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Dear Ms Collins

**SUBMISSION: REPRESENTATIONS ON THE DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL 2015 (DTALAB15)**

SAICA's Tax Administration sub-committee present herewith written submissions on the above-mentioned draft Bill on behalf of the SAICA National Tax Committee.

The submissions include a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification-suggestions for potentially ambiguous provisions. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. In this respect, you are more than welcome to contact us.

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

Yours sincerely

**Dr. Beric Croome**  
**CHAIRMAN: TAA sub-committee**

**Pieter Faber**  
**PROJECT DIRECTOR: TAX**

Attached:

- ANNEXURE A: Detailed submission



## ANNEXURE A

### DETAILED SUBMISSIONS

#### 1. GENERAL

##### Oversight of Bill by Tax Ombud

1. It was noted by the CEO of the Tax Ombud at the recent Deloitte Discussion Forum in August 2015 that other jurisdictions do submit a draft bill to the Tax Ombud equivalent for comment on the protection of taxpayer's rights.
2. In our view, the one sided nature of the Tax Administration Act 28 of 2011 ("TAA") is quite evident and this year's proposals represent an exemplary example that taxpayers rights get short shifted in SARS' search for more power and rights. It is quite alarming that even the judiciary are starting to comment, not only on the overzealous legislation, but also as to how it is applied in practice.
3. For example, in *Commissioner for the South African Revenue Service v eTradex (Pty) Ltd and Others* (12949/2013) [2014] ZAWCHC 142; 2015 (3) SA 596 (WCC) (9 September 2014) Rodgers J notes some of these incidents.
4. At 73 he notes that in practice SARS essentially copy and paste preservation orders without applying their minds to the facts. This is a very powerful provision and yet very little accountability seems to go with it.
5. At 70 he notes the constitutional unfairness of excluding the taxpayer from such ex parte proceedings by not giving notice, a right SARS proposed to the legislator in the TAA which has gone without scrutiny.
6. In respect of the scope of the rights of SARS to compel dissipation of assets by the curator he states (our emphasis):

*"Section 163 finds its primary application where the amount of tax has not yet been ascertained (i.e. where SARS cannot execute in the ordinary way). This being so, I do not think it appropriate that a preservation order should (as here) contain, as a standard provision, a power on the part of the curator to realise assets in satisfaction of the taxpayer's tax liability. I do not overlook that s 163(7) empowers a court which grants a preservation order to make ancillary orders regarding how the assets must be dealt with, including 'the realising of assets in satisfaction of the tax debt'. However, I do not understand how, in general, it is justifiable, at a time when the tax liability is unknown and contentious, to empower a curator to set about selling assets and appropriating monies towards an alleged tax debt. The order should rather make provision for SARS to approach the court at a*



*later stage (once the tax has been properly determined) for the granting of authority to the curator to realise the preserved assets in satisfaction of the tax debt. In other words, a court is unlikely to be able to make an informed and fair decision on this question at the time the application is initially granted and confirmed.*

7. The criticism of SARS' practice of audit and issuing of assessment without proper application of their minds is well documented in *Commissioner South African Revenue Services v Pretoria East Motors (Pty) Ltd* (291/12) [2014] ZASCA 91; [2014] 3 All SA 266 (SCA); 2014 (5) SA 231 (SCA) (12 June 2014) and no further comment is required in this respect.

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| <ol style="list-style-type: none"><li>8. <u>Submission</u>: Our concern in respect of the seemingly unrestrained legislative approach and practice taken by SARS in this regard is therefore not without substantive merit and an impartial view such as that of the Tax Ombud may just bring some much needed perspective and balance.</li></ol> |
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### **Separation of powers**

9. We again emphasize our concern at the lack of separation of powers between legislator and administrator as regards the TAA, especially when dealing not with administrative arrangements but powers of SARS officials and the scope of such powers.
10. SARS drafts, implements and administers this powerful piece of legislation and there appear to be limited checks and balances in place to prevent the abuse of its powers, with many forms of accountability lacking from the legislation.
11. Once SARS faces resistance from taxpayers who are fully entitled to question and understand the basis on which SARS assesses them, or requests information from them, SARS immediately amends the legislation to prevent taxpayers from being able to ask questions. This is confirmed in the Draft Memorandum on the Objects of the TALAB15 ("MoO") as well as in the SARS Short Guide to the Tax Administration Act, 2011.
12. This is concerning from an administrative justice and constitutional perspective and is a matter that the Minister and Parliament should be addressing as a matter of urgency.

### **Relevant information and the Auditing profession**

13. The auditing profession faces many challenges globally and in South Africa, with the public expectation gap growing every year. It further faces a challenge to ensure sufficient persons are entering the profession with numbers dwindling due to various factors, including the seemingly unachievable expectation gap.



14. In times of global economic hardship, the financial reporting failures of companies are held by public perception to be a direct reflection of the auditing quality, which correlation is incorrect.
15. Like SARS, the auditing profession relies heavily on companies, their management and staff to provide full and accurate information as to the financial records and controls of the company. However, unlike SARS, the auditor has limited statutory clout to compel disclosure or take direct enforcement action (See section 93 Companies Act 2008) even though it may grant a statutory right to such information.
16. Much reliance is placed on the trust relationship between auditor and client to ensure the effectiveness of the audit in identifying material misstatement in the financial reporting of a company or material defects in the relevant financial controls.
17. Historically, the auditing profession and SARS have collaborated to ensure that the trust relationship between auditor and client remains intact, guaranteeing that the auditing function has been performed in an environment of full disclosure. This collaboration was even reduced to writing in the form of a written ruling issued by SARS.
18. However, with the advent of the TAA, SARS in 2010 unilaterally withdrew the ruling.
19. Today the landscape has changed considerably for auditors as they have become the forefront of SARS' request for relevant information in terms of section 46 of the TAA. SARS now, on a regular basis, demand the contents of auditing files in respect of both recorded facts and any retained opinions of law for both the auditor and any third parties.
20. The consequences of SARS' approach to the matter has resulted in a deterioration of the trust relationship between auditors and their clients, with clients becoming reluctant to provide full disclosure of information to auditors in the fear that it will be requested by SARS or misinterpreted out of context by SARS. Auditors are being perceived as merely agents of SARS.
21. This has serious repercussions for the profession and the ability of the profession to conduct its public mandate to ensure that financial reporting conforms to the necessary requirements so that external parties, including SARS, can rely on the validity and integrity of the financial reporting.
22. A further concern is raised in respect of privileged information, as the Companies Act 2008 does not regulate access to privileged documents in carrying out the mandate of auditor in section 93. The concern is therefore whether the client's privilege is waived in respect of legal advice taken if such advice is disclosed to the auditor and consequently provides the opportunity to SARS to also demand such opinions.



23. The current proposals in the DTALAB15 to further expand SARS' powers in respect of both relevant information and privileged documents, merely compounds the problem.
24. It is clear that the auditing profession, its regulator the Independent Regulatory Board for Auditors (IRBA), the Minister of Finance as the custodian of National Treasury and SARS and the Minister of Trade and Industry as the custodian of the Companies Act 2008, will need further and urgent engagement to find common ground on the concerns raised.
25. It is submitted that a balance needs to be attained between SARS' ever growing need for information in the global economy and the public interest of having a properly functioning audit profession.



## CLAUSE BY CLAUSE

### 2. CLAUSE 2.2

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 2	Section 3(4)

26. We are concerned about SARS' perception that the mere deletion of the CSARS discretions results in a more legislative implementation of self-assessment (see our submission on self-assessment).
27. However, should SARS proceed with this approach, discretions in respect of the determination of the tax liability should be deleted in general. In this regard certain omissions remain such as in section 11(e) Income Tax Act 58 of 1962 ("ITA").
28. As these discretions impact on the provisions in the ITA, the effective dates should be aligned with those in the Draft Taxation Laws Amendment Bill 2015 (TLAB15).

29. Submission: The effective date of the amendments to this provision should be aligned with the effective date of the consequential amendments to the discretions in the corresponding provisions in the DTLAB15.

30. The amendments to the discretions and the amendment to section 3(4) may have different effective dates which may result in anomalies.

### 3. NEW: SELF-ASSESSMENT

#### Self-assessment by practice

31. The MoO states that SA already in practice has a self-assessment system though the law, especially for income tax, quite clearly is one of administrative assessment.
32. The fact that SARS even acknowledges that it has implemented self-assessment in practice is worrisome as it means SARS has not applied the law according to its tenor and secondly does not appreciate what a substantial change it is.
33. The first concern is clear from the anomalies created by the SARS modernised system. Firstly assessments to which SARS officials should have applied their minds (Refer to Pretoria East Motors case above) are now computer generated



with SARS applying its mind after the fact subject to levying penalties as with in a self-assessment tax system.

34. Secondly, it has resulted in returns which effectively require and compel the taxpayer to express an opinion as to whether the law applies to the facts (self-assessment) and not the taxpayer providing facts whereupon SARS should be applying its minds and making the determination of the tax liability.
35. For example, if a taxpayer disclosed depreciation and the nature of the assets to SARS, it is incumbent on SARS to calculate and determine whether the taxpayer qualifies for a section 11(e) wear and tear allowance and how much, hence the embedded discretion. In practice SARS requires the taxpayer to make this determination which is his opinion, and when SARS disagrees penalties result.
36. In our view this has been a misapplication of the law due to SARS applying practice that is not supported by the law.
37. Submission: SARS should reevaluate whether its current application of administrative assessment is in conformity with the law and whether the law currently permits self-assessment for income tax.

#### *Burdens and concerns on self-assessment*

38. SARS in the MoO refers to both Australia and the UK as examples of successful implementation of the self-assessment system.
39. Yet Australia has had two review committees since 1988<sup>1</sup> to seek a balance between taxpayers' rights and obligations which had been overly burdensome on the taxpayer in the initial migration. It is noted that many of the concerns raised in this report remain evident in our law with SARS ignoring the lessons already learnt.
40. Furthermore, it is also acknowledged that self-assessment is administratively burdensome on the taxpayer. In this regard the UK in its budget speech 2015 in April 2015 has undertaken to scrap the self-assessment system to "allow business to do business and not tax administration". SARS' conclusion that the system was successful therefore seems misplaced.
41. It should also be recognised that SA has a very complex tax law that has suffered over 1500 pages of amendments in the last 5 years alone.
42. The expectation with self-assessment is that taxpayers and not SARS officials, the latter who should be well versed in the law, will now not only be compelled

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<sup>1</sup> <http://selfassessment.treasury.gov.au/content/discussion.asp?NavID=2>



to interpret and apply the law to facts but will carry the risk of doing so. The risk in an administrative assessment system is on SARS.

