



THE TOBACCO INSTITUTE OF SOUTHERN AFRICA

NPO Number: 027-401
P O Box 7648, Roggebaai, 8012
Foyer A, Sovereign Quay Building, 34 Somerset Rd, Cape Town, 8001
Tel: +27 (0) 21 421 0011/2 Fax: +27 (0) 21 421 0013
Email: tisa@tobaccosa.co.za Web: www.tobaccosa.co.za

12 September 2016

**NA Standing Committee on Finance
Parliament
Cape Town**

COMMENTARY ON THE DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL, 2016

1. INTRODUCTION

As the Tobacco Institute of Southern Africa (“TISA”), we wish to thank the National Assembly Standing Committee on Finance for the invitation to submit comments on the Draft Tax Administration Laws Amendment Bill, 2016 (the “Bill”).

These comments are submitted by TISA on behalf of its members insofar as relevant provisions of the Bill will impact on its members across the tobacco sector value chain.

TISA appreciates that the South African government acknowledges that controls are needed to ensure that the current high levels of illicit tobacco trade is curbed. More particularly and within context, that illicit trade research indicates that more than 80% of total illicit product consumed in South Africa, is manufactured inside the country by manufacturers registered with SARS.

We applaud the South African government and in particular SARS’ consideration that enhanced manufacturing controls on local manufacturers will have the effect of limiting the ability of rogue manufacturers to manipulate excise accounts, thereby evading excise tax on cigarettes and committing tax fraud.

We now turn to deal with specific proposed amendments to the Customs & Excise Act No. 91 of 1964 (“the Act”).

2. COMMENTS ON SPECIFIC PROPOSED AMENDMENTS

2.1 Ad Amendment of section 35A of the Act

“Section 35A of the Customs and Excise Act, 1964 is hereby substituted by the following section:

Special provisions regarding cigarettes and other tobacco products

- 35A (1) *The Commissioner may prescribe by rule—*
- (a) the sizes and types of containers which may be used by a manufacturer for the packing of cigarettes and any other tobacco product;*
 - (b) distinguishing marks or numbers which must or must not appear on containers of cigarettes and other tobacco products removed from a customs and excise warehouse for home consumption or for export;*
 - (c) any other matter which is necessary to prescribe and useful to achieve the efficient and effective administration of this section.*
- (2) No licensee may remove any cigarettes or any other tobacco product or allow any cigarettes or any other tobacco product to be removed from a customs and excise warehouse unless—*
- (a) if removed for home consumption, distinguishing marks or numbers determined by the Commissioner have been made on their containers; or*
 - (b) if removed for export, distinguishing marks or numbers determined by the Commissioner have been made on their containers; and*
 - (c) the cigarettes or other tobacco product otherwise comply in every respect with the requirements prescribed by rule.*
- (3) No cigarettes or other tobacco products shall be sold or disposed of or removed from the customs and excise manufacturing warehouse in question in partly or completely manufactured condition except in accordance with the provisions of this Act.*

- (4) No person shall—
- (a) counterfeit or make any facsimile of any distinguishing marks or numbers determined under subsection (2);
 - (b) be in possession of, use or offer for sale or for use—
 - (i) any distinguishing marks or numbers counterfeited in contravention of paragraph (a); or
 - (ii) any facsimile of any distinguishing marks or numbers made in contravention of that paragraph.”.
- (2) Subsection (1) takes effect on a future date to be determined by the Commissioner.”

2.2 Commentary on the proposed amendments to Section 35A

2.2.1 The revised Section 35A(1)(a) and (b) has been amplified to include “any other” tobacco product and “other” tobacco “products” as follows:

“(a) the sizes and types of containers which may be used by a manufacturer for the packing of cigarettes and any other tobacco product”;

“(b) distinguishing marks or numbers which must or must not appear on containers of cigarettes and other tobacco products removed from a customs and excise warehouse for home consumption or for export;”.

- (a) Kindly provide clarity on what “any other” or “other” tobacco products it is intended will be included in the proposed amendments.
- (b) TISA propose that the proposed wording of “distinguishing marks or numbers” be replaced with “unique identification markings”. This is the terminology used in Article 8 of the FCTC Illicit Trade Protocol and would ensure alignment of the Act with the Protocol.

