficient time to implement system amendments.

"Similar difficulties have arisen" requirement

36. The proposed amendment's requirement that a decision in terms of section 72 of the VAT Act may only be issued if similar difficulties, anomalies or incongruities have arisen or may arise *for any other vendor or class of vendors of the same kind* or who *make similar supplies of goods or services,* is problematic. It is not clear how narrowly "similar" or "of the same kind" should be interpreted and this will give rise to practical difficulties.

37. Furthermore, the business operations of vendors are confidential, and so are the underlying agreements between the parties. A vendor will not have insight into the contractual arrangements of another vendor's operations. If a vendor has a unique operation or a unique business model, then it is quite likely that the specific VAT Act provisions may cause difficulties for such vendors and this would also apply to vendors in monopoly positions, such as certain State Owned Enterprises, who would all be prejudiced as SARS will not be able to make an arrangement to accommodate the vendor.

38. Submission: Section 72 should not place the onus on the taxpayer to determine whether other vendors of the same kind are experiencing similar difficulties. Further, section 72 should be applicable to and take into consideration the unique difficulties experienced by a vendor where there are no other vendors that make similar supplies or who operate similar business models.

Legislative clarity

39. There is uncertainty regarding certain wording in paragraph (i) of the first proviso and proviso (ii). Further details on these technical aspects can be found in our full submission to the NT.

40. Submission: NT should provide guidance as to how they would consider the VAT liability to be measured for the purpose of par (i) and (ii) of the proviso.

List of transactions not subject to section 72

41. It is our understanding that the Commissioner wants to publish a list of transactions or matters where a section 72 decision or arrangement will not be made, probably similar to the "no-rulings" list currently contained in Government Notice 748 of 24 June 2016.

42. If this is so, the Commissioner would then decide beforehand in which instances he will not make a section 72 decision or arrangement, without having to consider the merits of the applicant's case and whether the circumstances in fact do actually qualify for the application of section 72. In this regard, we do not believe this to be similar to the "no rulings list" as that seeks an interpretation of law, whereas this seeks a facts based practical solution where the law does not meet its intended purpose.

43. Submission: The amendment may be contrary to the provisions of section 3 of the Promotion of Administrative Justice Act, 2000, which entitles every person to fair administrative action which is procedurally fair and the person must be afforded a reasonable opportunity to make representations. The Commissioner has a statutory duty to objectively consider such representations and thus the inclusion of this subsection should be reconsidered.

Reapplication period

44. Neither sections 72 nor section 41B of the VAT Act nor Chapter 7 of the TAA make provision for the time frame within which a person must re-apply for rulings subject to an expiration date. Although in practice SARS in some cases allows the existing ruling to remain in force after the expiration date, provided the person has timeously submitted a re-application, no legislative provisions exist in this regard.

45. Submission: We recommend that provisions be incorporated into sections 72 and section 41B of the VAT Act and Chapter 7 of the TAA to the effect that the re-application of rulings subject to expiration dates must be made within a particular period prior to the expiration date of the ruling.

46. Further, we recommend that a provision be included to the effect that if the person submitted the re-application within the required period, the existing ruling will remain in force until the re-application has been confirmed, amended or declined by SARS.

47. Taking all our fundamental concerns regarding the changes to section 72 into account, it would be useful to understand exactly what NT's concerns are with this section, as the explanation in the EM is vague and does, unfortunately, not assist in this regard.

Exempt entities – Sections 30 and 30A

48. South Africa has an enormous public benefit need due to high unemployment, malnutrition, poverty, AIDS and dysfunctional family structures and family violence. Tax legislation for tax exempt entities is more complex than normal taxpaying entities as it prescribes activities, and is not a consequence of activities. The tax administrative

process in also more complex than normal taxes as it is a manual process and the SARS TEU division is under resourced.

49. Yet the current amendments, seek to delete the current provisions that empower the Commissioner to grant retrospective approval for tax exemption status to these entities. This retrospective approval is generally required as the majority of PBOs and Recreational Clubs are poorly resourced and do not have funds available for tax advice, in respect of very complex legislation, from the outset.

50. In the absence of these provisions, the organisations may be taxed as ordinary taxpayers and may in addition face understatement penalties. This will in turn undermine the public benefit objectives of such organisations. Alternatively, they will be required to go through the corporate tax cycle just to in any event end up in the exempt SARS channel which brings its own practical challenges regarding compliance history confirmations etc. This might discourage PBO's from becoming compliant and they would rather just abandon finished projects and give up trying to be tax compliant.

51. Submission: We do not condone non-compliance, however, the realities have to be considered in addition to the tax policy utopia. The proposed deletion of subsections 30(3B) and 30A(4) should be reconsidered, taking into account the function of these entities in society, the additional burden this will place on these organisations and the fact that increases in time and tax costs will undermine the roles that these organisations play in society.

Section 10(1)(o)(ii) – Implementation concerns

52. We understand that the prior year amendments to section 10(1)(o)(ii) of the ITA were effected on the basis that NT acknowledged that there were still concerns and practical challenges to address. To this extent, the effective date was deferred to 1 March 2020 and NT undertook to hold a workshop and consult on the remaining concerns.

53. The workshop was held and various concerns were raised. We note that, to date, no further clarification has been released on the legislative and practical problems surrounding this proposal.

54. Submission: We request that NT release, at minimum, an interpretation note on this section as soon as possible. A further workshop on this provision should also be scheduled as a matter of urgency to allow sufficient time for both industry and NT to explore appropriate solutions for the remaining legislative and administrative concerns.

Submission File Ref: 747743

23 August 2019

National Treasury
Ms Adele Collins (South African Revenue Service)

Per email: 2019AnnexCProp@treasury.gov.za
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Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2019

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill (DTLAB19) and Tax Administration Laws Amendment Bill 2019 (DTALAB19). As opposed to prior years, where a single submission has been made, our submission this year has been divided into three parts, namely matters involving amendments to –

1. The Income Tax Act, 58 of 1962, as amended (the Act);

2. The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and

3. The Tax Administration Act, 28 of 2011, as amended (the TAA Act).

We have set out in detail in **Annexure A,** our comments in relation to the matters referred to point 1. above pertaining to the Act. We also set out in **Annexure B** additional matters that in our view should also be considered.

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

Yours sincerely

David Warneke
Chairperson: National Tax Committee

Pieter Faber
Senior Executive: Tax

The South African Institute of Chartered Accountants

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ANNEXURE A

GENERAL

Effective dates

1 The DTLAB19 indicates the proposed effective date in relation to some, but not all of the amendments. The Bill also does not have the usual wording at the end, stating "*Save in so far as is otherwise provided for in this Act, or the context otherwise indicates, the amendments effected by this Act come into operation on the date of promulgation of this Act*" (which wording is in the TALAB19).

2 Submission: The lack of an effective date for many of the proposed amendments creates uncertainty as it digresses from the usual approach. We recommend that this be addressed.

INDIVIDUALS, TRUSTS AND EXEMPT ENTITIES

Individuals & Employment

Section 3 of the Estate Duty Act – Retirement Annuity Fund contributions (Clause 1)

3 The proposal closes a "loophole" by introducing *retrospective* changes to the Estate Duty Act to prevent individuals from avoiding estate duty by a making large contribution into a retirement annuity fund in the year the individual dies.

4 Submission: The proposed amendment should not be retrospectively applied as it is unfair to punish individuals who, at that stage, legitimately contributed 'non-deductible contributions' for retirement planning purposes. This goes against the fundamental principle of certainty in tax legislation and undermines confidence in the legislative process.

Section 7B of the Income Tax Act – Extending the scope variable remuneration (Clause 3)

5 The proposed amendment to section 7B replaces defined specific types of payments constituting variable remuneration with generic characteristics. The objective of the proposed amendment is thus to expand the definition of "variable remuneration" to include other types of income, for example, night shift allowances and standby allowances paid by employers.

6 However, the proposed wording in subsection (iii) appears to limit rather than expand the definition of variable remuneration. Similar to the principle underpinning the concept of 'capital', the principle underpinning the concept of 'variable remuneration' as set out in the Explanatory Memorandum does not lend itself to precise description.

7 The numbering of the subparagraphs of the definition of 'variable remuneration' is incorrect. Subparagraph (iii) should be subparagraph (ii).

8 Subsection (a)(i)(aa), (bb) and (cc) of the proposed definition of variable remuneration includes the following amounts:

"3(1) …

(a) any amount of remuneration, as defined in the Fourth Schedule, to the extent that the amount of that remuneration—

(i) (aa) cannot be determined prior to the entitlement of payment of that amount;

(bb) the identity of the employee to whom the amount is payable cannot be determined prior to entitlement to payment of that amount; and

(cc) differs in respect of each month; or …"

9 In many instances involving variable remuneration, the amount of the remuneration would be capable of determination "*prior to the entitlement of payment*" of that amount. An example of this would be an employee who approaches an employer for permission to work two hours of overtime. Furthermore, subparagraph (aa) provides that an amount will fall within the definition of variable remuneration to the extent that the amount cannot be determined prior to the entitlement of payment of that amount. In order for an amount to fall within a person's gross income, it must be a determinable sum in the hands of the taxpayer.

10 Submission: Taking the above into account, we submit that subparagraph (aa) is superfluous.

11 It is also problematic to suggest that an employer cannot determine the identity of its employees. Furthermore, in instances where an employee is paid weekly or daily – the amount would probably differ in respect of each week or day, not necessarily in respect of "each month".

12 It is also uncertain why section 7B would not apply if the employee becomes entitled to payment of the amount two months after the month in which the approval is given, and not in the month after approval was given as set out in the Explanatory Memorandum. Payments to employees that are approved by the employer, for example, annual bonuses, are not always paid out in the month following the month in which the amount was approved by the employer. For example, the Remuneration Committee may approve the amount to be paid as an annual bonus to employees in say, October, with the intention of paying the bonuses to the employees in December. Since the timing for payment of the bonus will not coincide with the timing in subsection (iii) of the proposed amendment, it will not fall within the definition of variable remuneration and will accrue to the employee once the employee becomes unconditionally entitled to the amount. This could result in the

employer having to withhold employees' tax in respect of the bonus prior to receipt thereof by the employee.

13 An employer will usually be in a position to determine the amount payable to the employee where the employee works a standard number of hours per night while on night shift and is paid in accordance with a specific hourly rate. However, where employees work night shift or are on standby they may be paid their night shift allowances and/or standby allowances for the full month, only on the last day of the month. A problem arises for the employer where the payroll run takes place earlier in the month, for example, on the 25th of the month and the employer is unable to undertake a second payroll run to pay the employees' tax, Skills Development Levies and Unemployment Insurance Fund contributions over to the South African Revenue Service by the 7th of the following month, in respect of the night shift allowances and standby allowances paid to employees on the last day of the preceding month.

14 Submission: The proposed amendment should be reconsidered in favour of the status quo with the addition of defined categories of remuneration that it is sought to be included in section 7B. The principle underpinning the concept of 'variable remuneration' is not easily defined.