43. A very daunting task given that the estimated illiteracy rate is estimated at more than 17% of adults older than 20 years<sup>2</sup>, only 28,5% had matriculated and only 12.1% had a tertiary education<sup>3</sup>.
44. This onerous requirement is recognised in Australia, where it has reduced its penalty regime substantially to allow for this margin of error and has reduced its prescription periods to less than 5 years to provide certainty (note SA proposing to increase prescription to 8 years in DTALAB15).
45. The right to object by the taxpayer was also increased initially to 4 years (note SA proposing to limit to 6 months in DTALAB15).
46. Mechanisms to assist taxpayers were also introduced such as binding oral advice and the ability to rely on publications (Note that Guides are currently excluded from official publications).

47. Submission: It is clear that SARS does not appreciate the legal implications as well as the socio-economic implications of migrating to self-assessment for taxpayers. Much of this is as a result of its migration without law to support that approach to date. It is submitted that a full review of the TAA be conducted and an economic impact study of SA's ability and readiness to actually implement self-assessment.

#### 4. CLAUSE 2.3

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 3	Section 35A

48. While the concern is understood, it is submitted that the proposed amendment does not resolve the problem in its entirety.
49. For the amount to be a final income tax payable, and not just a provisional payment, it should be preceded by some form of assessment.
50. In this regard, the proposed amendment should deem the payment to constitute a self-assessment after expiry of the 12 month period for which no return is required.

<sup>2</sup> <http://citizen.co.za/31407/literatez/>

<sup>3</sup> [http://www.southafrica.info/about/facts.htm#.VdsA7Gcw\\_IU](http://www.southafrica.info/about/facts.htm#.VdsA7Gcw_IU)



51. This would address two concerns, namely the lack of an assessment for the payment of the income tax liability and secondly, it removes the return compliance requirement imposed by the preceding legislation. The latter would have remained under the current proposed wording.
52. In effect the foreign taxpayer is paying more tax but should then be relieved of the compliance obligation.

53. Submission: (1) The payment should be deemed to be a self-assessment after expiry of the 12 month period and (2) the requirement to submit a return should then fall away.

**5. CLAUSE 2.6**

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 6	Para 1, 4 <sup>th</sup> Sch.

54. The purpose of the insertion of the words “settlor or beneficiary” to the definition of “personal service provider” is not clearly explained.
55. The term “settlor”, which is akin to a trustee under South African legislation, is not a term generally used in relation to trust law in South Africa and is not a defined term for the purposes of the amendment to the definition of a “personal service provider”.

56. Submission: The term “settlor” should be defined with clear precision within the context that it is intended.

**6. CLAUSE 2.7**

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 7	Para 5 4 <sup>th</sup> Sch.

57. Clarity is sought on whether the removal of the discretion and replacement with a directive implies that the directive process will be expanded to accommodate these applications and the forms revised for directive applications?
58. If, in this regard, changes to the directive application systems are difficult to implement, the DTALAB15 must be amended to reflect the ‘process of application’, alternatively, the MoO must be expanded in this regard.



59. Submission: We submit that SARS clarify the prescribed form and manner to be followed in order to submit such an application to SARS in the legislation.

**7. CLAUSE 2.8**

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 8	Para 9 4 <sup>th</sup> Sch.

60. The amendment in respect of medical scheme tax credits is welcomed.

**8. CLAUSE 2.9**

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 9	Para 11A 4 <sup>th</sup> Sch.

61. Though “remuneration” includes certain capital amounts it does not include as a general rule capital gains as envisaged in the Eighth Schedule.

62. Section 8C ITA does however include capital distributions and this amendment to our understanding is merely to include these as being subject to PAYE and not the future capital gains.

63. Submission: It is submitted that the MoO be clarified to confirm the above understanding.

64. The provision has been amended with more generic wording “amount referred to in section 8C” rather than using the word gain.

65. However in the deeming provision it then refers again to gain or that amount which does not broaden the scope but merely adds confusion as the more general wording would already include any gains in section 8C.

66. Submission: It is submitted that the wording should read: “.....amount referred to in section 8C which is required to be included in the income of the employee, **[the amount of that gain or]** that amount must.....”



## 9. CLAUSE 2.12

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 12	Para 13 4 <sup>th</sup> Sch.

67. The incidence of employer non-compliance with submitting the employees' tax declaration has a direct impact on an employee's ability to submit his or her tax returns due to the prohibition in paragraph 14.
68. Currently the law has no remedy for employees' who have had PAYE withheld but have not received an IRP5 which has also been submitted to SARS.
69. The law then imposes an obligation on the employee to request such IRP5 where it has not been issued but provides no relief where the employer remains non-compliant.
70. This is compounded where the company goes into debt rescue, administration or liquidation and the completion of the employer's compliance obligation is deferred. In practice in such instances SARS would accept the declaration by the employee of the income per the payslips but would not give credit for the PAYE withheld without resorting to the dispute resolution mechanisms.
71. In many instances it also results in SARS wanting to compel the employee to seek the employer's compliance rather than SARS doing so as required by law.

72. Submission: Paragraph 13 and 14 should be amended to include a remedy for the employee to be able to comply with his or her income tax obligations and obtain credit for PAYE withheld where the employer has failed to submit is PAYE declaration or issue IRP5's.
73. It should also be clarified that it is SARS who should compel the employer to comply for example by the issuance of some form of compliance notification preceding any offence provisions to be applied.



## 10. CLAUSE 2.16

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 16	Para 19 4 <sup>th</sup> Sch.

### Review mechanism

74. It is noted that clause 16(b) makes it clear that any increased estimate made by the CSARS will not be subject to objection or appeal.
75. The pre-TAA wording "...and the estimate as increased shall be final and conclusive..." was deleted by Act 28 of 2011 as it seems that the old limitation on taxpayers' rights to dispute (i.e. object and appeal to) unreasonable increased provisional tax estimates by SARS (especially in respect of the first provisional tax period) was regarded as prejudicial.
76. This also coincided with the introduction of paragraph 28A of the Fourth Schedule to the ITA and the limitation of taxpayers' ability to request a refund of an overpayment of provisional tax in terms of section 190 of the TAA.
77. It is submitted that this approach is wrong and that taxpayers should have an inherent right to object and appeal against the decision of the Commissioner to increase an estimate as envisaged in paragraph 19(3) of the Fourth Schedule to the Act.
78. A taxpayer should not be required to seek relief from the High Court where SARS increases an estimate for provisional tax purposes.

79. Submission: The Act should provide for an internal remedy whereby SARS' decision to increase an estimate for provisional tax purposes may be reviewed without the taxpayer incurring the substantial costs of applying to the High Court for relief.

### Exclusions for provisional tax

80. In paragraph 19(1)(a) it is proposed that the wording "should the Commissioner so require" be removed from the paragraph that deals with the submission of provisional tax returns for a company.
81. By removing this discretion, all companies would be required to file provisional tax returns. This would mean that companies that are dormant, nominee companies, etc. would also be required to file provisional tax returns, notwithstanding the fact that these entities would never be liable for tax. We



note that this is currently the SARS practice, notwithstanding the available discretion, which results a large amount of wasted time and costs.

82. This creates an unnecessarily administrative burden on such entities to lodge such returns and on SARS to process and follow up on such returns without any real economic or operational benefit. This is particularly relevant where a company is already coded as “dormant” by SARS.

83. Submission: The definition of “provisional taxpayer” should be amended to allow the Commissioner to exclude companies under the circumstances described above.

Basic amount reduction

84. Paragraph 19(1)(c) compels the taxpayer to seek approval from SARS before an estimate for an amount less than the basic amount may be used.

85. However it provides no procedure as to how to do this.

86. Of critical importance is timing of this application and response to prevent SARS not having a reasonable time to review the request or the taxpayer not having sufficient time to submit the return timeously, especially given the proposed paragraph 20(2A).

87. As the taxpayer has no control over how long SARS may take to respond, the obligation to submit the estimate for the purposes of paragraph 19 should only start to run for a specified time from date of the response received from SARS.

88. Submission: It is submitted that paragraph 19(1)(c) should provide for a minimum time period, for example 14 days before the estimate is due for the application to be made.

89. Furthermore, it should provide that notwithstanding paragraph 19 and 20, the taxpayer will have 14 days from the date of the notice from SARS that the request is accepted or rejected, to submit the estimate.

**11. CLAUSE 2.17**

<u>Draft Amendment Bill</u>	<u>Income Tax Act</u>
Section 17	Para 20 4 <sup>th</sup> Sch.

Threshold



90. The threshold of R1 million has not been increased since it was introduced a number of years ago.

91. Submission: It is submitted that the opportunity should be taken to increase the threshold in order to maintain the threshold in real terms which we propose should be amended to R2 million.

Deemed Rnil estimate

92. The proposed amendments to para 20(2A) will have draconian implications for provisional taxpayers who do submit a second provisional tax return, but do so late. In our view the penalty is totally disproportionate compared to the extent of the relevant non-compliance.

93. In this regard it is unclear and highly questionable whether the remittance relief in paragraph 20(2) would apply as the submission is deemed Rnil and therefore it is arguably not calculated seriously.

94. It also remains unclear whether the taxpayer is then still required to make a return submission as technically one has been deemed to be made to the value of Rnil.

95. This overly onerous provision that applies to such general extent should in our view be reconsidered as SARS already have the right to make an estimate where the taxpayer has not made one.

96. Where no estimate is submitted by the taxpayer, SARS would in any event have to make such an estimate as the levying of the penalty does not trigger an obligation to make payment of a specified amount of provisional tax, i.e. no deemed liability results in respect of the estimate.

97. It therefore does not resolve the main problem, namely SARS collecting the provisional tax but merely disproportionately penalises minor non-compliance.

98. Submission: Paragraph 20(2) should be amended to clarify that even where paragraph 20(2A) applies, if the taxpayer does submit an estimate then the discretion should continue to apply in respect of the penalty relief.

99. Paragraph 20 should also be clarified as to whether a return can or should still be made once the deeming provision has been applied.



## 12. CLAUSE 2.25

<u>Draft Amendment Bill</u> Section 25	<u>VAT Act</u> Section 16
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### Effective date

100. The proposed amendment will apply from the date of promulgation. This will arguably negatively impact on taxpayers in relation to past tax periods.

101. Submission: The effective date of the amendment should be made clear as applying to tax periods ending on or after the date of promulgation.

### Alternate documentation

102. The amendment to section 16(f) limits the deductions of input tax to circumstances where no tax invoice or alternative document is issued by the supplier. This limits the ability of the Commissioner to accept any other document besides a valid tax invoice even in circumstances where there is other documentary proof which proves that the VAT has been paid.

103. This limits the deductions by vendors where, as a result of administrative issues, a tax invoice or alternative document has not been received. In our view this unreasonably limits the discretion in these circumstances and could result in legitimate vendors not being entitled to an input tax deduction.

104. The introduction of section 16(g) seems to provide for a further opportunity for a vendor to substantiate his entitlement to a deduction. It seems that this is the third opportunity as the vendor could have held a valid tax invoice, or applied for the Commissioner to exercise his discretion in terms of sections 20(6) or 21(7) and now, based on this insertion, could also qualify for a deduction after the event, based on information included in a public notice.

105. Submission: If SARS agrees with the above interpretation, the position above should be clarified in the MoO.

### Multiple notices

106. This section seems to envisage two public notices, one for the circumstances that could apply and one for alternate documentation.

107. Submission: We would recommend that, if relevant, all this information should be included in a single public notice.



Public notice

108. The insertion of the new paragraph (g) refers to public notices issued by the CSARS. The term “public notice” is not defined in the VAT Act but only in section 1 of the TAA.

109. <u>Submission</u> : The term “public notice” should be either defined in the VAT Act or reference made to the term in the TAA.
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Submission of returns

110. Section 16(2)(f) and (g) refer to returns furnished.

111. <u>Submission</u> : To make the legislative references consistent and prevent interpretative differences, it is proposed that the words <u>submitted</u> be consistently used as is done in Chapter 4 Part A of the TAA.
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**13. CLAUSE 2.26**

<u>Draft Amendment Bill</u>	<u>VAT Act</u>
Section 26	Section 20

112. This amendment is welcomed as a pragmatic approach to the matter.

**14. CLAUSE 2.27**

<u>Draft Amendment Bill</u>	<u>VAT Act</u>
Section 27	Section 41

113. This section now introduces a reference to section 99(2) of the TAA, while paragraphs (aa) to (cc) have not been deleted, with the effect that these requirements are extended and duplicated.

114. <u>Submission</u> : Section 41(aa)-(cc) should be amended to align to the new requirements proposed in section 99 TAA as to when prescription would apply.
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**15. NEW – SDL EXEMPTION**

115. Section 4 of the Skills Development Levies Act was amended by section 91 of Act No. 30 of 2000, to cater for the regulation of public benefit organisation in terms of the new section 10(1)(cN) read with the Ninth Schedule.



116. The wording in the previous exemption referred to all “charitable and religious organisations”, however in the amended section only selected exempt entities in the Ninth Schedule were excluded.

117. On enquiry to SARS by SAICA, SARS confirmed that there existed no policy reason for this exclusion that they were aware of.

118. Submission: The exemption from SDL in section 4 should be extended to all entities and bodies exempt under this section.

**16. CLAUSE 2.31**

<u>Draft Amendment Bill</u>	<u>Mineral and Petroleum Resources royalty (Administration) Act</u>
Section 31	Section 14

119. Given the duplication between the section 14 penalty and the understatement penalty under the TAA and the fact that this was an oversight, it is submitted that the repeal of section 14 should be made retrospective to 1 October 2011.

120. It is submitted that any instance where SARS would impose both penalties would be contrary to its own stated oversight and would be subject to judicial scrutiny.

121. Submission: As practically SARS will only be applying the TAA penalty, the amendment should be made retrospective to 1 October 2011 or the TAA penalties should expressly be excluded from 1 October 2011 to the effective date of this amendment.

**17. CLAUSE 2.32**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 32	Section 1

Definition of international tax standard

122. Section 1 of the TAA defines “international tax standard”: *as an international standard as specified by the Commissioner in public notice for the exchange of tax-related information between countries.*



123. The draft memorandum sets out that greater transparency and the automatic exchange of information between tax administrations is an important step forward in countering cross border tax evasion and aggressive tax avoidance.
  124. The introduction of the definition of “international tax standard” is stated to be necessitated to implement a scheme under which SARS may require SA financial institutions to collect information under an international tax standard, such as the OECD Standard for Automatic Exchange of Financial Information in Tax Matters, which encompasses Common Reporting Standards (CRS) that was endorsed by G20 Finance Ministers in 2014.
  125. The draft memorandum proceeds, stating that in order to implement the standard on a consistent and efficient basis, certain financial institutions must report on all account holders and controlling persons, irrespective of whether SA has an international tax agreement with their jurisdiction of residence or whether the jurisdiction is currently a CRS participating jurisdiction.
  126. It is stated that the introduction of the definition of “international tax standard” and ensuing reporting obligation (i.e. based on the amendment of section 3(2)(i) and section 26) will substantially ease the compliance burden on reporting financial institutions as they would otherwise have to effect system changes and collect historical information each time a jurisdiction is added to the CRS or SA concludes a new international tax agreement.
  127. The reporting financial institution accordingly pursuant to this amendment will be obliged by statute to obtain the information and provide it to SARS and it is stated that this should not contravene any relevant data protection laws. It is further proposed that the amendment comes into effect on the date of promulgation of the DTALAB15.
  128. The definition must be viewed in the context of section 3(2)(i) and the amendment to section 26, which deals with third party returns.
  129. The first question that arises is to what extent has SARS researched and verified that no data protection laws would be contravened and that no express discussion has been held on this matter, and whether this is merely speculative.
130. Submission: The MoO should clearly indicate which data protection laws SARS considered and why the amendment would not contravene such laws.
  131. Submission: Secondly, a clear distinction should be drawn between the information sharing obligations and powers of revenue authorities and the obligations of taxpayers.



18. **CLAUSE 2.33**

<u>Draft Amendment Bill</u> Section 33	<u>Tax Administration Act</u> Section 3
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Exchange of information

132. Any obligation to exchange information is between the competent authorities of the relevant states and not, as seems to be suggested, on the taxpayer.
133. The obligation on a taxpayer to provide information and/or relevant material must therefore be carefully examined and this may lead to unnecessary and costly disputes if applied incorrectly by the SARS officials concerned.
134. One must continue to be mindful of the clear distinction between the obligations imposed on the revenue authority concerned to exchange information and the obligations imposed on the taxpayer to provide the information.
135. At a practical level, this distinction is not always observed by SARS, as has been seen in information exchange requests that are on occasion posed directly to the taxpayer.
136. We are of the view that SARS may retain the information provided by third parties but can only exchange the information as and when required under an international tax agreement or in terms of an international tax standard.
137. Our view is therefore that SARS can only exchange the information gathered with another Revenue Authority if it is provided for in a Double Taxation Agreement, Agreement for the Exchange of Information or duly ratified Intergovernmental Agreement between the two countries, further SARS can exchange the information with other signatories to the Multilateral Convention on Mutual Administrative Assistance.
138. If, however, there is a country that exists to which none of these agreements applies, SARS cannot exchange information with that country or its Revenue Authority.
139. Further, each country may have its own data protection legislation that would prevent information such as this from being shared cross border.

140. Submission: The word “only” should be inserted between retain and exchange of information: “SARS may retain and only exchange the information...”.



Delivery

- 141. Section 3(3)(a)(iii) allows SARS to serve or deliver a request to the relevant person as required by a tax Act, which are subject to the delivery mechanisms in the TAA, including the use of eFiling.
- 142. In our view eFiling as a delivery mechanism is already a controversial mechanism due to it being a government E-service and not electronic address communications and would be inappropriate for this type of delivery.
- 143. For example a non-resident who previously registered on eFiling to submit a return due to section 35A applying to a disposal, can now receive such a request on eFiling and such request will be deemed to have been validly delivered.

144. Submission: It is submitted that requests delivered to taxpayers under these instances be limited to registered mail or an electronic address as elected by the relevant person.

**19. CLAUSE 2.34**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 34	Section 6

- 145. SARS officials have wide ranging powers and therefore the exercise of such powers should be limited to SARS officials.
- 146. We are concerned that reference to “a person” can include a person other than a SARS official delegated by the Commissioner.
- 147. Should this be the intention that CSARS can delegate powers beyond SARS officials, which we believe to be outside the scope of the enabling legislation and should be treated with suspicion, then this should be clarified in the MoO and should include the reasons why the CSARS needs such extraordinary delegation powers.
- 148. It would also raise concerns about SARS’ independence if the CSARS could delegate powers that would oblige SARS officials to report and take instruction from non-SARS officials.

149. Submission: The words “a person” should be replaced with “a SARS official”.



## 20. CLAUSE 2.35

<u>Draft Amendment Bill</u> Section 35	<u>Tax Administration Act</u> Section 11
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150. It is unclear why the Act would need to be amended.
151. CSARS either has exclusive authority to authorise and delegate representation in civil proceedings or he does not and the Act provides who may do so.
152. Having an outright exclusion which is overridden by specific exclusions is non-sensical.

153. Submission: This provision should then rather be amended to state that only such persons who have been empowered by the TAA to authorise such proceedings may do so, as clearly no exclusive right for CSARS was intended as per these proposals.

## 21. NEW – TAX OMBUD’S INDEPENDENCE

154. When the Tax Ombudsman office was created in the TAA, SAICA raised various concerns about the actual and perceived independence of his office.
155. It is worrying to note that the Tax Ombud has publicly<sup>4</sup> raised the same concerns which we expressed when the TAA was drafted.
156. Notwithstanding the above concerns, no proposals have been made to address the concerns regarding the independence of staff appointments and budgetary control.

157. Submission: (1) Section 15(1) TAA should be amended to allow the Tax Ombud to appoint his own staff and second staff from SARS in consultation with CSARS, as his office will require both to function optimally.

158. (2) It is proposed that section 15(3) TAA be amended to allow the Minister to make a direct allocation to the Tax Ombud’s office.

159. (3) Section 14(1)(a) TAA should be amended to provide for a longer, but non-renewable term of office.

<sup>4</sup> <http://www.moneyweb.co.za/mymoney/moneyweb-tax/tax-ombud-speaks-independence/>



## 22. CLAUSE 2.37

<u>Draft Amendment Bill</u> Section 37	<u>Tax Administration Act</u> Section 26
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### Third party returns.