15 Should this not occur, the definition of "variable remuneration" should be amended to include any amount that is subject to approval by the employer prior to payment thereof, which is payable to the employee in *any subsequent month.*

16 We further suggest that the word "and" at the end of subparagraph (bb) be replaced by the word "or" in order to widen the definition of variable remuneration and take into account circumstances where the amount to be paid differs in respect of each month but the identity of the employee is known.

17 Where variable remuneration is paid to an employee after the 25th of the month the amount should be deemed to accrue to the employee in the following month. The employer will then be able to process the night shift allowances and standby allowances through the payroll in the following month without attracting penalties and interest.

18 The numbering of the subparagraphs of the definition of "variable remuneration" is incorrect. Subparagraph (iii) should be subparagraph (ii).

Exempt entities

30 and 30A – PBOs and Recreational Clubs (Clauses 34 and 35)

19 The EM states that the reason for the deletion of section 30(3B) and 30A(4) is to remove an obsolete transitional measure initially introduced to provide organisations

that were already exempt from the Act under the repealed legislation the opportunity to re-apply under section 30/30A of the Act.

20 This may have been the initial intention but we submit that such intention was changed in 2009.

21 According to the EM on the TLAB 2009, section 30(4) was introduced for the following reasons:

22 *"Many PBOs and clubs applying for exemption do so after several years of activity. This delay may stem from a lack of expertise or due to an over-emphasis on starting activities. Failure to seek prompt approval then keeps the relevant parties from subsequently seeking relief on a going forward basis because of concerns about the potential tax liability from pre-existing activities*".

23 This discretion, as amended in 2009, recognises the importance of especially PBO's in society and therefore made their retrospective approval subject to them having always benefited society by carrying on a PBA historically (i.e. it was merely a compliance matter). In fact, the discretion was widened to include both pre and post 2001 PBO's.

24 It appears as if the reasons for not registering for tax are currently still the same. However, if a PBO or Recreational Club only realizes that it has to register with the Commissioner after it has commenced operating (which is a regular occurrence), the current provisions (section 30(3B) and 30A(4)) empower the Commissioner to grant retrospective approval.

25 The majority of PBOs and Recreational Clubs are poorly resourced and do not have funds available for tax advice from the outset in respect of which is very complex legislation.

26 In the absence of these provisions, the organisations may be taxed as ordinary taxpayers and may in addition face understatement penalties. This will in turn undermine the public benefit objectives of such organisations. Alternatively, they will be required to go through the corporate tax cycle just to in any event end up in the exempt SARS channel which brings its own practical challenges regarding compliance history confirmations etc.

27 It is also our view that this will discourage especially PBO's from becoming compliant and they would therefore just abandon finished projects and never apply for tax compliance.

28 Submission: We do not condone non-compliance, however, the realities have to be considered in addition to the tax policy utopia. The proposed deletion of subsections 30(3B) and 30A(4) should be reconsidered, taking into account the function of these entities in society, the additional burden this will place on these organisations and

the fact that increases in time and tax costs will undermine the roles that these organisations play in society.

29 Should this proposal not be accepted, then at minimum, these organisations should be given relief from penalties and interest that arise as a result of the deletion of these subsections.

LOCAL BUSINESS TAXES

Section 11(j)(aa)(B) – Grammatical error (Clause 15)

30 Submission: The word “and” should be deleted as it appears twice after subsection (i)(aa)(B).

Section 22 – Trading Stock (Clause 22)

31 It is noted that there is no EM insertion relating to NT's thoughts around the amendments contained in Clause 22(b).

32 Submission: NT should provide the background and the reasons for this amendment as it is imperative to understand NT's thought process for this inclusion as this has far reaching practical implications in practice.

33 In light of the significant uncertainty caused by the ruling of the court in the SCA case C:SARS v Volkswagen S A (Pty) Ltd (1028/2017) [2018] ZASCA 116 (19 September 2018), we welcome the proposed amendments to section 22(1) of the Act, and specifically the addition of proviso (b).

34 Proviso (b) to section 22(1) states that "*any diminution in the value of trading stock must be determined on an item-by-item basis*”. The court’s view that the net realizable value of stock had to be determined in total and not on an individual item basis amounted to a significant deviation from long standing practice and would have had significant implications.

35 Without advocating for the determination of net realisable value to be determined on a total basis, we acknowledge that valuing items on an item by item basis will be impractical for corporations with significant stock levels. The current prevailing practice by SARS allows the reduction from closing stock if such a reduction is on a specific basis even if per category of stock (based on for example shelf-life, fashion, expiry dates) which is "broader", yet specific enough to ensure taxable income cannot be manipulated by diminution of stock levels.

36 Furthermore, the judgment in the SCA case C:SARS v Volkswagen S A (Pty) Ltd (1028/2017) [2018] ZASCA 116 (19 September 2018) in clause 45, referred to the

IAS 2 requirement that trading stock by valued on an item-by-item basis, unless otherwise impractical. The full extract from IAS 2 paragraph 29 reads as follows:

"Inventories are usually written down to net realisable value item by item. In some circumstances, however, it may be appropriate to group similar or related items. This may be the case with items of inventory relating to the same product line that have similar purposes or end uses, are produced and marketed in the same geographical area, and cannot be practicably evaluated separately from other items in that product line. It is not appropriate to write inventories down on the basis of a classification of inventory, for example, finished goods, or all the inventories in a particular operating segment."

37 Submission: In cases where it is impractical to value trading stock on an item by item basis, for example if trading stock consists of many identical items such as nails or sweets, it is submitted that it should be permitted to write down trading stock by group of similar or related items.

38 Unfortunately, despite the proposed amendment to section 22(1), taxpayers are still left with a significant amount of uncertainty as to whether the value of trading stock included in the determination of taxable income both as opening stock and closing stock will be acceptable to SARS.

39 Clarity is required as a matter of urgency. As the law currently stands, taxpayers will be required to determine the net realisable value of trading stock for accounting purposes as well as for tax purposes with no guarantees that the determination for tax purposes will be accepted by SARS. This is a significant burden on the taxpayer.

40 The cost of having to maintain separate tax and accounting valuations of trading stock is a burden on taxpayers that significantly adds to the costs of compliance.

41 Submission: It is recommended that section 22 be amended further to align the tax treatment of trading stock to the accounting treatment instead of the current situation in which taxpayers have to maintain separate records for accounting and tax purposes. Accounting principles have already been accepted elsewhere in the Income Tax Act (refer for example to sections 11(j) and 11(jA)).

Section 22B – Dividends treated as income (Clause 23)

42 Submission: We refer you to our submission, entitled "Comments on the initial batch of the draft Taxation Laws Amendment Bill 2019" for our views on the proposed changes to this section as well as our discussion on the changes to paragraph 43A further on in this document.

43 We remain on the view that the continual expansion in policy and scope of this provision is problematic and therefore unavoidably encroaches on legitimate transactions outside of the intended mischief.

Section 23C – Cost or market value of asset and VAT (Clause 24)

44 It is not only paragraph 7 of the Seventh Schedule where VAT is considered in determining the market value or cost of an asset. For example, paragraph 5 also refers to cost and to market value and paragraph 10 refers to cost.

45 The word 'notwithstanding' is inappropriate in the current context.

46 Submission: We suggest that the clause should read: "*Except for paragraph 7 of the Seventh Schedule, where regard is to be had…*"

Section 24BA – Assets acquired as consideration for shares issued (Clause 28)

47 The amendment in section 24BA refers only to IFRS and not IFRS for SMEs. The principles in IAS 12 would be the same for IFRS for SMEs.

48 Submission: We suggest that the reference to IFRS be extended to include IFRS for SME's.

49 Value 'mismatches' created by a deferred tax liability currently create a problem for taxpayers by potentially rendering transactions that are in all other respects conducted a value-for-value basis, subject to section 24BA adjustments. We also note that section 24BA is one of the transactions that specifically overrides the corporate restructuring rules. In view of this and the fact that the proposal was announced in the Minister's Budget Speech on 20 February 2019, we submit that the envisaged effective date of this proposal should be brought forward so as to apply to any acquisition on or after 20 February 2019, or if this is not acceptable, to 21 July 2019 (the date of release of the DTLAB).

50 Submission: The effective date of this proposal should be brought forward so as to apply to any acquisition on or after 20 February 2019, or if this is not acceptable, to 21 July 2019 (the date of release of the DTLAB)."

Section 24O – Deductibility of interest on debt (Clause 30)

51 The proviso at the end of subsection (3) appears to apply to the whole of subsection (3).

52 Submission: The proviso should only apply to subsection (3)(b) and not the whole of subsection 3.

53 The wording of the amendment relating to section 24O(5) refers to "in consequence of an unbundling transaction contemplated in section 46…"

54 Submission: It should be clarified whether the proposed wording "contemplated in section 46" means that the unbundling transaction must have been carried out in

terms of section 46 or whether it means that the unbundling transaction is merely an unbundling transaction as described in section 46.

55 As currently worded, section 24O only applies to debt used to acquire shares which acquisition results in the purchaser becoming a controlling group company in relation to the other company. If, for example, a company ("the taxpayer") acquires 72% of the shares in a company and all the other requirements of section 24O are met, the taxpayer is able to claim the interest incurred in relation to the debt utilized to finance the acquisition.

56 Should the taxpayer later on acquire the remaining shares (28%), that acquisition will not result in the taxpayer becoming a controlling group company in relation to the other company as the taxpayer is already a controlling company in relation to the other company. Therefore, the interest incurred in relation to the debt utilized to acquire the remaining 28% of the shares will not be deductible for tax purposes.

57 Submission: Section 24O should be amended to allow the deduction of interest incurred on debt utilized to acquire additional shares in a company, even if the taxpayer already controls the company before acquiring the additional shares.

Section 25BB – Taxation of REITs (Clause 31)

58 The inclusion of exchange gains and losses in the calculation of "rental income" is welcomed.

59 However, this treatment is not extended to exchange gains and losses arising in relation to exchange items taken out to finance property, for example mortgage bonds. Such exchange items are integral to the operations of a REIT.

60 Submission: The inclusion of exchange gains and losses in the definition of 'rental income' should be extended to exchange gains and losses arising in relation to exchange items taken out to finance property.

Section 41(2) – Exclusion of interest-bearing instruments and exchange items (Clause 38)

61 It is unclear from the draft explanatory memorandum why adjusted gains or losses on redemption or transfer of interest-bearing instruments, as contemplated in s 24J, and exchange items, as contemplated in s 24I, should be excluded from the corporate rules.

62 Unlike other provisions specified in s 41(2) that explicitly do not override the corporate rules (for example, value-shifting rules, GAAR, etc.), it is submitted that provisions relating to adjusted gains or losses on the transfer or redemption of interest-bearing instruments and deferral of exchange gains or losses are not anti-avoidance rules. These provisions merely govern the timing of when certain gains or

losses should be taken into account by a taxpayer. The policy rationale for excluding such timing provisions from the relief afforded by the corporate rules is unclear.