160. In terms of the proposed amendment to section 26(3) the Commissioner may require a person to register as a person required to submit a return under this section, an international tax agreement or an international standard for exchange of information.
161. The draft MoO sets out that in order to ensure that the relevant financial institutions comply with international tax standards such as the CRS, the proposed amendment will require them to register with SARS for this purpose. The registration will allegedly assist in the administration and enforcement of SARS international tax standards, such as the CSARS. It is noted that a registration process currently exists for purposes of the Inter-Governmental agreement concluded with the US and the associated FATCA.
162. While the MoO therefore deals with banks that are required in terms of a registration process for purposes of a relevant Inter-Governmental agreement to be registered as a person required to submit a return, the wording of this section is very broad.
163. It creates an administratively unfair obligation on taxpayers to continually monitor the various agreements that SARS enters into to determine whether they would have such return obligation or not.
164. Submission: In the furtherance of legal certainty, and for ease of reference, SARS should by government notice publish the names of institutions required to register as a person required to submit a return, with specific reference to the specific intergovernmental agreement in terms of which this is enabled.

### Administrative mechanism

165. The fact that SARS may require a person to submit a return, does not currently seem to address how this requirement will be enforced in practice.
166. Even if the provisions of an international tax agreement are relied on, the fact that the revenue authorities concerned may have agreed obligations towards each other still does not mean that the offshore party has such an obligation.



167. While section 26 therefore proposes to place an obligation on an offshore party to register for purposes of submitting a return, considerable clarity is required as to the correct channels for SARS to enforce any obligation it intends to create on the offshore party to provide information relating to a related party in SA.

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| <p>168. <u>Submission</u>: If the intention is that this should be coordinated and enforced in line with international treaties, then this should be specifically clarified either in the main body of the legislation or via public notice.</p> <p>169. <u>Submission</u>: Due to the enormous administrative and cost burden imposed by these blanket information sharing agreements that SARS engage in, the affected parties should be properly consulted as to the obligation and financial burden required from them and the reasonability of such requirement.</p> |
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Definition

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| <p>170. <u>Submission</u>: “International standard” should be revised to read “international tax standard” as that term is defined in section 1 of the TAA.</p> |
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**23. CLAUSE 2.38**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 38	Section 34

171. We have concerns regarding the expansion of the reportable arrangement regime to be a make shift solution for matters which it was not meant to address.
172. When the legislation was first introduced it was directed at tax-based financing, which was the primary area of avoidance of concern at the time. Lately, the regime is being used to identify other arrangements that may present a risk to the fiscus.
173. To this end, the current legislation is not fit for this purpose in a number of respects.
174. While some of the amendments proposed address some of the areas of concern, it is our view that the regime requires a major overhaul in order to address loopholes, unintended consequences and identify BEPS in line with the OECD report on mandatory disclosure regimes.



175. While it is acknowledged that the proposed amendment would address the concern that there may be no participant in relation to certain of the listed arrangements, it should also be noted that in many instances a person may inadvertently become a promoter to a listed arrangement without being aware that they are a promoter in relation to such an arrangement.

176. Submission: With a clear obligation to report listed arrangements being placed on the parties, it is submitted that there is no need to extend a reporting obligation in relation to such arrangements to a promoter. In fact, it may be more appropriate to require parties to all arrangements to report and remove the reporting obligation from the promoter.

Broadening of scope

177. Added to the definition of “participant” is “any other person who is a party to an “arrangement” listed in a public notice as referred to in section 35(2) of the TAA and again widens the net of reportable arrangement legislation.

178. It is not clear what the policy thinking was and why this penalty is warranted. The definition accordingly seems vague and is casting the net arbitrarily too wide.

179. Submission: The inclusion of a promoter in the definition of a participant should be removed or limited to s35(1) reportable arrangements.

**24. CLAUSE 2.40**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 40	Section 42A

Scope

180. The proposed provisions apply only for purposes of Part B of Chapter 5, the provisions of s64 will continue to apply separately for purposes of Part D and that no provision is made for privileged documents for purposes of Part C.

181. Submission: It is submitted that a uniform process should apply for all claims to privilege for Chapter 5 as a whole.



**25. NEW: Insertion of section 42A into the TAA**

182. The proposal to include a procedure to regulate the position where a taxpayer asserts legal privilege is, in principle, to be supported. The proposed new section refers to a “legal practitioner” which term is not defined in the TAA.

183. Submission: The term should be defined in the TAA itself or alternatively, reference should be made to the definition contained in the Legal Practice Act, 28 of 2014.

Alignment of requirements

184. It is noted that section 64 currently regulates the issue of legal professional privilege where SARS foresees the need to search and seize relevant material. However, the provisions of section 64 do not appear as onerous as the proposed section 42A on the basis that that material which is alleged to be privileged is merely handed over to the attorney appointed under section 111 of the TAA to determine whether the material is indeed privileged or not.

185. Submission: Similar criteria for assertions of privilege should apply during the normal audit process and search and seizure operations.

Waiver of privilege

186. We refer to SARS’ presentation to the Standing Committee on Finance on the 4th of August 2015. It is concerning that SARS feels the need to insert a provision like this to effectively and timeously gather information critical to finalising audits with accurate outcomes as according to SARS, assertions of legal privilege are increasingly used to prevent or delay SARS access to information.

187. We are not aware of any other Revenue Authority that has resorted to similar legislative changes. International best practice is that a Revenue Authority can challenge the legal privilege assertion in a High Court where the client claims legal professional privilege.

188. In our view SARS’ obligation to timeously obtain information should not supersede the taxpayer’s right to privilege which is what this legislation is proposing.

189. It is our view that compliance with the wording of the proposed section could in itself amount to the waiving of legal privilege by merely providing the information set out therein. In our view certain of the subsections are broadly worded and depending on the specific information required to be provided to SARS in terms of those requirements, legal privilege could be undermined.



190. The purpose of the insertion of s42(1) is, according to the draft MoO, to provide a procedure for claiming legal privilege in the context of information requests, interviews and audits.
191. The purpose of section 42A is to preserve legal privilege. The provisions are similar in many respects to those relating to claims of legal privilege in the context of search and seizure operations, however, a superseding step is sought to be introduced which essentially requires that a taxpayer seeking to rely on legal privilege as a ground for withholding a document must provide all of the information set out in section 42A(1) to SARS.
192. If SARS disputes the validity of a claim of legal privilege, the section provides for safekeeping of the documents by a panellist appointed in terms of section 111 of the TAA and such panellists are to be chosen from among the ranks of attorneys and advocates (legal professionals who are required to maintain independence) – the rules of privilege would therefore still apply to such panellists in relation to the taxpayer’s information and provision of information to SARS by such panellists would be unlawful to the extent that it was in breach of the taxpayer’s right to legal privilege.
193. The panellist is to rule on the validity of the claim of legal privilege. If either SARS or the taxpayer is dissatisfied with the ruling of the panellist, provision is made for approach to a court to determine the issue.
194. Despite the fact that the section as a whole provides for the process of protecting legal privilege, there are subsections which are contentious.
195. The relevant subsections that we have identified as being potentially problematic are subsections 42(1)(a), (e) and (i).
196. In terms of these provisions of the DTALAB15, a taxpayer claiming legal privilege in respect of documents must provide SARS with a description of the document, the “specific purpose of the legal advice or in connection to what it was given” and “if the person [a person other than the client and in whose possession the relevant document is in] obtained the document from the client or another person, the instructions of the client or other person regarding the document”.
197. The information required to be given to SARS is required to be given despite the existence of a claim of legal privilege over the relevant documents and the type of information required to be given in the three subsections set out above may, in certain circumstances and depending on exactly what the provisions mean, lead to legally privileged information being required to be given and thereby arguably leading to a waiver of the right to legal privilege.



198. We are therefore of the view that the requirement that this information be given could possibly infringe the right to legal privilege due to the current wording. For example, where a description of a document is required (s42A(1)(a)), if the description 'legal opinion' suffices then no infringement of privilege would occur however if something more were required that may be problematic. S42(1)(e) poses even more of a challenge to privilege as information of the "specific purpose" of the advice is sought.
199. If it states that the specific purpose is "to obtain advice regarding interpretation of statutory provisions", for example, that would not be problematic however, more may be required in terms of that subsection. s42A(1)(i) is ambiguous as the "instructions regarding the document" may be read to mean instructions pertaining to, for example, storage of the document or regarding how long to keep it or in what format etc. The wording of the above subsections would need to be revised to give proper context as to what information will satisfy the requirements set out therein.
200. In providing the required information, there also exists the risk of waiving legal privilege as alluded to above and of providing information to SARS which effectively gives SARS insight into the content of the legal advice which is the subject of the claim of legal privilege.
201. Please also note our general comments and concerns as to the waiver of privilege on information made available to auditors.
202. Our view is that s42A as a whole does not, prima facie, infringe the right to legal professional privilege but there is potential for infringement depending, in each case, on what information regarding the description, purpose and instructions in relation to a document are actually required to be given to SARS at the stage where a claim of legal privilege is made.
203. We are also of the view that revision of the offending subsections may ameliorate the effects of the provision as a whole and may assist in ensuring that the provision stands up to constitutional scrutiny.
204. Reading the provisions of s42A brought to mind the recent case of *A Company and Others v Commissioner for the South African Revenue Services* (16360/2013) [2014] ZAWCHC 33; 2014 (4) SA 549 (WCC) . The conclusion in this case is relevant for present purposes. The court held that "*attorneys' fee notes are not amenable to any blanket rule that would characterise them as privileged communications per se. Mere reference in fee notes to advice sought or given does not equate to disclosure of the substance of the advice. The position would be different if the fee note set out the substance of the advice, or contained sufficient particularity of its substance to constitute secondary evidence of the substance of the advice. Only one of the invoices in*



*question contained information from which the nature of the legal advice could be discerned. The remaining invoices would have to be furnished as requested by the respondent.”*

205. This illustrates the importance of, in each case, evaluating whether or not the provision of certain information will lead to the substance of advice being revealed, as that determines whether legal privilege is infringed or not.

206. Submission: Our recommendation would be that this insertion is deleted completely in order to allow the common law principles to apply. Alternatively, that section 42A(1) is removed, which will allow the same process as under Search and Seizure provisions to be applied to investigations and audits. If SARS does not agree we recommend that the following words be inserted at the end of section 42A(1): “provided that the provision of such information would not be tantamount to disclosure of the substance of the relevant material”.