63 If the corporate rules do not apply to these items and roll-over relief is not afforded to these items until the gains or losses truly realise, reorganisation transactions will not be completely tax neutral. As a result, tax may become an obstruction to such transactions contemplated in ss 42 to 47, which the legislature intended to allow on a tax neutral basis.

64 Submission: It is recommended that the rationale for the proposed position of excluding these items from the roll-over relief be reviewed in light of the purpose of the corporate rules, and, if not revised, that the policy rationale for not enabling tax neutral reorganisations be clearly explained in the Explanatory Memorandum.

INCOME TAX: BUSINESS (INCENTIVES)

Special Economic Zones (SEZ)

Section 12R – Policy rationale and amendments (Clause 18)

65 SAICA acknowledges the concerns raised by NT in relation to this incentive and therefore supports NT's policy rationale in addressing such abuse. However, the manner in which this abuse is addressed should be undertaken in a very specific way and, most importantly, should not undermine investor confidence.

66 The requirement that a trade must not have previously been carried on by any connected person in relation to a qualifying company is not realistic. For example, if a non-resident company relocates some of its operations to a South African SEZ, this requirement will not be met.

67 The requirement that the gross income of a qualifying company must have increased by at least 100% when compared with the highest gross income derived in respect of that trade during any of the three years of assessment immediately preceding that date, is extremely stringent.

68 Per the proposed amendments to section 12R, one of the qualifying criteria applicable to companies that were carrying on a trade within an SEZ before 9 February 2016 is that "*operations of that trade were expanded on or after that date and as a result, the gross income derived by that company in respect of that trade increased by at least 100% when compared with the highest gross income derived in respect of that trade during any of the three years of assessment immediately preceding that date*."

69 Increases in gross income of 100% will most likely only be achieved in respect of completely new trades, in which case no companies currently operating within an

SEZ that were carrying on a trade within an SEZ before 9 February 2016 would meet this qualifying criteria for expansions.

70 This would especially be the case where companies have commissioning periods that occur halfway or towards the end of a year of assessment, whereby the products from the commissioning period can be sold, but the resultant gross income derived from these sales will be far less than when production is at its full capacity.

71 Submission: Turnover is dependent on many factors, including market volatility. The proposal, that only companies whose expansions result in a 100% increase in turnover, will be eligible for the beneficial tax benefits of a SEZ, is unrealistic and unreasonable.

72 In order to limit the negative effects on investor confidence, we recommend that the *average* gross income of the three years of assessment immediately preceding 9 February 2019 should be applied, rather than the highest gross income of a single year of assessment.

73 We also recommend that either:

74 1) the percentage increase in gross income be reduced to between 25% and 30% in the first year, with an overall 50% increase in gross income by that company in respect of that trade achieved within three years from the expansion of operations, or

75 2) a requirement that is not linked to gross income be considered (such as creating and maintaining jobs over, for example, a five-year period, or a sustained increase in production).

76 In addition, we recommend that guidance be given on how commissioning periods should be treated.

Section 12R – Technical issues

77 When defining a "qualifying company", paragraph (d) states that "*not less than 90% of the income of that company is derived from the carrying on of a trade within… special economic zones*". When determining this *income*, it is unclear whether foreign exchange gains/ losses should be included or excluded from this calculation. In addition, it is unclear whether the income for purposes of the calculation includes or excludes exempt income.

78 Submission: We recommend that a definition of "*income*" for purposes of this section be provided, or that "*income*" be expressly defined with reference to the definition already set out in section 1 of the Income Tax Act.

79 "Qualifying companies" as defined do not require pre-approval to benefit from the reduced corporate tax rate of 15% (other than meeting the required qualifying

criteria). As such, should a company meet the definition of a “qualifying company”, it may benefit from the reduced corporate tax rate upon disclosure / election in its tax return that it constitutes a qualifying company as defined.

80 However, when attempting to apply the SEZ tax benefit, it is unclear whether companies require a letter from the SEZ operator as proof of meeting the “qualifying company” requirements, or whether the onus of proof is on the individual company.

81 Submission: Clarification on the above issues is requested.

82 Section 12R no longer specifies the reduced corporate tax rate of 15% within the section. This has been moved to section 3 of Schedule 1 of the Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2019.

83 Submission: We recommend that section 12R makes reference to a reduced corporate tax rate being applicable to qualifying companies and also where the reduced corporate tax rate percentage can be found.

84 The effective date of implementation of the proposed amendments to section 12R is 1 January 2019, however, there is uncertainty regarding how the effective date will be practically applied for companies who do not have a December year end and are no longer regarded as “qualifying companies”, as defined, on or after 1 January 2019.

85 Submission: We recommend that guidance be provided as to how the effective date is to be practically applied when submitting tax returns i.e. how should companies who are no longer regarded as “qualifying companies” on or after 1 January 2019 apply the change in the corporate tax rate.

86 Currently, the section 12R provision ceases to apply “in respect of any year of assessment commencing the later of: a) on or after 1 January 2024, or b) 10 years after the commencement of the carrying on of a trade in a Special Economic Zone”.

87 In effect, this paragraph would allow for the SEZ tax benefits to be available until 1 January 2034 (for instance, should a company have a December year of assessment and commence operations in an SEZ during December 2023).

88 Submission: It should be clarified whether this is indeed the intention of the legislation as it currently reads.

89 The SEZ Act sets out the duties of the Department of Trade and Industry (DTI) in terms of SEZs i.e. acting on the Advisory Board and reporting to Parliament. However, clarification is required as to whether the DTI has any further involvement in terms of monitoring the performance of the individual companies located within the SEZ, or whether this performance will be monitored on an individual basis solely by

the SEZ operators, with a consolidated performance/progress report being provided to the Advisory Board?

90 Submission: Clarification on the above issues is requested. It is, however, recommended that the DTI be involved in the monitoring of the performance of the individual companies located in SEZs. We also suggest that the DTI be involved in a pre-approval process for SEZs wishing to conduct businesses in an SEZ. Pre-approval of SEZs will give certainty to taxpayers that their entry into the SEZ is within acceptable boundaries and is much better than a post-hoc facts-and-circumstances analysis.

Venture Capital Companies

Section 12J – Rationale for changes (Clause 17)

91 The changes introduced to the 12J legislation in the 2018 TLAB were extensive, comprehensive, thoroughly debated, and generally well received by the industry and, in their opinion, successful in closing the opportunities for abuse.

92 However, the EM states as follows: "*Despite Government's efforts to introduce these anti-avoidance measures, it has come to government's attention that some taxpayers are still attempting to undermine the objectives and principles of the VCC tax incentive regime to benefit from excessive tax deductions*".

93 It appears that there is a significant information gap between the allegations of "rampant abuse" and actual abuse that may be taking place.

94 Submission: National Treasury is urged to provide information on the current status of VCCs in South Africa and the abuse as the role players do not believe that this correctly reflects the activities of the majority VCC companies and they would like to assist in preventing further abuse.

95 SAICA supports NT's policy rationale in addressing abuse of the incentive, however, the manner in which this abuse is addressed should be undertaken in a very specific way and, most importantly, should not undermine investor confidence.

96 Many legitimate venture capital funds were set up on the basis of the legislation as it currently reads and investors have locked in their capital for a five-year period. Introducing an incentive and after several years changing the basis of the allowance by once again introducing a limit to the deduction, will have a detrimental effect on the viability of existing VCCs that were established with the valid objective of investing in small businesses.

97 If enacted, the proposal will result in many existing VCC arrangements becoming non-compliant with the requirements of section 12J. While there was no limitation of the amount of the allowance, many large investments were made into VCCs that rely

on further large capital raises from other taxpayers within the following three years in order to comply with the section 12J requirements relating to connected persons and the 20% of shareholding. The imposition of the limit of R2.5 million will make such large capital raises practically impossible, leading to non-compliance with the requirements of section 12J.

98 This non-compliance will result in a penalty and the lack of confidence that this will engender will jeopardise future investments into VCCs and small businesses.

99 Furthermore, such a major change to the structure of the incentive will undermine investor confidence. If the proposal is accepted, there is little doubt that potential investors will think twice in future when evaluating any VCC investments or any other investments that are offered by National Treasury as tax incentives.

100 Submission: The effect on investor confidence should not be underestimated, especially in the tough economic climate in which South Africa finds itself. Having to continually modify business models to remain compliant does not provide policy certainty to investors who are seeking to improve economic growth and job creation.

101 Rather than limiting the tax deduction for capital investment into VCCs, limiting what a VCC can do with the investment money it receives should be considered as it seems the abuse is not the cash amounts but that it is not being used for what NT is attempting to incentivise.

102 We are not in favour of limiting the tax deduction for capital investment into VCCs, especially in view of the current state of investment in our economy. However, if there is to be a limit on the tax deduction for capital investment into VCCs, then the amount of R2.5 million per annum is too low to attract investors that could make a meaningful difference to our economy and should be increased significantly.

Section 12J - Carry-forward of amounts not deducted

103 The amendment proposes to limit the deduction allowed in respect of expenditure incurred by a person to acquire venture capital company (VCC) shares to R2,5 million during a year of assessment.

104 While an investor in a VCC may only benefit from a tax deduction of R2,5 million during the year in which the expenditure is incurred to subscribe for venture capital company shares, that investor may nevertheless invest a greater amount in the shares of a VCC. It is unclear from the proposed amendment whether any expenditure by an investor in a VCC in excess of R2,5 million during a year of assessment can be carried forward and qualify for deduction under section 12J(2) in a subsequent year of assessment or will be forfeited (i.e. treated like any other investment in shares of capital nature).

105 Submission: As noted above, in our view the proposal to limit tax deductions for investment in a VCC should be scrapped. If it is to be retained, then any excess investment over the limit should rank for deduction in future years of assessment.

Capital gains tax

Paragraph 43A of the Eighth Schedule to the Act and section 22B (Clauses 59 and 23)

106 Section 22B and para 43A have become dreadfully complex. The so-called 'mischief' that is sought to be addressed rests on a questionable foundation and is, in any event, outweighed by the increased cost to business of interpreting the provisions and monitoring whether or not ordinary transactions fall foul of them.

107 The declaration of dividends by a company and the issuing of shares by a company are hardly capable of description as 'abusive' transactions. If a dividend is declared by a company, the reserves in the company become part of the reserves of the shareholder company. In time, dividends tax will be collected when these reserves cease to form part of the reserves of a company. Therefore, the issue in question is a deferral of dividends tax, which is an exemption granted in the case of dividends declared by one South African resident company to another.

108 The declaration of dividends by a company, in fact, helps to eliminate the cascading effect of capital gains, where reserves in a company are taken into account more than once. That is, firstly in the valuation of the shares of that company and secondly, in the valuation of the shares of the shareholder company. One can argue that this cascading effect is inequitable from the perspective of the shareholders, and should as far as possible be eliminated from income tax systems.

109 Submission: Given the questionable theoretical basis for the provisions and the complexity that is associated with them, these provisions should be reconsidered.

110 Notwithstanding this, if it is decided to retain them, the following concerns should be considered.

Meaning of "effective interest"

111 A reduction in the effective interest of a company ('shareholder company') in the shares of a target company is central to the proposed amendment, both as a trigger event for the deemed disposal to occur (proposed s 22B(3A)(b) and paragraph 43A(3A)(b)) and also to determine the percentage of shares deemed to be disposed of.

112 Unlike the 2018 amendments to the debt relief rules in s 19 and paragraph 12A of the Eighth Schedule, which require taxpayers to consider the *market value of the effective interest* held by a person, the proposed anti-dividend stripping amendments do not define or otherwise specify the basis on which the effective interest must be determined.

Consider, for example, the situation in which there are multiple classes of shares in a company, all with different entitlements. How is one then to determine a percentage reduction in the "effective interest" in the shares in the company, if additional shares in any particular class are issued? The voting rights of existing issued shares may, for example, have decreased relative to the other shares, but the entitlement to dividends and returns of capital may remain the same, or *vice versa*.

113 As a result, the term is open for interpretation as either a change in the value of the effective interest that the shareholder company holds in the target company or merely a change in the percentage of the issued shares of the target company that the shareholder company holds, irrespective of whether a change in value has occurred.

114 In the absence of a clearly specified basis for determining whether a reduction in effective interest of a shareholder company has occurred or not, the proposed amendments may affect transactions that it was not intended to affect (i.e. share issue transactions at arm's length terms). Similarly, a lack of a clearly defined basis for determining the effective interest of a company may leave room for abusive schemes to escape the amendment on the basis of interpretation of the meaning of effective interest.

115 Submission: The basis to determine the effective interest of the shareholder company must be clearly specified in the amendments to s 22B and paragraph 43A of the Eighth Schedule.

116 Since an actual disposal of shares in the target company does not fall within the scope of the provisions where the disposal occurs in terms of the corporate restructuring rules in Part III of the Act, the same exclusion from scope should be extended to the deemed disposal that arises where shares are issued in terms of the corporate restructuring rules.

117 The current version of the proposal does not cater for this.

118 Submission: Subparagraph (2) of paragraph 43A should be amended to read:

119 "Subject to subparagraph (3), where a company holds shares in another company and disposes of any of those shares in terms of a transaction that is not a deferral transaction, or is treated in terms of subparagraph (3A) as having disposed of any of those shares in terms of a transaction that is not a deferral transaction and that company held a qualifying interest in that other company…".

120 Subsection (2) of section 22B should also be amended *mutatis mutandis*.

121 The new subparagraph (3A) is proposed to be added to paragraph 43A of the Eighth Schedule to the Income Tax Act. The proposed addition to subparagraph (2) provides that the "extraordinary dividend" attributable to the reduction in the effective interest shall be taken into account as a 'capital gain' in respect of the shares deemed to have been disposed.

122 The aforementioned tax treatment as a 'capital gain' is not consistent with the treatment as proceeds in the case of an actual disposal, and as such no parity exists between the two disposal types.

123 Furthermore, the inclusion of the words "*effective interest*", will encompass indirect shareholdings in addition to direct shareholdings.

124 Submission: The capital gains tax treatment in respect of actual disposals, and the treatment in respect of the proposed deemed disposal should be similar/consistent. This can be achieved by the treatment of the "extraordinary dividend" as proceeds, and allowing for a subtraction of an equivalent proportion of the aggregate base cost of the underlying shares against the proceeds.

125 It is proposed that the word "effective" be removed from paragraph (3A). This will ensure that only reductions in direct interests in the shares of the target company will be impacted.

Employment Tax Incentive (ETI)

Section 6(a)(ii) – ETI and SEZs

126 The purpose of the amendment to this section is to allow a company to claim the expanded Employment Tax Incentive ("ETI") (i.e. without any age limit), only if that company is a *qualifying company* as contemplated in section 12R of the Income Tax Act No. 58 of 1962. Section 12R defines a qualifying company for purposes of claiming the income tax incentives under the special economic zone ("SEZ") regime as discussed above from point 65. It has been proposed that the effective date of the amendment is 1 March 2019 – thus a retrospective change.

127 Section 6(a) (ii) of the ETI Act does not currently make reference to section 12R of the Act. If the proposed amendment to section 6(a)(ii) of the ETI Act is legislated, businesses involved in disqualified trades listed in section 12R of the Act or those listed by the Minister of Finance by notice in a Government Gazette will not be able to benefit from the ETI in respect of employees who are older than 29 years of age. Currently, the ETI tax incentive can only be claimed by an employer in respect of qualifying employees between the ages of 18 and 29 years of age.

128 Employer companies in certain industries have created new employment by employing qualifying employees in the SEZ. These employees were employed without having regard to the age limit. If the proposed amendment to section 6(a)(ii) of the ETI Act is legislated retrospectively, these employer companies will be financially impacted, as they will be seen to be carrying on a disqualified trade listed in the Government Gazette. Effectively, this means that they should not have claimed the ETI and the South African Revenue Service ("SARS") will be entitled to reverse the ETI utilised by these companies and charge penalties and interest in respect of the underpayment of employees' tax, Skills Development Levies and Unemployment Insurance Fund contributions.

129 Furthermore, the significant increase in the cost of employing the individuals may result in the jobs which were created, ultimately being lost. This contrasts with the intended purpose of the ETI legislation which was aimed at encouraging employment across specific sectors in South Africa, by reducing the cost to an employer of hiring employees from stipulated groups by way of a cost sharing mechanism with the Government, leaving the employees remuneration unaffected.

130 It is important to note that at the time that the ETI was introduced, the Explanatory Memorandum on the Draft Employment Tax Incentive Bill, 2013 stated the following:

131 "*Special economic zone: Special economic zones designated by the Minister of Trade and Industry pursuant to an Act of Parliament (currently the Special Economic Zones Bill, B3 of 2013), will be designated areas that promote targeted economic activities, supported through special arrangements and support systems including incentives, business support services, streamlined approval processes and infrastructure. The tax incentives for these zones will be authorised by the Minister of Finance, after consultation with the Minister of Trade and Industry."*

132 From the above, it is evident that it was recognised that the promotion of targeted economic activities was going to have to be supported through business support services. Individuals residing near a SEZ will benefit from the increase in employment opportunities within a SEZ. Whereas business operating in a SEZ will have their own employees, such business will still be reliant on other services (e.g. food and beverage service activities, security and investigation activities). There does not seem to be policy reason to exclude employees providing indirect services in a SEZ from the ETI, whilst advantaging employees providing direct services.

133 In the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2013, reference was made not only to the manufacturing sector but also to business support services in the SEZs. At the time of introduction, the expanded tax incentives (i.e. the reduced income tax, value-added tax rates and accelerated special allowances) were used as a tool to encourage investment in the SEZ's, thereby growing and developing the economy in such regions which would hopefully lead to job creation.

134 Further to the above, in terms of section 4 of the Special Economic Zones Act No. 16 of 2014 (the "SEZ Act"), the SEZ is envisaged to be an economic development tool to promote national economic growth and export by using support measures in order to attract targeted foreign and domestic investments and technology. Amongst the identified purposes, specific mention is made to the following:

135 *"(h) creating decent work and other economic and social benefits in the region in which it is located, including the broadening of economic participation by promoting small, micro and medium enterprises and co-operatives, and promoting skills and technology transfer."*

136 In view of the above, at the time of implementing the extended ETI in the SEZs, the intention to exclude certain industries was not clear and accordingly, many employer companies set up businesses to provide support services to other companies in the SEZs.

137 The unemployment rate according to Stats SA, Quarterly Labour Force Survey, Quarter 2: 2019 increased from 27,2% to 29%. The extended incentive for employer companies operating within the SEZ, tackles a wider unemployment issue than just youth unemployment, which in turn has a positive effect on the growth of the economy and the increasing unemployment rate.

138 Submission: We request that National Treasure reconsider its intention to make the proposed amendment effective retrospectively. If the proposal is to be enacted, it should only be with effect from a future tax year. This would at least mitigate the negative financial impact on employers in the SEZ who claimed the ETI but no longer qualify, as penalties and interest will be payable to SARS in respect of the underpayment of employees' tax, Skills Development Levies and Unemployment Insurance Fund contributions.

139 In addition, we recommend that National Treasury obtains a list of all the jobs created in the SEZ, from 1 August 2018, per industry which will be disqualified as a result of the proposed amendment to the legislation and perform a cost/benefit analysis. National treasury should thereafter determine whether they should reconsider allowing these industries in the SEZ to benefit from the extended ETI in the SEZ.

INCOME TAX: INTERNATIONAL

Section 1 – Definition of 'Domestic Treasury Management Company' (Clause 2)

140 Clause 2(1)(c) deletes the word "and" after paragraph (b) of the definition of "domestic treasury management company" and inserts that word after paragraph (c). Clause 2(1)(f), however, deletes paragraph (c). The effective date of the clause 2(1)(f) is 1 January 2019 which is before the effective date of the change to clause 2(1)(c). Thus the effect of clause 2(1)(c) is to insert the word "and" after a paragraph that has been deleted.

141 Submission: The effective dates of the proposed changes should be amended to give effect to the proposals as set out in the Explanatory Memorandum.

142 It is unfortunate that foreign-incorporated companies which are tax resident in South Africa are being excluded from the definition of a 'Domestic Treasury Management Company' (DTMC) merely because FinSurv has not updated its circular. Foreign-incorporated companies, other than those that were registered with the SARB prior to 1 January 2019, will be denied the right to use a foreign currency as their functional currency.

143 A number of foreign banks would prefer to advance funds to an offshore company rather than to a South African company, or if they will advance to a South African company, they will do so on less favourable terms. A foreign company thus gets a better deal even though it is wholly-owned by a South African holding company. It seems unreasonable to deny the group this commercial saving.

144 Additionally, an effective date was not announced in the Budget speech, but in the TLAB the effective date is 1 January 2019. It is uncertain how a company that sought to bring itself within the 'Domestic Treasury Management Company' dispensation between the Budget speech and the release of the TLAB dates will be treated.

145 Submission: Clarity would be appreciated as to why the circular cannot be changed, as the effects of the proposed changes appear to go against the changes made in 2013 that were brought about to ease the burden for companies incorporated offshore but that have their place of effective management in South Africa. If the amendment is retained, we also suggest that the effective date thereof be brought forward to the date of promulgation of the Taxation Laws Amendment Act of 2019.

Section 9D – Reviewing the comparable tax exemption (Clause 10)

146 The reduction in the high-tax comparative rate from 75% to 67.5% of the South African corporate rate of 28% is welcomed. However, the fact that a reduction is required, highlights the fact that South Africa has become an outlier in respect of its high rate of corporate tax.

147 Submission: Although the reduction in the high-tax comparative rate is a step in the right direction, the results of the review are an indication that National Treasury should seriously consider a reduction in our corporate tax rate in order to stimulate investment and thereby reduce unemployment in the country.

Section 9D(9A)(ii) – Circumventing of the CFC anti-diversionary rules (Clause 10)

148 As currently worded, the provisions of this section will apply if there is *any direct or indirect benefit* to a connected resident in relation to the controlled foreign company. This provision is too broad and unclear.