207. It would then also be important that the overbroad language of the subsection be revised to give guidance as to exactly what level of detail is required to be given under ss42(1)(a), (e) and (i).

208. Submission: A uniform process should apply for all claims to privilege for Chapter 5 as a whole.

#### Unclear wording

209. Certain of the required information proposed to be provided in terms of s42(1) is unclear as to what is intended, most notably that in paragraphs (f) to (i) where it is not clear what is meant by the term “client”.

210. Presumably this is meant to refer to requests for relevant material from third parties as opposed to the taxpayer. In this regard, it must be borne in mind that the privilege is that of the client of the legal advisor and no third party, be it the legal advisor or otherwise, is in a position to determine whether or not the privilege is to be asserted.

211. Submission: This provision should be clarified if the proposals are retained.



26. **CLAUSE 2.41**

<u>Draft Amendment Bill</u> Section 41	<u>Tax Administration Act</u> Section 46
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212. **The Davis Tax Committee in its first interim report issued in December 2014 pointed out that taxpayers' rights must be balanced against the need for the Commissioner to collect taxes. This fundamental principle also underlies our Constitutional values. The impact of the limitation of taxpayers' rights must be weighed up against the Commissioner's right to collect tax.**
213. These principles cannot simply be ignored by SARS in its endless quest for taxpayer compliance.
214. The various amendments set out below seem to only consider SARS' rights to tax rather than any of the taxpayer's constitutional rights. As indicated below, even the current low thresholds of accountability are sought to be eliminated in these proposals.

Information under oath

215. We have previously expressed utmost concern that section 46 does not prescribe the form of information requested.
216. In practice SARS officials do this not only in person, but over the phone as well, without the taxpayer being able to verify who he is talking to and obtain a copy of any recording of the conversation should a dispute arise as to what was said.

217. Submission: Relevant information should be requested in writing on demand by the taxpayer.

218. The sourcing of relevant information under oath also seems merely to circumvent the inquiry provisions.
219. The fact that criminal investigations can be conducted in this way also alludes to SARS attempting to circumvent judicial oversight in its information gathering proceedings.

220. Submission: Section 46(7) should be deleted as there are remedies for SARS to acquire this information in both civil and criminal proceedings.



### Third party information – Bilateral agreements

221. A concern is expressed with the proposal that SARS should be able to compel a taxpayer to produce relevant material held by a non-resident connected person.
222. How this is legally possible is unclear as no taxpayer is in a position to compel a parent or fellow subsidiary to provide information. The association does not create automatic rights of demand.
223. It is inappropriate that SARS should seek to impose such an obligation on a taxpayer.
224. What is not addressed is on what basis SARS considers that it has the required jurisdiction to obtain such material directly from the offshore party or on what basis SARS should be in a position to compel the local entity to provide information of the connected offshore party.
225. It is also unclear how SARS intends to enforce such an obligation on the offshore party to provide the requested material. SARS already has remedies available via the treaty process and should not be allowed to proceed with arbitrary rule-making in the face of accepted international legal principles.
226. While most multinational groups would generally adopt a cooperative approach in this regard and would be prepared to provide material which *they* consider to be relevant to the enquiry, most groups would not be prepared to give a foreign tax authority carte blanche information in relation to the global affairs of the group.
227. Should SARS desire to obtain such information, it has ample power to do so through the mechanism afforded by the bilateral and multilateral tax treaties that the State has concluded with other countries. Such mechanisms are the appropriate instruments under which to obtain information held by non-residents.

228. <u>Submission</u> : It is submitted that the proposed provision is unreasonable and over broad and that the associated penalty proposed in subsection (9) is legally questionable.
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### Use of information

229. The proposed prohibition on the use of such material in subsequent proceedings is legally questionable.
230. This is particularly the case if SARS does subsequently obtain such information through other means, such as an international treaty. In such



circumstances, SARS would be able to use the material in subsequent proceedings, but the taxpayer would be barred from doing so.

231. A foreign company would be well within its rights to refuse to provide information to another party, particularly if the information is regarded as commercially sensitive. Although in most cases, multinational groups are prepared to and do share information between group companies, in some instances there are outside shareholders involved and such information may be regarded as confidential within the group.
232. It would be unfair and not administratively fair in such circumstances to penalise the taxpayer.
233. It is also questioned on what constitutional basis this legislation would be able to prevent the taxpayer raising a valid defence such as that a third party refused to comply with a request.
234. In our view the legislation places the hurdle too far to constitute administratively fair and just actions.

235. Submission: This proposal should be deleted.

236. Submission: The proposed provisions relating to the provision of material held by connected persons should be withdrawn.

#### Effective date

237. We note that the effective date of the amendment would be the date of promulgation. This raises the question of retrospective application of the provision.

238. Submission: In the event that SARS proceeds with the proposed amendment, it should be made clear that the provisions operate prospectively to requests for relevant material on or after the date of promulgation.

#### Senior SARS official

239. Paragraph (b) of this clause proposes removing the requirement that a senior SARS official may direct that relevant material be provided under oath or solemn declaration.
240. By virtue of the fact that a request for information under oath or solemn declaration is intrusive, it is contented that the proposed removal of "senior" should not be proceeded with and that it should be required that a senior SARS official must direct that relevant material be provided under oath or solemn declaration.



241. Reference must be made to the inquiry proceedings regulated under Part C of the TAA which requires judicial intervention as a result of the intrusive nature of the inquiry procedure.

242. Submission: The proposal to allow only a SARS official to direct that relevant material be provided under oath or solemn declaration is therefore not supported.

## 27. CLAUSE 2.42

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 42	Section 47

### Interview of staff

243. The DTALAB15 proposes an amendment to section 47 of the TAA that allows SARS to not only require the taxpayer whose tax affairs are under verification or audit to be interviewed but also, third parties such as current employees of the taxpayer or persons who hold office in the taxpayer to be interviewed.

244. The current provision does not allow SARS to require a third party to attend an interview in respect of the tax affairs of a taxpayer under investigation and the intention as indicated in the initial purpose of section 47 was to expedite and end the process of verification and audit and not to be used as a process to gather further information or extend the audit and verification process.

245. Chapter 5.3.3 of the SARS Short Guide to the TAA provides a basis of the original purpose of section 47 and also details the limitations of requiring a person to attend an interview and produce relevant information.

246. Two of these limitations are highlighted as follows:

The interview is limited to the tax affairs of the person required to attend, i.e. a third party may not be interviewed regarding the tax affairs of another person;

The purpose of the interview is limited to the administration of the tax Act and is further limited in that it may only be used for the purpose of:

- clarifying issues of concern to SARS to render further verification or audit unnecessary; and

- may not be used for purposes of criminal investigation.



247. The TAA also provides an inquiry procedure that is subject to certain requirements which safeguards taxpayers. These procedures are found in Chapter 5 of the TAA and contain the following requirements:
- protect taxpayers from self-incrimination;
  - provide for a limited enquiry;
  - the inquiry being done in the presence of a presiding officer;
  - SARS must obtain permission from a judge.
248. The proposal provides SARS with excessive power and the ability to gather incorrect and incriminating hearsay information from third parties, who may at times not have the necessary knowledge in the specific tax related affairs under investigation.
249. It places an unfair burden on a taxpayer to prove the correctness of information or evidence that was potentially unreliable and inadmissible in the interview process to start with.
250. It will result in the interview becoming part of an on-going information gathering process for further audit and investigation, which could drag the process out for years to come.
251. The amendments seemingly seek to only circumvent and diminish the protection provided by the inquiry procedures set out in Chapter 5 of the TAA and could possibly lead to a taxpayer being faced with SARS enquiries that do not provide the abovementioned safeguards.
252. We are further of the view that this eliminates the purpose of a public officer as the person who in this regard would be the relevant person to contact. Furthermore, we are of the view that should SARS wish to conduct an audit or verification, prior notice to the public officer of the taxpayer must, in any event be provided.
253. Submission: The proposed clause 42 of the DTALAB15 causes the process for obtaining relevant material to become an overly intrusive process violating the privacy and rights of a taxpayer without due process and should be deleted.



**28. CLAUSE 2.43**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 43	Section 49

254. In the event where a person misunderstands a specific question or bases his answer on his perception of the facts; providing the information under oath or solemn declaration may lead to the individual committing perjury.

255. It is therefore unclear how in practice SARS would want to implement this adversarial process where an employer would have to discredit an unwitting employee because SARS compelled them to give answers to questions they may not have had the correct or full information to.

256. Submission: This amendment should be deleted.

257. In light of the intrusive nature of this power, it is suggested that as a minimum the clause should require the power to be exercised by a senior SARS official.

258. Past practices have shown that especially in complex matters SARS officials may be ill equipped to interpret and apply what factually is being told to them. Furthermore they may not be equipped to ensure that the person being interviewed and the taxpayer's rights are not transgressed in the process.

259. Submission: Should SARS proceed with this ill-considered amendment, it should be limited to a Senior SARS official exercising such powers.

**29. CLAUSE 2.44**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 44	Section 51

260. Section 51(1) states:

*“A judge may grant the order referred to in section 50(2) if satisfied that there are reasonable grounds to believe that...”*

261. Submission: We believe that this should refer to section 50(1).



### 30. CLAUSE 2.48

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 48	Section 93

262. We are extremely concerned with this proposed amendment to restrict the issue of reduced assessments in accordance with this section.
263. Firstly, the provisions of the proposed subsection (3) apply to the whole of section 93 and not only to the circumstances contemplated in s93(1)(d). We assume that this is an oversight and that it is not intended that taxpayers are expected to request a reduced assessment in the case of matters resolved through the dispute resolution or settlement processes.
264. The rationale for the concerns expressed by SARS is not understood. A reduced assessment can only be issued in terms of section 93(1)(d) if SARS is satisfied that there is an undisputed error by SARS or by the taxpayer in a return.
265. If SARS is not so satisfied a reduced assessment may not be issued in terms of this section. It is therefore difficult to see where the risk to SARS arises. If the matter is disputed then SARS would be within its rights to refuse to issue the reduced assessment. This would force the taxpayer into the dispute resolution process.
266. It is understood from our engagements with SARS that SARS does not want taxpayers, who out of negligence or incompetence made the errors, to seek relief. In summary SARS would want these persons to be effectively penalised under this provision by being excluded notwithstanding its actual mandate under the SARS Act is to only seek to tax and recover what is due to the fiscus. This is emphasized by the proposed deletion of section 98(1)(d)(ii) & (iii) of the TAA.
267. On the question of the proposed timeframes, the provisions of section 99 would prevent SARS from issuing a reduced assessment after 3 years. This is the same period as the outer limit for objections under section 104.
268. The very nature of errors is that they go undetected for extended periods of time. In our experience SARS applies the term “exceptional circumstances” exceedingly strictly. As such, the likelihood is that taxpayers will be regarded by SARS officials as not qualifying for the extended period contemplated in section 93(3) and, by definition, for the extended period to lodge an objection in terms of section 104.