149 Submission: For clarity, the provision should be amended to read: "is derived from any service performed by that controlled foreign company for the *contractual* benefit of a connected person…".

Section 31 – Reviewing the "associated enterprises" definition (Clause 36)

150 Although it is a term used in the OECD's Model Tax Convention, the inclusion of the term "associated enterprise" as an alternative to the term "connected person" in the definition of "affected transaction" introduces a great deal of uncertainty into the interpretation of section 31 (besides vastly widening the scope of the definition of "affected transaction").

151 The term “associated enterprises” is defined in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2017. Accordingly, two enterprises are associated enterprises with respect to each other if one of the enterprise meets the conditions of Article 9, sub-paragraphs 1a) or 1b) of the OECD Model Tax Convention with respect to the other enterprise.

152 The OECD Model Tax Convention (MTC) (2017), states with regard to Article 9, sub-paragraphs 1a) and 1b) the following:

153 “*Where*

> *a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or*
>
> *b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, …”*

154 The term “associated enterprises” as defined above is very broad and requires further clarification. Furthermore, the OECD did not intend the term "associated enterprise" to be a defined term as recognised by SARS. It is a guideline for individual countries to consider in defining domestic related party provisions. SARS acknowledges this by referring to it as a term "contemplated" in the OECD Guidelines as opposed to "defined".

155 The definition contains three key tests, 1) participation in the management, 2) participation in the control or 3) participation in the capital of the other entity. In order for this to be determined, these tests need to be clearly defined. Control could mean a shareholding in another entity or voting power over that entity. The existing connected person test provides clear guidance on when such ownership or control results in the parties being connected. Adding this additional layer without any clear guidance creates unnecessary confusion.

156 Most OECD member and non-member countries apply specific rules including for example a percentage threshold to determine the level of shareholding required for the shareholder and the investment enterprise to be considered “associated”. For instance, many countries adopt a 50% threshold and some reduce this threshold to 25%1. India, which has recently adopted the associated enterprise definition into Section 92 of its Act, adopts a 26% threshold thereby providing certainty to companies on when they will be viewed as associated or not. Article 9 of the MTC provides neither a minimum nor a maximum limitation regarding direct or indirect participation in control. Moreover, as indicated above, the OECD states “it should be left to the contracting states [domestic law] to determine on the ‘broad basis’ of common understanding when participation in the

[1] Refer to country profiles listed on the OECD website

management, control, or capital of an enterprise may result [in a transfer pricing adjustment].[2]

157 Participation in management not only refers to voting rights but also the involvement in the management of the entity. The constitution of the Board of Directors could result in two companies being associated notwithstanding the fiduciary duty of the directors is to be independent in their appointment on a number of Boards. The question is then what proportion of common directors would create this association? If there is simply one common director would this trigger the association or should there be more than 50% common directors? Furthermore, certain countries may interpret the definition differently, especially around control and this could lead to double taxation.

158 Participation in capital also needs to be clearly defined. The advancement of a loan is arguably participation in the capital, as is being one of the key creditors of a company. A threshold needs to be considered as to the level of capital involvement that would meet the test for 'association'. In addition, clarity is needed as to whether the mere guaranteeing of a loan would be considered participation in capital.

159 Another key concern is whether a degree of economic dependency creates participation in either the capital or management of an entity. It is common under normal commercial operations for a company to outsource certain activities to a third party, for instance contract manufacturing arrangements whereby the contract manufacturer utilizes the intangibles of the company and manufactures solely for that company. It is therefore imperative to understand what levels of economic activity and dependency create an association.

160 Overall, the term "associated enterprises" creates the broad common understanding between two DTA States, but it requires domestic law clarification in order to be effective. Merely referring to the definition of "associated enterprises" as set out in Article 9 of the MTC would create undue uncertainty, unless further clarification is provided.

161 Submission: Tax policy should seek to make interpretation of the legislation clear to the ordinary person and provide for certainty. The current proposed amendment seems to achieve the opposite. The proposal will increase the complexity of our tax system, which is already extremely complex for a developing country and further increase the cost of doing business in South Africa for potential foreign investors.

162 We submit that in order to provide certainty to taxpayers the term "associated enterprise" should be defined with reference to clear parameters, for example, similar to the way the definition in other OECD member and non-member states is structured.

[2] Refer for example to Klaus Vogel on Double Taxation Conventions, 3rd Edition, Art. 9 para 23.

163	Alternatively, the term “affected transaction” could be defined to include any transaction, operation, scheme, agreement or understanding between an enterprise and its permanent establishment.

Section 31 of the Act – Reference to “associated enterprises” throughout the section (Clause 36)

164 Although the proposed insertion of “associated enterprise” is in the alternative to “connected persons” i.e. taxpayers transacting with connected persons or associated enterprises, the proposal does not seem to adapt the remainder of section 31 of the Act to align with this insertion. This means that following the definition of “affected transaction” in section 31(1) of the Income Tax Act, the remainder of the section is not updated to also align to insertion of the “associated enterprises” definition. That is, the remainder of the section only refers to the term “person”. However, the term “associated enterprises” as defined is much broader (refer to previous comment above) and also includes, for example, dealings between a legal entity and its permanent establishment. This may create inconsistencies when applying section 31 in the case of “associated enterprise”.

165	Submission: Section 31 of the Income Tax Act should be entirely updated to align with the term “associated enterprise”, if this concept is to be included in the definition of “affected transaction”.

ANNEXURE B

ADDITIONAL MATTERS

Section 10(1)(o)(ii) – Implementation Concerns

166 We understand that the prior year amendments to section 10(1)(o)(ii) of the ITA were effected on the basis that NT acknowledged that there were still concerns and practical challenges to address. To this extent, the effective date was deferred to 1 March 2020 and NT undertook to hold a workshop and consult on the remaining concerns.

167 The workshop was held and various concerns were raised. We note that, to date, no further clarification has been released on the legislative and practical problems surrounding this proposal.

168 Submission: We request that NT release, at minimum, an interpretation note on this section. A further workshop on this provision should also be scheduled as a matter of urgency to allow sufficient time for both industry and NT to explore appropriate solutions for the remaining concerns.

Section 12P and the Eleventh Schedule – List of exempt government grants

169 The list of grants exempt from income tax under the Eleventh Schedule currently includes government grants which have been terminated/suspended. Examples of these are, *inter alia*, the Enterprise Investment Programme and Manufacturing Competitiveness Enhancement Programme.

170 Additional grants, such as the Critical Infrastructure Programme and Aquaculture Development and Enhancement Programme, have been introduced by the Department of Trade and Industry, however, these are not reflected in the list of grants exempt from income tax under the Eleventh Schedule.

171 Submission: An update of the available government grants exempt from income tax should be provided in the Eleventh Schedule to reflect the grants which have been introduced and to delete those which have been terminated/suspended.

Submission File Ref: 747748

23 August 2019

National Treasury
Ms Adele Collins (South African Revenue Service)

Per email: 2019AnnexCProp@treasury.gov.za
acollins@sars.gov.za

Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2019

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill (DTLAB19) and Tax Administration Laws Amendment Bill 2019 (DTALAB19). As opposed to prior years, where a single submission has been made, our submission this year has been divided into three parts, namely matters involving amendments to –

1. The Income Tax Act, 58 of 1962, as amended (the Act);

2. The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and

3. The Tax Administration Act, 28 of 2011, as amended (the TAA Act).

We have set out in detail in **Annexure A**, our comments in relation to the matters referred to in point 3 above pertaining to the TAA Act. We also set out in **Annexure B** additional matters that in our view should also be considered.

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

Yours sincerely

David Warneke
Chairperson: National Tax Committee

Pieter Faber
Senior Executive: Tax

The South African Institute of Chartered Accountants

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ANNEXURE A

TAX ADMINISTRATION

The Income Tax Act –

Amendment of section 49E and 50E (Clauses 2 and 3)

1 The amendments to both sections do not mention that the declarations and written undertakings need only be done once where more than one payment is made to the same foreign person within a period of two years as set out in the Explanatory Memorandum (EM). It is also not clear from the proposed amendments that the declarations and written undertakings need to be submitted before the first payment is made.

2 Subsections 49E(4) and 50E(4) should clarify that the declaration or written undertaking will become invalid after a period of two years calculated from the date when the declaration or written undertaking was submitted.

3 Submission: Subsections 49E(2), s49E(3), 50E(2) and 50E(3) should be amended to reflect the intentions as set out in the EM.

4 Subsections 49E(4) and 50E(4) should be amended to provide clarity from when the two year period is calculated. That is, that the declaration and written undertakings will no longer be valid after a period of two years from date of submission (ie. two years after the date the declaration and written undertakings were submitted – which is *before* the *first* payment was made to that foreign person).

Amendment of section 60(5) (Clause 4)

5 The repeal of section 60(5) is regarded as a technical correction to bring the assessment of donations tax under Chapter 8 of the TAA. However, section 60(5) does not only deal with assessment, but also with the payment of donations tax as is evident from the heading of the section: “Payment and assessment of tax”.

6 Section 60(5) currently reads as follows:

7 “*The Commissioner may at any time assess either the donor or the donee or both the donor or the donee for the amount of donations tax payable or, where the Commissioner is satisfied that the tax payable under this Part has not been paid in full, for the difference between the amount of tax payable and the tax amount paid, but the payment by either of the said parties of the amount payable under such assessment shall discharge the joint obligation*.”

8 Chapter 8 of the Tax Administration Act (TAA) does not specifically provide for the Commissioner to assess either the donor and donee or both as is catered for in section 60(5).

9	Submission: The section should not be deleted in its entirety as the section deals with both the payment and assessment of donations tax. The nuances of the assessment for donations tax for a donor and done as currently set out in section 60(5) should be specifically catered for in the TAA.

Amendment of section 64G (Clause 5)

10 It is not clear why the amendments to sections 49E and 50E regarding the declarations and written undertakings that need only be done once (before the first payment is made) where more than one payment is made to the same foreign person within a period of two years are not also applied to section 64G (however please note our concerns with the current wording the proposed amendments to sections 49E and 50E as mentioned in paragraph 1 above).

11 Subsection 64G(4) also does not clarify that the declaration or written undertaking referred to in section 64G(2) and 64G(3) will become invalid after a period of two years from the date when the declaration or written undertaking were submitted.

12	Submission: Subsection 64G(4) should be amended to reflect the intentions as set out in the EM.

Amendment to paragraph 14 of the Fourth Schedule (clause 7)

13 The amendment proposes to extend the penalty in terms of this paragraph to instances where an employer submits a return that is not in the "prescribed form and manner ie. an incomplete return".

14 It first needs to be pointed out that form and manner have nothing to do with completeness. Furthermore, as the proposal is worded, any mistake or omission on the form submitted, no matter how insignificant, could be argued to render the employer liable for the penalty. This is overly punitive.

15	Submission: The penalty should be limited to cases in which there are material omissions or inaccuracies on the form, or if the form is not submitted at all by the due date.

The VAT Act –

Amendment to section 20 (clause 18)

16 The amendment delegates the authority to prescribe particulars to be contained on a tax invoice issued by a foreign supplier of electronic services, from the Minister to the Commissioner.

17	Submission: Changes made to these invoices should generally not happen very often but could have profound effects for the foreign suppliers should they be required as generally changes to taxpayer ERP systems would be both costly and time consuming. We would thus like to understand the reasoning behind why the delegation of a matter, that could have profound implications for taxpayers, has changed from the Minister to the Commissioner.

The Skills Development Act –

Amendment to section 7 (clause 21)

18 The EM states that the proposed amendment aims to align the refund provisions of the Skills Development Levy Act with the provisions of the TAA (section 190(4)), in that the refund must be claimed by the employer within 5 years from the date the levy was paid.

19 It is not clear what constitutes "claimed" as section 190(4) of the TAA does not require a refund to be claimed, it merely states that SARS must pay a refund if a person is entitled to the refund and sets out the prescription periods for the refund.

20	Submission: The term "claimed" should be clarified or the TAA should be amended to align with the proposed amendment.

The Unemployment Insurance Contribution Act –

Amendment to section 9 (clause 24)

21 The EM states that the proposed amendment aims to align the refund provisions of the Skills Development Levy Act with the provisions of the TAA (section 190(4)), in that the refund must be claimed by the employer within 5 years from the date the levy was paid.

22 It is not clear what constitutes "claimed" as section 190(4) of the TAA does not require a refund to be claimed, it merely states that SARS must pay a refund if a person is entitled to the refund and sets out the prescription periods for the refund.

23	Submission: The term "claimed" should be clarified or the TAA should be amended to align with the proposed amendment.

The Tax Administration Act –

Amendment to section 11 (clause 25)

24 The proposal seeks to extend the notice period that is required to be provided, by a taxpayer to SARS, to inform SARS that legal proceedings will be instituted against the Commissioner in the High Court.

25 The EM justifies this extension by comparing it to the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, in which, according to the EM, it is stated that no legal proceedings for the recovery of debt may be instituted unless six months' written notice, from the date the debt became due, is provided to the organ of state.

26 Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, however, states that a notice must be served within six months from the date on which the debt became due. Hence this section merely limits the time in which a notice can be served and does not state that six months' notice must be given before proceedings for the recovery of a debt may be instituted.

27 Submission: The misstatement in the EM in relation to the notice period contained in the Institution of Legal Proceedings Against Certain Organs of State Act should be removed or corrected to reflect the correct context.

28 The reason provided in the EM for the extension of the notice period to be provided to SARS, is in order to allow SARS an opportunity to investigate the matter further so as to avoid or minimise litigation at the public's expense. However, most proceedings instituted by taxpayers in these instances are to compel SARS to comply with its obligations as set out in the provisions of the TAA, which SARS fails to do. Taxpayers attempting to recover debts arising from a delict or from a breach of contract are rarely the cause for applications to the High Court.

29 Submission: Extending the pre-emptory notice period from seven calendar days to twenty-one business days, effectively means that a taxpayer will need to wait a period of nearly a month before it can approach the High Court for relief. In most instances, these applications are made to compel SARS to fulfil its obligations in terms of the various Acts. The extension of the time period for SARS to reply will be to the detriment of taxpayers' rights, and could result in a surge of urgent applications against SARS and will put even further pressure on the already overburdened State Attorney's offices.

30 We are therefore of the view that one week is sufficient time to resolve the majority of issues and there is no need to amend section 11(4) to extend SARS' time period to reply.

Amendment to section 12 (clause 26)

31 The reference, in section 12(2)(b) to "an advocate duly admitted under a law providing for the admission of advocates in an area in the Republic which remained in force by virtue of paragraph 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996" appears to be superfluous as the Legal Practices Act makes provision for all legal practitioners (which includes advocates) to appear in the tax court or High Court irrespective of how they became an advocate.

32 Submission: Section 12(2)(b) can be deleted as it is superfluous.

Amendment to section 191 (clause 36)

33 The proposed amendment to section 191 aims to clarify that SARS may set-off refunds against the outstanding tax debt of the taxpayer as well as amounts outstanding in terms of customs and excise legislation, even if there is no outstanding tax debt. In such instances the full amount is then utilised towards the customs and excise debt.

34 The current debt equalisation practices employed by SARS where PAYE, VAT and income tax debts can be set-off against refunds arising under any of these tax types are problematic as SARS's systems is not capable of informing the taxpayer of the amounts, taxes and periods affected by the debt equalisation. This, in turn, leads to interest, penalties and lost business as the taxpayer's tax compliance status is negatively affected. The resolution and reconciliation of these actions by SARS are consuming increasing resources of taxpayers. If customs debts are brought into the scope of debt equalisation, it may be near impossible to resolve these matters.

35 Submission: This amendment should only become effective once SARS's systems are capable of providing accurate and complete information on a timeous basis to taxpayers so that taxpayers are able to address these matters in an informed manner.

36 The proposal is to substitute subsection (4) of section 191. However, there is no subsection (4) of section 191 currently in the TAA. The reference should be to section 91.

37 Submission: The correct subsection that requires substitution is section 91(4).

Amendment to section 212 (clause 38)

38 The title of section 212 refers to "Reportable arrangement and mandatory disclosure penalty". The proposed amendment to section 212(1)(b) reads as follows ".....who fails to disclose the information required to be disclosed under the regulations."

39 Submission: As there is a difference between the terms "mandatory and "required" we suggest that the term "required" be deleted and the subsection be amended to

read as follows: "….who fails to disclose mandatory information under the regulations".

40 The regulations issued under section 257 should refer to the 'static' definition of "intermediary" i.e. as defined at a given date, in order to avoid problems similar to those that necessitated the proposed change to the definition of "permanent establishment" in Clause 2(1)(i) of the Taxation Laws Amendment Bill of 2019.

41 Submission: The regulations issued under section 257 should refer to the 'static' definition of "intermediary" i.e. as defined at a given date.

Amendment to section 234 (clause 40)

42 The EM states that a criminal sanction would now be imposed if any document required to be submitted to SARS is erroneous, incomplete or false. It fails to mention that this sanction is only relevant if the person wilfully and without just cause submits such documents.

43 Submission: The EM should be amended to clarify the true extent of the change.

44 A document could be erroneous due to a bona fide inadvertent error, or an immaterial error. In such circumstances, criminal sanctions would be inappropriate. This would also align with the fact that section 222(1) expressly excludes bona fide inadvertent errors from incurring understatement penalties.

45 Submission: It is imperative that the meaning of the terms "wilfully and without just cause" be clarified so as to ensure that bona fide inadvertent errors or immaterial errors are prevented from being subject to criminal sanctions.

Amendment to section 240A (clause 41)

46 As of 1 November 2018, the Legal Practice Council (LPC) replaced the four law societies and Bar councils as the statutory regulator of the legal profession with those bodies being relegated to mere member bodies.

47 In terms of the amendment to section 240A, the LPC must be recognised by SARS as a recognised controlling body and will thus be required to comply with all the necessary regulatory provisions attached to this, such as those stipulated in section 240A(3)(1) and section 243.

48 Submission: It should be ensured that the Legal Practices' Council has agreed to this and is in a position to comply with the necessary provisions.

49 Despite the above, it seems untenable to retain section 240A(1)(b).

50	Submission: It is submitted that section 240A(b) be deleted from a future date to enable such organisations to fully comply with section 240A(2) and transition to that regulatory regime in the next 12 months.

Amendment to section 256 (clause 43)

51 The wording of section 256(2) appears to exclude the possibility of a taxpayer applying for a TCC him/herself.

52	Submission: Section 256 should clearly distinguish and/or clarify what the procedures and implications are, for both a taxpayer or a taxpayer's client applying for a taxpayer's tax compliance status, should they be different.

53 Section 256(2) also suggests that SARS has 21 business days to provide/decline to provide access to a taxpayer's tax compliance status. The 21 business days appears excessive if it relates merely to third party access to a taxpayer's tax compliance status – and not to the actual confirmation of the tax compliance status as is alluded to in the latter part of the subsection.

54	Submission: A distinction should be made in the subsection between the provision of access to a taxpayer's compliance status and the actual confirmation (determination) of the taxpayer's compliance status as they are two distinct processes. We submit that 21 business days is far too long for providing access to a taxpayer's compliance status as this should be instantaneous once the status has been confirmed (determined).

55 The requirements set out in subsection (3) that are essential in order to reflect if a taxpayer is tax compliant or not are as follows: a) whether he/she is registered for tax, b) whether he/she has no outstanding tax debt and c) whether he/she does not have any outstanding tax returns. Currently the section reads as if these three requirements are exclusive alternatives to each other as they are separated by the word "or".

56	Submission: As it is our understanding that all three requirements should be fulfilled before a taxpayer's tax compliance status can be reflected as compliant, the "or" at the end of subsection 3(b) should be changed to "and".

57 Subsection (3)(b) regards a taxpayer as fulfilling the requirement of 'having no outstanding tax debt' even if the taxpayer has debt, but only if the debt consists of the following types of debt: debts contemplated in sections 167 and 204 of the TAA (instalment payment agreement or a compromise of a tax debt), debt that has been suspended in terms of sections 164, debt that does not exceed R100 as stipulated in section 169(4) or any higher amount that the Commissioner may determine by public notice.

58 The EM stipulates that the purpose of this amendment is to insert a *de minimis* amount for the amount of outstanding tax debt that will contribute to a taxpayer's tax compliance status as being indicated as non-compliant. However, the word "or" is used to separate the different debts in the section, so the de minimis amount is not exclusionary.

59 Submission: The section should be amended so that the objective of inserting a *de minimis* as set out in the EM is met.

60 Subsection (4) lists items that must be included on a "verification" of the tax compliance status of a taxpayer. The use of the word "verification" in this context does not make grammatical sense as "verification" is a process.

61 Submission: The word "verification" should be removed and another alternative word (perhaps "confirmation") should be inserted in its place.

62 Subsection (5) now enables the Commissioner to provide access to a taxpayer's tax compliance status as at the date of the request or a previous date as prescribed by the Commissioner by public notice. This prescribed date had to previously be prescribed by the Minister.

63 Submission: Reasons as to why this authority has changed from the Minister to the Commissioner should be included in the EM.

64 It is unclear what the consequences would be in subsection (6) if the access provided was provided in error. Furthermore, the section refers to the revocation of the access on the basis of fraud, misrepresentation or non-disclosure of material facts. It is unclear by whom the fraud, misrepresentation or non-disclosure of material facts should have been perpetrated. It is also unclear what the process and implications would be if the taxpayer disproved the allegations.

65 Submission: The subsection should provide for instances where an error was made in providing access to a taxpayer's tax compliance status. The subsection should also make it clear that it is the taxpayer's fraud, misrepresentation or non-disclosure of material facts that may lead to the revocation of the access. The steps to be taken where the taxpayer disproves the allegations within the 14 days should also be covered in this subsection.