269. Submission: The amendment seeks to impose a limitation of taxpayer’s rights to seek redress where errors are made and SARS have been the beneficiary of amounts that should not properly be subject to tax. It is also unclear how this represents any balance of rights in SARS seeking self-assessment system of taxation.
270. The proposal should be withdrawn.

Reduced assessments

271. The proposed reduction of the period to request a reduced assessment is unjustifiable.
272. There seems to be no justifiable reason to place further constraints on the taxpayer while SARS seeks to extend its own powers in terms of prescription time-frames and potentially constitutes an unjustified limitation of fundamental rights.
273. It is submitted that the “exceptional circumstances” requirement relating to a delay beyond 51 business days is particularly prone to arbitrary application by SARS and it is submitted that in a similar vein, SARS is most likely to interpret the provisions relating to “exceptional circumstances” in an equally arbitrary manner, tipping the scale in its own favour to the detriment of taxpayers.

274. Submission: This proposal in section 93(3) should be deleted and the 3 year period retained.

**31. CLAUSE 2.49**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 49	Section 98

275. While the concerns raised by SARS in the MoO are acknowledged and we are supportive of most of the changes made to section 98(1)(d), we are concerned with the removal of the circumstance relating to an undisputed factual error by the taxpayer in a return. This was specifically cited as an example in the statements in the MoO related to the insertion of this provision.
276. It seems anomalous that a taxpayer can fail to submit a return and qualify for relief under this provision, but that a taxpayer that submits a return and simply makes an undisputed error in the return does not. As noted in the MoO, errors are frequently only identified long after a return is filed and the tax assessed.



The very purpose of the provision was to provide for a remedy in such circumstances where prescription had applied.

- 277. The scope of the provision will be narrowed to cases where there was an adverse assessment mainly due to the submission of incorrect returns by 3rd parties and employers.
- 278. This proposed change has unintended consequences and unnecessarily limits its application.
- 279. In practice it has admittedly been very difficult to convince SARS to apply this provision but there continues to be a real need to find redress in situations where there is an “undisputed factual error”.
- 280. The reasoning behind the proposed change is not accepted and unnecessarily limits taxpayer rights.

281. Submission: This provision should continue to apply to undisputed factual errors by a taxpayer in a return.

**32. CLAUSE 2.50**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 50	Section 99

- 282. One of the key tenets of a successful tax system is certainty. One such area in which taxpayers require certainty is in respect of so-called open years of assessment i.e. years of assessment that are still open and available to audit scrutiny, and possible adjustment, by SARS.
- 283. The current period for which an assessment is open is 3 years from the date of assessment by SARS, after which the assessment prescribes, and it may only then be re-opened if it is shown that the full amount of tax chargeable was not assessed was due to fraud, misrepresentation or non-disclosure of material facts.
- 284. While we have much sympathy for SARS insofar as access to taxpayer information is concerned we have consistently held the view that SARS is entitled only to factual and contextual information (and all such information) relating to the taxpayer and its affairs.
- 285. By contrast, we have reservations as to whether SARS is entitled to documents that express a view on the tax implications or risks associated with



a given set of facts on the grounds that such views are irrelevant for purposes of administration of a tax Act and we advise our members accordingly. To the extent that taxpayers dispute SARS' right to factual and contextual information, we understand the cause for concern and the rationale behind the proposed provisions.

286. However, we have some concerns with the proposed provision as set out below.
287. The provision gives SARS the power to extend prescription by an "appropriate period". There is no indication of what an appropriate period is, leaving this entirely to the subjective discretion of SARS officials and is therefore open to abuse.
288. SARS can therefore use the provision, if enacted as proposed, to arbitrarily extend the prescription period of a taxpayer in circumstances where it has not timeously applied its mind to the tax affairs of a taxpayer. The taxpayer is therefore denied the certainty that would otherwise have existed had SARS been more thorough in its execution of audit planning and execution, and this uncertainty can be extended by up to a further three years.
289. Given that an outer limit is imposed for complex matters, similarly, an outer limit should be imposed for information disputes. In this regard, we would suggest that prescription should not be extended beyond a period of 6 months after the relevant material is provided to SARS.
290. We are also concerned with the reference to a "reasonable period" for the provision of relevant material. This is subjective and we often find in practice that SARS makes requests for the provision of large volumes of information to be provided by taxpayers with inordinately short deadlines of as little as 2 days.
291. While it is acknowledged that the period for the provision of relevant material cannot be prescribed as to what constitutes a reasonable period would be dependent on the nature of the request and the circumstances, safeguards are required to protect taxpayers from abuse.

<p>292. <u>Submission</u>: It is submitted that a minimum period within which taxpayers must provide relevant information before which the provision cannot be invoked should be prescribed. For example, the provision should only apply if a taxpayer has not provided relevant material within 30 working days or such longer period as SARS may allow having regard to the circumstances.</p>
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293. Furthermore, taxpayers are within their rights to dispute the entitlement of SARS to certain information or documents requested. This is also implied by the proposed paragraph (b). To this end, paragraph (a) should not apply where



a taxpayer fails to provide relevant material timeously having disputed SARS' entitlement thereto with just cause.

294. While we acknowledge the concern of SARS related to complex matters and that this clearly relates to the general anti-avoidance rule (GAAR) and transfer pricing audits, we are concerned with the potential for abuse on the part of SARS officials.

295. Firstly, as currently formulated, it is possible for a SARS official to extend prescription on the basis that SARS is considering the application of the GAAR. In our view, this is too low a threshold to be applied in this regard. Before prescription can be extended it must be readily apparent that the audit is a complex matter.

296. Submission: SARS should be required to provide the taxpayer with reasons as to why it intends to extend prescription, why an audit is regarded as complex and give the taxpayer an opportunity to make representations prior to prescription being extended.

297. In addition to the above, SARS should not be permitted to commence an audit shortly before the expiry of prescription and then be able to extend prescription on the basis that the matter is complex. Taxpayer's rights should not be adversely affected where SARS has been lax in fulfilling its duties timeously within the prescribed prescription period. To this end, it is submitted that it should be a prerequisite for the extension of prescription that SARS has issued notification of audit relating to the specific matter at least 6 months prior to prescription.

298. Secondly, we are concerned with the term "matter of analogous complexity". Complexity is a subjective matter of opinion and what is a complex matter for one person is a simple matter for another. This term raises the risk of abuse by SARS officials simply alleging that a matter is complex.

299. While it is acknowledged that it is unreasonable to expect the compilation of a comprehensive list of complex matters, safeguards are required.

300. Submission: It is submitted that the application of this provision should be reserved for a senior SARS official and that any decision to extend prescription should be subject to objection and appeal (in addition to the right of review under the Promotion of Administrative Justice Act 2000).

301. Finally, we consider that the ability to extend prescription for a period of up to 3 years is excessive. This amounts to a doubling of the prescription period in the case of SARS assessment from 3 years to 6 years and for self-assessment will



result in a prescription period of up to 8 years. This undermines the very principle behind prescription of bringing finality to matters.

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| 302. <u>Submission</u> : The proposed extensions should be deleted.   |
| 303. <u>Submission</u> : We submit that prescription, even for complex matters should not be subject to an extension of prescription, but should SARS proceed on this matter, for complex matters it should be extended by no more than 12 months which, even in the most complex of matters, should provide SARS with sufficient time to complete its audit and raise an assessment. |

304. While it may be implicit, it should be made explicit in the provision that the extension of prescription relates only to the matter under audit and is not of a general nature.
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**33. CLAUSE 2.52**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 52	Section 109

305. If SARS and the taxpayer agree, the tax board can hear a case from a taxpayer where the dispute relates to different tax periods and the amount of tax involved in each period is below R500 000. Currently, the disputes pertaining to each tax period have to be heard separately.
306. It is not entirely clear how the matters relating to different years are intended to be conjoined in circumstances where they are at different stages of the dispute process.

307. <u>Submission</u> : While this is a very good idea in principle, the practical implementation thereof needs to be considered. Attention should be given to address the specific triggering events for joining disputes, i.e. at what point in time may the dispute process be joined, should the disputes be beyond objection stage for example, or may the disputes be joined provided a letter of findings has been issued?
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#### 34. CLAUSE 2.55

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 55	Section 146

308. The proposed deletion of the cost vs benefit of litigation as pertaining to debt write off only, is misguided.
309. This is a subjective criterion in considering whether to settle where there is a dispute, but where SARS is subjectively of the view that it has the balance of probability in its favour.
310. To prevent a settlement, even where SARS subjectively is of the opinion that it has a strong case, is non-sensical where the ultimate recovery against winning such case is going to be minimal.
311. For example where a business rescue practitioner contests the validity of SARS' claim to historical debt and the moneys available are minimal, SARS contesting such tax debt will only result in the pool of funds available for distribution decreasing with the cost of litigation, the latter which the practitioner is compelled to engage in based on his subjective conclusions, without SARS increasing its entitlement to more money recovered.

312. Submission: In our view the cost of pursuing the full debt and not partial debt recovery by settlement seems short sighted, as this remains only a factor to be considered, not a compulsion.

#### 35. NEW – SECTION 163 PRESERVATION ORDERS

313. In Commissioner for the *South African Revenue Service v eTradex (Pty) Ltd and Others* (12949/2013) [2014] ZAWCHC 142; 2015 (3) SA 596 (WCC) (9 September 2014) Rogers J comments as follows: (our emphasis):

*“Section 163 finds its primary application where the amount of tax has not yet been ascertained (i.e. where SARS cannot execute in the ordinary way). This being so, I do not think it appropriate that a preservation order should (as here) contain, as a standard provision, a power on the part of the curator to realise assets in satisfaction of the taxpayer’s tax liability. I do not overlook that s 163(7) empowers a court which grants a preservation order to make ancillary orders regarding how the assets must be dealt with, including ‘the realising of assets in satisfaction of the tax debt’. However, I do not understand how, in general, it is justifiable, at a time when the tax liability is unknown and*



contentious, to empower a curator to set about selling assets and appropriating monies towards an alleged tax debt. The order should rather make provision for SARS to approach the court at a later stage (once the tax has been properly determined) for the granting of authority to the curator to realise the preserved assets in satisfaction of the tax debt. In other words, a court is unlikely to be able to make an informed and fair decision on this question at the time the application is initially granted and confirmed.”