CUSTOMS & EXCISE

Amendment to section 114A in the Customs & Excise Act

Criminal sanctions in the TAA to apply (clause 16)

66 The proposed amendment makes provision for options for SARS, in addition to those dealt with in section 114 of the Customs and Excise Act, for the collection of debt owed to SARS in terms of that Act. This is achieved by making Part D of Chapter 11 of the Tax Administration Act, 2011, including any criminal and other sanctions contained in that Act, with the necessary changes as the context may require, applicable for purposes of the Customs and Excise Act.

67 Submission: Chapter XI of the Customs and Excise Act already has penal provisions for criminal procedures. The amendment results in a legal overlap, not options, and should be removed.

ANNEXURE B

ADDITIONAL MATTERS

Amendment to section 18A of the Income Tax Act (Clause 2.1)

68 There is currently an anomaly with regard to the practical requirements in terms of a section 18A(2B) and the guidance Interpretation Note 112 (Section 18A: Audit certificate) issued on 21 June 2019.

69 Section 18A(2B) requires that an audit certificate must be obtained, confirming that ALL the donations received in a year for which a receipt was issued in terms of section 18A(2), were utilised in the manner contemplated in section 18A(2A) I.e. 100% substantive testing.

70 The Interpretation Note, however, stipulates the following in section 4.3.1:

71 *"Strictly interpreted, confirmation regarding the use of all donations for which section 18A receipts were issued requires detailed testing of every flow of cash in respect of which a section 18A receipt was issued. SARS recognises this poses serious practical difficulties and therefore accepts that an independent person that is suitably qualified can do appropriate work involving less than 100% detailed testing*."

72 The guidance in the Interpretation Note, though more practical than the legislation, is in fact a transgression of the legislation.

73 We also express concern with the concept and proposal in the IN that "audit" work should be available to "all suitably qualified persons" where no such requirement is contained in law, though should be i.e. both set a very low standard and the law should define who is competent. Furthermore, should SARS merely want a declaration by the person issue the certificate then it should state that and what the declaration should confirm and how.

74 Submission: Section 18A(2B) should be amended so that it aligns with SARS' interpretation of the section as set out in Interpretation Note 112 at a minimum but rather be defined to ensure that it properly instructs who should be providing assurance, competency requirements and what they should be giving assurance. It should not be prescriptive on how unless that how has been properly determined to be practical and in fact contributes to the assurance sought.

Alignment of section 93(1)(d) and section 104 of the TAA Act

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

76 Section 93(1)(d) merely provides for a less formal remedy based on a much narrower circumstance, namely a readily apparent undisputed error.

77 However, the law does not regulate the procedure and timelines for section 104 when a remedy is sought under section 93, resulting in taxpayers either losing the section 104 remedy should SARS not respond within 30 days from date of assessment, or it compels the taxpayer to make two separate submissions to two separate SARS channels and then withdraw the objection if section 93 is successful. Such double procedure is wasteful.

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

Clarification of section 223 of the TAA Act

79 Section 223 TAA imposes penalties for understatement in certain instances and in column 5 and 6 reduces such penalties depending on whether disclosure was made before or after "voluntary disclosure".

80 However, section 223 does not refer to "voluntary disclosure" in Part B of Chapter 16 and uncertainty remains whether it means that or just the normal grammatical meaning.

81 From SARS' website it seems that the SARS' position is that the taxpayer must have applied under PART B. However, in practice it seems that there are differing approaches followed by SARS and taxpayers – from the normal grammatical meaning, to applied under PART B, to qualifying under PART B to even the extreme of having a signed contract under PART B.

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

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

Amendment to section 125 of the TAA Act

84 The right of appearance in a tax court is currently regulated by section 12 and section 125 of the TAA. These sections set out when a senior SARS official may appear on behalf of SARS or the Commissioner in proceedings in any matter before the Tax Court or High Court.

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

86 Submission: Given the importance of these matters within the Chartered Accountancy profession and specifically within the tax industry, right of appearance for tax practitioners is sought in respect of and only in the context of the process and proceedings involving a dispute between the taxpayer and SARS that is before the courts – that is, the right to appeal against an assessment/decision made by SARS in the Tax Court.

87 Section 125(2) should be reinstated into the TAA.

[1] The sub-section used to read as follows: "The 'appellant' or the 'appellant's' representative may appear at the hearing of an appeal in support of the appeal". It was deleted by s. 26 of Act, No. 13 of 2017.

Submission File: #747746

23 August 2019

National Treasury

Ms Adele Collins (South African Revenue Service)

Per email: 2019AnnexCProp@treasury.gov.za
acollins@sars.gov.za

Dear National Treasury and Ms Collins

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2019

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill (DTLAB19) and Tax Administration Laws Amendment Bill 2019 (DTALAB19). As opposed to prior years, where a single submission has been made, our submission this year has been divided into three parts, namely matters involving amendments to –

1. The Income Tax Act, 58 of 1962, as amended (the Act);

2. The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and

3. The Tax Administration Act, 28 of 2011, as amended (the TAA Act).

We have set out in detail in **Annexure A,** our comments in relation to the matters referred to point 2 above pertaining to the VAT Act.

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

Yours sincerely

David Warneke **Pieter Faber**

Chairperson: National Tax Committee **Senior Executive: Tax**

The South African Institute of Chartered Accountants

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ANNEXURE A

CATEGORY – VALUED ADDED TAX

Financial Services to include the transfer of ownership of a long-term re-insurance policy

Amendment to section 2(1)(i) (Clause 65)

1 Section 2(1)(i) of the VAT Act is amended to specifically include the transfer of a long-term reinsurance policy as a "financial service". The proposed amendment removes the uncertainty that existed as to whether or not the transfer of long-term reinsurance policies is an exempt financial service.

2 Submission: We welcome the proposed amendment and have no further comment.

Refining the VAT corporate reorganisation rules in relation to VAT

Amendment to section 8(25) (Clause 66)

3 Section 8(25) of the VAT Act will be amended to include the supply of fixed property where the supplier and the recipient agree in writing that immediately after the supply, the supplier will lease the fixed property from the recipient.

4 The proposed amendment will include transactions where the only asset being transferred will be fixed property provided it will be leased back to the supplier once transfer of the property is completed. This amendment will address the adverse cash flow consequences of such fixed property transfers within a group of companies.

5 Submission: We welcome the proposed amendment but would suggest that this amendment be extended to include movable property.

Reviewing section 72 of the VAT Act

Amendment to section 72 (Clause 71)

6 The proposed amendment includes a requirement that a decision in terms of section 72 of the VAT Act may only be issued by the Commissioner if similar difficulties, anomalies or incongruities have arisen or may arise for any other vendor or class of vendors of the same kind or who make similar supplies of goods or services.

7 According to clause 72(2) of the draft Taxation Laws Amendment Bill (TLAB), the amendments to section 72 are deemed to have come into operation on 21 July 2019 and apply to all applications made on or after that date. The Explanatory Memorandum (EM), however, simply stipulates that the amendments are deemed to have come in operation on 21 July 2019.

8 The impact of the proposed amendment to the legislation on section 72 decisions already issued is not clear.

9 Decisions already issued by the Commissioner contain a proviso that the decision is only valid for as long as there is no change to the underlying legislation. This could have the undesirable effect that all decisions will no longer be valid from the date the proposed amendments to section 72 are promulgated. It is also our understanding that SARS' view is that the current ruling will in fact be withdrawn from date of release of the draft Bill namely 21 July 2019, making all such taxpayers non-compliant retrospectively.

10 Conflicting decisions may then simultaneously be in force in relation to the same issue.

11 It should also be borne in mind that costly and time-consuming system amendments would in many cases be required to comply with the amendments to the VAT Act, which also cannot be implemented overnight.

12 Submission: The proposal to withdraw the current rulings on date of announcement or promulgation is impractical. Explicit clarity should be provided on the status of existing section 72 decisions. Furthermore, we suggest that the amendments be brought into effect from a future date in order to provide vendors or classes of vendors with current section 72 arrangements with sufficient prior notice as to whether their arrangement will be renewed or not, and they should be allowed sufficient time to implement system amendments.

13 It seems that vendors will be required to demonstrate that similar difficulties, anomalies or incongruities exist for other vendors or class of vendors of the same kind or who are making similar supplies of goods or services before a section 72 arrangement will be made.

14 It is not clear how narrowly "similar" or "of the same kind" should be interpreted and this will give rise to practical difficulties.

15 Furthermore, the business operations of vendors are confidential, and so are the underlying agreements between the parties. A vendor will not have insight into the contractual arrangements of another vendor's operations. If a vendor has a unique operation or a unique business model, then it is quite likely that the specific VAT Act provisions may cause difficulties for such vendors and this would also apply to vendors in monopoly positions, such as certain State Owned Enterprises, who would all be prejudiced as SARS will not be able to make an arrangement to accommodate the vendor.

16 Submission: Section 72 should not place the *onus* on the taxpayer to determine whether other vendors of the same kind are experiencing similar difficulties. Further,

section 72 should be applicable to and take into consideration the unique difficulties experienced by a vendor where there are no other vendors that make similar supplies or who operate similar business models.

17 It is not clear why it is proposed that the word "arrangement" be deleted in section 72(1). All the BGR's issued by the Commissioner under section 72 seem to be "an arrangement". If it is considered that "decision" and "arrangement" are synonymous in this context, then it would make sense to delete the words to avoid duplication.

18 Submission: National Treasury should provide more clarity with regard to the reason for and purpose of the deletion of the word "arrangement".

19 It is proposed that the words "substantially" and "ultimate" be deleted from par (i) of the first proviso. If the intended measurement is that the VAT liability of each vendor involved in a transaction is considered individually, then it is most likely that a section 72 decision will hardly ever be made in the case of a class of vendors.

20 However, if the VAT liability of such class of vendors is measured collectively, taking into account output tax and input tax that would otherwise have been payable and deductible, then the deletions would be in order.

21 Deleting these words may also render section 72 more or less superfluous (especially deleting the word "ultimate") which then requires a macro assessment instead of a micro-assessment, which increases the difficulty of interpretation and application.

22 Submission: National Treasury should provide guidance as to how they would consider the VAT liability to be measured for the purpose of par (i) of the proviso.

23 Alternatively, it should be proposed that proviso (i) be amended to read along the lines of: *(i) have the effect of reducing or increasing the tax payable by a vendor or class of vendors collectively, as calculated under section 16(3)*.

24 Our understanding of the proviso to section 72 is that either par (i) or par (ii) will prevent the Commissioner from making a decision or arrangement under section 72. Therefore, if a decision does not result in any reduction or increase in the VAT payable, but it is considered to be contrary to the construct of the VAT Act, then the Commissioner may not make the decision or arrangement. There are often disputes as to what exactly is "policy intent" and this can at times be confused with SARS' own internal administrative policies with regard to the interpretation of the VAT Act.

25 The wording of proviso (ii) to subsection 1 is ambiguous. It seems that it can be interpreted as follows:

(i) The decision shall not be contrary to the construct and policy intent of the VAT Act as a whole, or it shall not be contrary to any specific provision of the VAT Act; or

(ii) The decision shall not be contrary to the construct and policy intent of the VAT Act as a whole, or it shall not be contrary to the construct and policy intent of any specific provision of the VAT Act.