314. We agree with the honourable judge that the scope of the provision is extended beyond what is legally justifiable.

315. Submission: Section 163(7)(c) TAA should be deleted.

316. We have also noted Rogers J comments at 70 regarding the ex parte nature of these proceedings where he states:

*Before concluding, I make the following observations. Firstly, although s 163 permits SARS to bring a provisional preservation application ex parte, it would be contrary to basic principles of fairness and constitutional values to read the section as providing that the application may be brought ex parte in the absence of circumstances justifying a departure from ordinary procedure (cf Knox D’Arcy supra at 379F-I). Where the application is brought on grounds which would sustain a conventional anti-dissipation order at common law, an ex parte order may often be warranted (though not necessarily in the case, for example, of a taxpayer whose only material assets comprise immovable property). In other circumstances, there might be little or no reason justifying an absence of notice to the taxpayer.*

317. Notwithstanding the High Court’s criticisms of the inherent unfairness and lacking constitutional values of this power, no attempt has been made to rectify it.

318. Submission: Section 163(1) TAA should be amended to only provide for an ex parte application where a judge has heard and held that the matter qualifies as exceptional to warrant a departure from ordinary procedure.

### 36. NEW – SECTION 172 CIVIL JUDGEMENT PROCEEDINGS

319. In *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice And Correctional Services and Others* (1670314) [2015] ZAWCHC 99 (8 July 2015) at 51 the court confirms that the right to access to courts is a fundamental right in our constitutional state.

320. As to the attachment of wages the courts states the following:



*The International Labour Organisations' Protection of Wages Convention (the Convention) places an obligation on each state to prevent the violation of socio-economic rights by private actors in its jurisdiction. While South Africa is not a party to the Convention (which came into force in 1952) 97 states have ratified it. As a consequence the Convention has probably reached the status of international customary law which is binding on all states. At the very least, the Convention's provisions are highly persuasive.*

*[68] The Convention contains a number of provisions that are aimed at protecting debtors. For example, it provides that:*

*"Wages may be attached or assigned only in a manner and within limits prescribed by national laws or regulations.*

*Wages shall be protected against attachment or assignment to the extent deemed necessary for the maintenance of the worker and his family."*<sup>22</sup>

*[69] In addition, the Convention requires that the judiciary or another impartial body capable of providing an adequate remedy must supervise the attachment of wages and that the laws or regulations of the states shall prescribe appropriate penalties and remedies for violations of the provisions of the Convention.*

321. The court also makes the following statement as to the constitutional flaws in the system:

*The South African EAO system established by the MCA fails to comply with the principles set out above in that:*

*1. EAOs may be issued by a clerk of the court without the involvement of a judicial officer.*

*2. Workers are not given an opportunity to make representations before an EAO is issued.*

*3. When an excessive portion of a debtor's earnings is attached, the remedy provided by the MCA is the opportunity to review and set aside the order. However, this will not be an effective remedy if Section 45 of the MCA is interpreted such that it allows indigent debtors to consent to the jurisdiction of distant courts.*<sup>24</sup>

*[76] The Constitutional Court has emphasised the general principle that there must be judicial oversight where an applicant seeks an order to execute against or seize control of the property of another person. This*



*principle has been reiterated in a number of Constitutional Court judgments.*

322. It is quite alarming that section 172 has the same flaws in that it is issued without judicial oversight and taxpayers are given no opportunity to make representations.
323. No remedy or procedure is even prescribed how to have this order set aside.
324. Furthermore, no procedure is set for the making of provision of living expenses which is in itself a notorious oversight as it goes against the constitutional values of treating people fairly. Does a child need to suffer the indignity of not eating so that the fiscus immediately gets its full claim from his or her parents?

325. Submission: It is proposed that this provision be reconsidered by it formally having to be presented to a judge or magistrate. It should also involve notice to the taxpayer in all instances and provision should be made for living expenses to be excluded from the judgment of the court.

**37. CLAUSE 2.57**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 57	Section 179

Constitutionality of provision

326. We are concerned with the suggestion that the issue of notices is proposed to be automated. In our experience, this collection mechanism is being abused and, rather than being used as a last resort as stated to Parliament, it is frequently being used as a first resort to collect tax debts.
327. Not infrequently, this includes the collection of debts shortly after the issue of an assessment and debts in respect of which a dispute has or is to be instituted and where a request for suspension of payment has been lodged by the taxpayer.
328. We have already communicated to SARS our awareness of the Banking Association of South Africa statistics. Each bank receives between 4000 and 8000 agent appointments on a monthly basis. The cost for the bank to action 1 appointment is more than R200. This process is currently a manual process and is very time consuming as a person has to verify the SARS details to that of the account holder; reserve the funds and pay it over immediately to ensure that no debit order reduces the value of the amount reserved.



329. It is noted that when the customer is provided the opportunity to liaise with SARS to cancel the notice of reduce the amount as per the notice only 5 out of each 4000 agent appointments are withdrawn or reduced by SARS.
330. It is also alarming that the timing of these appointments seem to have shifted to the 25<sup>th</sup> or 30<sup>th</sup> to avoid employers applying garnishee restrictions to the amounts claimed.
331. Though section 179(4) provides for SARS to on application apply a basic living expenses allowance, no such procedure exists (The IT88 Guide merely requires the person to approach SARS) with SARS imposing this obligation on employers in many instances. More importantly, no time frame is prescribed for SARS to access and repay the amounts.
332. Again it is the dependents and minors of taxpayers who invariably suffer this indignity.
333. What is more, serious questions can be raised with respect to the constitutionality of this section (which the proposed automation of the process will make even worse) in light of the recent case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others* (16703/14) [2015] ZAWCHC 99. In that case it was held that certain provisions of the Magistrates Court Act relating to emolument attachment orders were held to be unconstitutional on the grounds that they failed to provide for judicial oversight. Section 179 contains no safeguards whatsoever and the issue of a notice in terms of this section is left to the whim of a senior SARS official.

#### Cost of administration

334. Though SARS prides itself in maintaining its 1% of collections as collection cost, it does not reveal the actual tax administration cost which SARS has been systematically transferring to appointed third parties and taxpayers.
335. To reconcile a suspense account with 4000-8000 entries per month per bank will be a mammoth task that will escalate when notices increase to more than 8000 per month as indicated by SARS. SARS mentioned notices of more than 20000 per month for the big 5 Banks, which is quite alarming given that this is a “last resort” mechanism.
336. Adding the burden of the proposed 72 hours preservation will require entries to be date tracked and there will be no way to automate this process.

337. Submission: It is clear that SARS has not considered the practicalities and cost of administration to appointed third parties agents when drafted for these proposals.



338. The above concerns are reflected as follows:

*72 Hour preservation procedure in practice*

339. Sec 179(2) requires the bank to preserve the money for 72 hours. The definition of preserve is to maintain (something) in its original or existing state. In the banking environment an amount can only be preserved in its original state where there is a court order to “freeze” the account.
340. The word “preserve” is used in the TAA in the context of a preservation order (sec163) and this can only be done once a court order is issued. The other two terms used by banks is to reserve or pledge funds.
341. The definition of reserve means to “hold” the amount in an informal manner. If a hold is placed on an amount the debit orders can still go through and the amount “reserved” will reduce over 72 hours and the bank will have to treat the original agent appointment as a new appointment and will therefore have to action the same instruction twice.
342. Pledge is defined as “a solemn promise or undertaking” and in banking terms it is treated the same as a hold.
343. In both instances it would seem that not only does this procedure circumvent the courts but places banks in an untenable position.

*SARS withdraws or amends the notice*

344. Section 179(2)(a) refers to “SARS “withdraws or amends” the notice,..”. A notice can only be actioned on the date received and be off-set against the money held at the time. Banks have no guarantee that money will be held at a future date unless the client has a fixed investment with a specific maturity date and the account number of this investment is not linked to the transactional account. SARS can withdraw (cancel) a notice and re-issue a notice but cannot amend the same notice.
345. A notice has a specific PRN (Payment Request Number) that SARS uses to allocate the payment. When there is any change to the notice a new PRN will have to be issued.

*Within the period specified in the notice*

346. Section 179(2)(a) refers to “...upon the person advising SARS of the reasons for being unable to comply within the period specified in the notice; or...”. The bank informs SARS of the reason it cannot recover the amount. These reasons include but are not limited to account closure, insufficient funds and the information as per the notice does not validate with the information on the



bank's systems. Banks don't have a facility to keep and AA88 and action over a period provided by SARS other *than to deduct and pay immediately*.

*Inform the person of the notice*

347. Section 179(2)(b) states "after being informed by the person of the notice, the taxpayer requests SARS ...". Due to the volumes the Bank will only be able to notify a client/taxpayer if this notification is built into the system. Currently bank systems only send clients notices once a debit goes through. To change systems to send notices once money has been reserved will also result in notices when fraud is suspected per proposed amendment to sec190(5A).

*Amends the notice to extend the period over which the amount must be paid*

348. Section 179(2)(b) further states that the taxpayer can request SARS to amend the notice to take the living expenses into account "and SARS amends the notice to extend the period over which the amount must be paid." As explained earlier in this document SARS cannot send an "instalment" type AA88 to the Banks. SARS can only cancel the previous AA88 and then re-issue a new AA88 with the amended amount that will be actioned immediately and SARS must then send a new AA88 each month until the full debt is recovered.
349. SARS has indicated that it wants to automate the process in May 2016 and this will not be possible if monies must be "preserved" for 72 hours. An automated file will result in a deduction same as debit orders and will be paid directly into the account of the creditor.
350. During the SARS financial year-end and mini-year-ends SARS insists that the banks action all appointments and pay over the amounts as the balances of the SARS accounts is communicated to National Treasury at that time. With this amendment the last 3 days' collections will only be paid to SARS after the year-end.

351. Submission: Section 179(2) be deleted and SARS and put an electronic application for a refund on e-filing where the taxpayer cannot meet its living expenses obligations.

352. Submission: The proposed amendment to section 179(1) should be withdrawn and appropriate safeguards should be introduced, including the exhaustion of other collection mechanisms and judicial oversight.



**38. CLAUSE 2.59**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 59	Section 187

353. In terms of the proposed new subsection (8), it is not clear what is meant by the commencement date of the accrual of the interest. Interest begins to accrue on a tax debt from the effective date on a monthly basis.
354. The question that arises, is if the effective date is older than the prescribed period is all of the interest not subject to remittance or only that portion of the interest relating to the period that is older than the prescribed period?
355. Furthermore, the effective date is generally the date on which the tax was due and payable. If the assessment is only raised subsequent to the proposed prescription period having expired, the interest would not qualify for remittance at all.

356. Submission: This provision be clarified and that the prescription period for the exercise of the discretion should be linked to the assessment giving rise to the interest rather than to the date of accrual of the interest.

**39. CLAUSE 2.60**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 60	Section 190

Objection and appeal

357. The application of section 190(6) should be extended to include the right to object and appeal a failure by SARS to effect a refund within a specified time frame where the refund is properly refundable and if so reflected in an assessment (per section 190(1)(a)).
358. In practice SARS is withholding refunds by raising obscure reasons such as consecutive bank detail confirmations or conducting audits which are apparently not within the confines of section 48 TAA but then continue for an unspecified time stated as “up to to 12 months”.



359. Submission: The decision not refund should be done with 21 days or the refund paid without delay. Any decision not to refund should be subject to objection.

### Security

360. Though the law provides for taxpayers to provide security to have refunds released, SARS provides no guidance as to how the “security requirement” is to be met which is currently causing significant controversy will be dealt with in a more practical manner.
361. There is currently no clear legislative or other guidance on the security required by SARS or even the process to apply for security to provide and this aspect invariably delays the refund process.
362. SARS must be compelled to stipulate within a specified time frame the security required failing which SARS must be compelled to effect a refund within a specified time frame.

363. Submission: The provision should be amended to provide guidance as to the type of security and it must compel CSARS to issue procedures by public notice.

364. Any decision by SARS not to refund and any failure by SARS to take a decision within a specified time frame must be made subject to objection and appeal. SARS routinely delays the refund process and there are several situations where such delay is not justified.
365. The provisions are clear insofar that a refund may only be withheld where the audit or verification relates to the refund itself, yet SARS applies the provision in practice as if any outstanding audit, even for unrelated periods, may be a justification for withholding refund.

366. Submission: The process needs considerable refinement and clarity.

### Payments in error

367. Currently a taxpayer is entitled to claim a refund of an amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment as long as this claim is lodged within three years from the date of the assessment. It is proposed to change the wording from “within three years from the date of the assessment” to “within three years from the date of payment”.



368. Normally a payment of assessed taxes or an erroneous overpayment of assessed taxes (i.e. an amount erroneously paid in respect of an assessment) can only be made after assessment. This means that the proposed change would favour taxpayers. However, it is possible to make an advance or other payment into the assessed tax account. Such advance or other payment is a payment of assessed taxes. It is not a provisional tax payment that will only be consolidated to the assessed tax account on the date of assessment.
369. It would be unfair on taxpayers to limit the potential future refund of such an advance or other payment of assessed taxes to the date of such payment (which would precede the date of assessment).
370. We are not sure how one would determine when an amount was paid erroneously as in all cases amounts paid to SARS in respect of an assessment are based on some calculation or understanding of the assessment or the assessment to be raised. Further, in some cases due to SARS account errors, a taxpayer could be forced to pay an amount of assessed taxes in order to obtain a tax clearance certificate.

371. Submission: The proposed amendment should be amended not to prejudice a taxpayer aiming to claim a refund of an amount where the payment made in respect of an assessment is made before the date of such an assessment.

*Banks obligation to report*

372. Section 190(5A)(b) obliges the bank to “immediately report to SARS the suspicion and the grounds on which it rests; and”. Any alleged suspicious transactions are identified through the Bank’s risk engines.
373. Due to the increased risk of fraud syndicates the “grounds” on which the suspicion rests is confidential and cannot be shared.

374. Submission: The proposed amendment should read - “(5A) If the person where the account into which an amount referred to in subsection (5) is deposited, is held, reasonably suspects that the amount is paid as a result of a tax offence the person must immediately report to SARS this suspicion.



**40. CLAUSE 2.62**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 62	Section 212

375. While the reduced penalty for parties to a listed reportable arrangement is welcomed, it is questioned why the promoter of such an arrangement should face the far higher penalties that apply in terms of section 212(1). The reduced penalty should apply for all listed arrangements.

376. It is also questioned as to which penalty will apply when a party to a listed reportable arrangement derives a tax benefit from the arrangement and is therefore also a participant on this basis. Will the penalty in section 212(1) apply or that in section 212(3)?

377. Submission: This provision should be clarified.

378. Furthermore, it is possible that a reportable arrangement could qualify as such in terms of both the listed reportable arrangements and in terms of the provisions of s35(1).

379. Submission: This provision should be clarified.

**41. CLAUSE 2.64**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 64	Section 226

380. We welcome the clarification that an audit or investigation must relate the default to be disclosed. This will go a long way towards making the VDP more attractive, particularly for large companies which are usually always subject to some tax audit.

381. Submission: Given that this amendment is stated to be a clarification, we submit that it should be made retrospective to 1 October 2012 and that those taxpayers that have been denied VDP relief or have had to pay understatement penalties on the basis that they are subject to an audit unrelated to the default disclosed should be allowed the appropriate VDP relief.



382. On a related matter, it often happens that a taxpayer is not aware of a pending audit or investigation or is not aware of the nature of the activities being undertaken or to be undertaken by SARS.

383. In particular, a taxpayer will not necessarily know whether they are being subjected to an audit or a verification, simply having been asked for relevant material. This is important as both the VDP relief and understatement penalties draw a distinction between a verification and an audit.

384. Submission: It is submitted that it should be made explicit in section 40 that SARS should be required to inform a taxpayer in writing as to the nature of the enquiry (inspection, verification or audit) and, in the case of an audit, the information required to be provided to the taxpayer in terms of section 42. Similarly, section 43 should be amended to explicitly require that SARS must inform a taxpayer that they are subject to a criminal investigation, including the scope thereof. Following on from this, section 226(1) should be amended so as to refer back to the notices referred to above.

385. The language used in section 226 (and 223) is inconsistent in that it refers to an investigation rather than a criminal investigation. In the interests of consistency and not creating the impression that the term has a different meaning in the context of the VDP and understatement penalties the wording should be aligned.

386. Submission: Both section 226 and section 223 should be amended to refer to a criminal investigation.

#### 42. CLAUSE 2.65

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 65	Section 227

387. We welcome the proposed relaxation of the requirements for a valid voluntary disclosure.

388. However, we wish to point out that the proposed paragraph (d) would still not be met where there is no substantial understatement and the other behaviours in the table are also not present. This raises the question as to why it should be a requirement at all that the VDP is linked to understatement penalties. It should be sufficient to qualify for the VDP if there has been a default with no reference to understatement penalties. It is therefore submitted that, rather than being amended, paragraph (d) should simply be deleted.



389. We also wish to point out that the definition of a default in section 225 does not cater for the situation where a taxpayer is in an assessed loss position, both before and after the disclosure of an income tax matter, that results in the assessed loss being overstated.
390. In this regard, there is a lacuna in the law as such a taxpayer could be subject to understatement penalties in terms of section 222.

391. Submission: The definition of a default should be amended to include this scenario.

**43. CLAUSE 2.66**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 66	Section 229

392. We welcome the extension of VDP relief to penalties for the late payment of tax as this better balances the need of the fiscus to punish non-compliance with the rights of taxpayers to be treated fairly and equitably in voluntarily disclosing non-compliance.

**44. CLAUSE 2.68**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 68	Section 251

SARS eFiling as delivery mechanism

393. While we are not opposed to delivery to an e-filing page in general, we are not in agreement with the proposition that sending it to an e-filing page is sufficient on its own to constitute effective delivery.
394. This is especially so in matters where legal action will be taken against the taxpayer such as offences, agency appointments, default judgements, withholding of refunds etc.
395. The administrative fairness of using eFiling on its own for such delivery is highly questionable.



396. Many taxpayers do not check their e-filing page on a regular basis, only doing so for the purpose of filing a return or making a payment due to the inherent limitations of the system of automatically notifying taxpayers to communications devices.

397. Submission: It is submitted that delivery to e-filing should be accompanied by a notice to that effect delivered in terms of any of the other delivery criteria.

Effective date

398. In addition to the above, we cannot agree to the retrospective application of this amendment which would have the effect of retrospectively rectifying deficiencies in delivery and could negatively impact on the vested rights of taxpayers and/or result in adverse implications for them.

399. Submission: The effective date of the amendment should be prospective with effect from date of promulgation.

**45. CLAUSE 2.69**

<u>Draft Amendment Bill</u>	<u>Tax Administration</u>
Section 69	Section 252

Effective date

400. See our comments on 2.68 above.

401. Once again it is noted that it is proposed that this amendment will take effect from 1 October 2012 and taking account of the nature of the amendment, it should in our view only take effect from date of promulgation of the amending legislation.

**46. CLAUSE 2.69**

<u>Draft Amendment Bill</u>	<u>Tax Administration Act</u>
Section 70	Section 256

402. Any correspondence to a company must be sent directly to the company's e-filing profile which includes the Public Officer's business profile and not to the personal profile of the Public Officer.



403. Despite the fact that the Public Officer had to go into the SARS branch offices to register for the single registration process and all contact data has been updated SARS sends company correspondence to the private addresses of the Public Officer which poses a confidentiality risk.

404. Submission: It is proposed to add the delivery of a document to the “company or public officer’s email as well if the company or public officer is a registered user as defined in those rules” as an official method of delivering documents to companies.

**47. CLAUSE 2.138**

<u>Draft Amendment Bill</u>	<u>Tax Administration Laws Amendment Act, 2014</u>
Section 138	Section 52

**COMMENTS: Draft Memorandum on the Objects of the Tax Administration Laws Amendment Bill, 2015**

405. Ad 2.14 re ad paragraph (b)

In the third line paragraph 19 the word “paragraph” is incorrectly spelt in that it contains two “p’s”.

406. Ad 2.49

In the second line on the last paragraph of page 21, the word “were” should read “where”.