26 The Commissioner will not be required to make a decision under section 72 unless there is a difficulty or anomaly in the application of a specific provision of the VAT Act. If the proviso is to be interpreted as set out under (i) above, the Commissioner will, it appears in our view, never be allowed to make a section 72 decision.

27 If the proviso is to be interpreted as set out under (ii) above, then the difficulties with regard to the subjective interpretation and application of the "construct" and "policy intent" arise.

28 Submission: The reference to "construct" and "policy intent" do not seem to belong within the legislation, as these are embedded overarching principles applicable to the VAT Act as a whole and not only section 72. This could potentially also be contradictory to "the manner in which [any provisions of the VAT Act] shall be applied" and potentially render section 72 moot.

29 For example, the application of section 72 to the airline industry where foreign airline owners who lease aircraft to South Africa customers are absolved from the requirement to register for VAT, on the basis that any VAT which the foreign owner would charge the local recipient, could be claimed back as an input tax deduction by the local recipient.

30 This would presumably be contrary to the policy intent of s23(1) of the VAT Act, even though it may not necessarily be contrary to the policy intent of the VAT Act as a whole as the net position is the same.

31 On this basis, it appears that all such vendors would in future have to register for and charge VAT to their local recipients, including those who are currently in possession of section 72 approval, even though SARS has established a precedent in this regard.

32 It is unclear what the purpose of the proposed new section 72(2) is.

33 SARS is entitled to apply the provisions of section 72 without the requirement of an application by a vendor or class of vendors for a ruling. SARS has issued many section 72 rulings to overcome difficulties or anomalies where there was no prior application under Chapter 7 of the Tax Administration Act (TAA) by a vendor or class of vendors. Examples are BGR 12, 14, 34, 37, 39, 46 and 51.

34 Submission: We recommend that the proposed section 72(2) be deleted. Alternatively, it could simply state that any decision or arrangement made by the Commissioner under section 72 must be made in terms of a ruling as contemplated in

section 41B or Chapter 7 of the TAA. Such a ruling will then have a binding effect on SARS.

35 Our understanding of the new proposed section 72(3) is that the Commissioner wants to publish a list of transactions or matters where a section 72 decision or arrangement will not be made, probably similar to the "no-rulings" list currently contained in Government Notice 748 of 24 June 2016.

36 If our understanding is correct, the Commissioner would then decide beforehand in which instances he will not make a section 72 decision or arrangement, without having to consider the merits of the applicant's case and whether the circumstances in fact do actually qualify for the application of section 72.

37 In this regard we do not believe this to be similar to the "no rulings list" as that seeks an interpretation of law, whereas this seeks a facts based practical solution where the law does not meet its intended purpose.

38 Submission: This may be contrary to the provisions of section 3 of the Promotion of Administrative Justice Act, 2000, which entitles every person to fair administrative action which is procedurally fair and the person must be afforded a reasonable opportunity to make representations. The Commissioner has a statutory duty to objectively consider such representations and thus the inclusion of this subsection should be reconsidered.

39 It is worth comparing the apparent vast use of wording in the proposed subsections (2) and (3) to the one-liner used in s17(1) i.e. "……as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or section 41B". The sections that have been specifically omitted from the proposed subsection (2) to section 72, could create ambiguity as to which section(s) of the TAA apply to any other ruling applications.

40 For example, in practice, an application for approval to use an alternative apportionment method is not subject to an application fee, however, given the use of the word "or" in section 17(1), presumably section 79(6) read with section 81 of the TAA applies to such an application as it has not been specifically removed as is the case with 41B(1)(i), or specifically applicable as is the case with the proposed subsection (2) to section 72.

41 Submission: It would be preferred if the proposed section 72 could follow a similar construct to that in s41B(1)(i) by only listing the sections that are not applicable. This will provide for more concise drafting, as well as an opportunity for the EM to explain why the particular sections are being omitted from section 72.

42 Section 72 is not currently a "rulings section", but section 41B is. It appears that section 72 is now being made into a "rulings section" in its own right and, on this

basis, the proposed subsections (2) and (3) appear to be largely duplicating what has already been provided for in section 41B (e.g. proposed subsection (3) vs s41B(1)(ii)(bb)). However, when comparing section 41B to the proposed amendments to section 72, it is important to note that -

43 Section 72 applications will henceforth be subject to an application fee as provided for in s79(6) read with s81 of the TAA, presumably to attract applications only when they are absolutely needed;

44 Section 72 rulings will likely not provide protection to vendors as section 82(1) of the TAA will not apply to require that SARS must interpret or apply the VAT Act to the person in accordance with the ruling;

45 Section 72 rulings may henceforth be cited in any proceedings, including court proceedings, as section 82 and section 88 of the TAA will not apply, whereas currently section 72 does not allow this.

46 Neither sections 72 nor section 41B of the VAT Act nor Chapter 7 of the TAA make provision for the time frame within which a person must re-apply for rulings subject to an expiration date.

47 Although in practice SARS in some cases allows the existing ruling to remain in force after the expiration date, provided the person has timeously submitted a re-application, no legislative provisions exist in this regard.

48 Submission: We recommend that provisions be incorporated into sections 72 and section 41B of the VAT Act and Chapter 7 of the TAA to the effect that the re-application of rulings subject to expiration dates must be made within a particular period prior to the expiration date of the ruling.

49 Further, we recommend that a provision be included to the effect that if the person submitted the re-application within the required period, the existing ruling will remain in force until the re-application has been confirmed, amended or declined by SARS.

50 Taking all the above comments into account, it would be useful to understand exactly what National Treasury's concerns are with this section, as the explanation in the EM is vague and does, unfortunately, not assist in this regard.

51 Submission: We have fundamental concerns regarding the proposed section 72 amendments, and we request a meeting with National Treasury and SARS to discuss this section specifically. The normal workshops in which all the proposed amendments are discussed will not be a suitable forum or allow sufficient time to discuss the concerns.

Refining the VAT treatment of foreign donor funded projects

Amendment to section 1 (Clauses 64, 66 and 70)

52 The proposed amendments clarify the uncertainty as to who must register a foreign donor funded project for VAT. The definition of a "foreign donor funded project" is amended to include a requirement that it "has been approved by the Minister of Finance as a foreign donor funded project for the purposes of the definition".

53 Submission: We recommend that SARS regularly publishes an updated list of approved foreign donor funded projects.

54 The requirement in the definition of "foreign donor funded project" to **obtain prior approval from the Minister of Finance** seems to be problematic. The Explanatory Memorandum refers to a guideline to be issued by SARS outlining a streamlined process to be followed to obtain this required approval. As with any ministerial approval (despite any promised streamlined process), it is expected that significant delays will be experienced to obtain such approval. Any undue delays in obtaining approval will place the foreign donor funding and the project in jeopardy. The implementing agency will not be able to accept foreign donor funds prior to obtaining the ministerial approval, as the project must be free of income tax and VAT as a condition of the donor funding. If the ministerial approval is not granted for any reason or if it is delayed, then the recipient will be in breach of the donor funding conditions which may impact on all future donor funding.

55 Submission: We caution that this streamlined process should be in place before the effective date of the proposed amendment to avoid delays in the approval process given the importance of these projects. An amendment to section 8(23) was previously introduced to obtain ministerial approval for Housing Schemes that would fall within that section. It was later realised that such ministerial approval could not be provided or obtained, and this requirement was firstly postponed for two years and thereafter repealed.

56 In order to avoid a similar experience, clarity on the following should be provided before any amendment in this regard is implemented: exactly what is meant by a "streamlined process" to obtain approval, what would be required in order to obtain approval and how long such approval will take.

57 It would also not make any sense to implement such a requirement unless the process has been properly considered and tested beforehand.

58 In order to further avoid the expected delays in obtaining ministerial approval, we recommend that organs of foreign states, such the National Institute of Health, Centre for Disease Control and Prevention, USAID etc be pre-approved as qualifying foreign donors (as opposed to each projected funded by them), as all the donor funding

provided by all these institutions, will in any event qualify for approval as foreign donor funded projects. A streamlined approval process can then be implemented for any other donor organisations which are not "pre-approved".

59 There are certain foreign private donors (such as the Bill & Melinda Gates Foundation) which provide substantial amounts of donor funding, particularly for medical research projects to South African entities.

60 Submission: Consideration should be given to the inclusion of these foreign donors in relation to qualifying projects in the definition of "foreign donor funded project".

61 The definition of "enterprise" is amended to include the activities of an "implementing agency" as opposed to the activities of a foreign donor funded project. It is unclear as to how this will impact the current registrations of foreign donor funded projects when the amendments become effective, i.e. whether current registrations would need to be cancelled and a new VAT registration for the implementing agency would be required.

62 Submission: Clarity should be provided with regard to the registration status of uncompleted foreign donor funded projects as at 1 April 2020. The proposed amendments should preferably only apply to all foreign donor funded projects commencing on or after 1 April 2020.

63 As mentioned above, activities of an implementing agency are now included in the definition of "enterprise".

64 Submission: Clarity should be provided as to whether a single VAT registration for an implementing agency which manages and administers multiple foreign donor funded projects would be in order, or whether a separate registration for each foreign donor funded project managed by the implementing agency is required.

65 Paragraph (b) of the new definition of "implementing agency" includes an institution or body appointed by a foreign government, as contemplated in s 10(1)(bA)(ii) of the Income Tax Act.

66 Submission: Clarity should be provided as to why multinational organisations as contemplated in s 10(1)(bA)(iii) of the Income Tax Act are not also included in this definition.

67 Where a government department receives foreign donor funding for a project, and it in turn contracts with another person to implement, operate, administer or manage the project, it is not clear as to whether both the government department and the person who contracts with the government department, who are both "implementing agencies", are both required to register for VAT. Both could be considered to implement, operate, administer or manage a foreign donor funded project.

68	Submission: Clarity should be provided on the above matter.

69 Where the government department receives the foreign donor funding and pays it on to the implementing agency to implement the project, it is not clear as to whether such payment to the implementing agency will fall within the ambit of section 8(5B), being a payment received from an international donor.

70	Submission: Clarity should be provided on this matter.

71 It is not clear whether the words "to implement, operate, administer or manage a foreign donor funded project" only apply to paragraph (c) of the definition of "implementing agency" (and not also to paragraph (a) or (b)) in which case the words should follow directly after paragraph (c), or whether they apply also to paragraph (a) or (b) of the definition.

72	Submission: Clarity should be provided on this matter.

73 The term "Official Development Assistance Agreement" is currently not defined.

74	Submission: We recommend that this term be defined, potentially by adopting the OECD definition.

Goods supplied consist of sanitary towels (pads)

Amendment to section 11(1)(w) of the VAT Act (Clause 68)

75 The proposed insertion of section 11(1)(w) is to correctly capture the supply of sanitary towels which was incorrectly included under section 11(1)(j) of the VAT Act.

76	Submission: We welcome the proposed amendment to correct the legislation.
77	We recommend further that "tampons" also be afforded the benefit of the zero rate (per recommendation of the VAT Panel chaired by Prof Ingrid Woolard).