2.2.2 In relation to the proposed amendment to sub-section 35A(2) of the Act, it is stated in the memorandum on the objects of the Bill as follows:

“In order to comply with the fiscal marker and tracking and tracing obligations in Article 8 of the Protocol to Eliminate Illicit Trade in Tobacco Products under the World Health Organisation’s Framework Convention on Tobacco Control, the Commissioner for SARS is empowered to prescribe by rule the necessary distinguishing marks and numbers on tobacco products. As a consequence, the current diamond stamp marker on cigarette containers will be replaced by suitable marking and tracking and tracing numbering on relevant tobacco product containers.” (Paragraph 2.1.6 of the Memorandum on the objects of the Draft Amendment Bill)

(a) Whilst TISA is in full support of the proposed amendment to Section 35A(2) of the Act, which will prescribe by rule necessary *“distinguishing marks or numbers”* to be applied on tobacco products and the consequent replacement of the current diamond stamp marker on cigarette containers, we kindly request SARS to have due regard to the following important factors in its consideration of a suitable fiscal marker and track and trace solution:

1. The nature of the solution(s) that can adequately support enforcement of the control measure from a technical, implementation and administrative perspective. In the absence of clarity surrounding the intended solution to replace the diamond stamp marker, we are unable to meaningfully comment on the viability and/or practicality of the intended fiscal marker. We trust that SARS will afford us the opportunity to comment on the relevant Rules, once the draft is available.
2. TISA has previously indicated to SARS and remains of concern that illicit tobacco local manufacturers exploit the lack of controls over the manufacturing process in South Africa, thus avoiding excise duties. In its submission to SARS in response to the proposed rule amendment published in December 2015, relating to the introduction of sealed counters on manufacturing equipment, TISA raised some clarifying questions about the nature, scope, control

environment and enforcement of the rule amendment. Without repeating those queries, we once again ask SARS to have regard to some of the key factors we consider extremely important for the effective administration and enforcement of fiscal marks and a track and trace solution, which include:

- (i) The process of compliance management and enforcement of local manufacturing as well as foreign based manufacturers who manufacture product for import into South Africa.
- (ii) Cost of implementation as well as the impact that such solutions may have on manufacturing such as productivity (machine speeds) and potential compromises to the warranties and SLA arrangements between the manufacturers of the machines and the industry.
- (iii) Consideration of conflicting or excessive requirements for fiscal marker placement on products destined for export. This would be relevant where existing fiscal marker requirements exist in countries of destination, resulting in a dual system to be implemented.
- (iv) Application of suitable penalties and sanctions for non-compliance.
- (v) An inclusive approach across SACU member states.

(b) **Further Considerations**

1. As highlighted in previous submissions to SARS, there are various technologies available in support of Authentication, Verification and Tracking and Tracing of manufactured cigarette products.
2. Our position, which we continue to hold and have previously communicated same to SARS on a number of occasions, is that the ultimate and more effective fiscal marker solution to replace the

current ineffective diamond stamp approach should be an integrated and secure Digital Verification Technology.

3. This technology should be applied during the manufacturing process to avoid opportunity for tampering, ensuring that manufactured volumes of cigarette products match with excise declarations and payment.

2.3 Ad Amendment to section 113 of the Customs and Excise Act 91 of 1964

“Section 113 of the Customs and Excise Act, 1964, is hereby amended—

(a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:

“(b) cigarettes with a mass of more than [2 kilograms] 0.8 kilogram per 1 000 cigarettes;”; and

(b) by the substitution for subsection (9) of the following subsection:

“(9) No person shall manufacture cigarettes the mass of the tobacco of which exceeds [2 kilograms] 0.8 kilogram per 1 000 cigarettes.”

(2) Subsection (1) takes effect on the date of promulgation of this Act.”

2.3.1 Commentary on proposed amendment to Section 113(1)(b)

- a. While we commend SARS’ desire to tighten controls around declared manufacturing inputs and outputs, we respectfully submit that the proposed amendments to Section 113(1)(b) of the Act, which introduces a maximum weight cap of manufactured cigarette mass per 1 000 cigarettes to “0.8 kilogram” are practically unworkable and unreasonable in any respect.
 - i. We respectfully point out that at a maximum of 0.8kg per 1’000 cigarettes, only the mass of tobacco in a cigarette is accounted for. Consideration should be given to the inclusion of all elements related to the manufacturing of a cigarette. These include the tobacco itself, filter, filter plug wrap, cigarette paper, bundle

packaging (e.g. in the case of 20's), outer carton packaging (e.g. 10 x 20 = 200's) and master case packaging (e.g. 50 x 200 = 10'000).

- ii. The average cigarette weight, including paper and filter (excluding all packaging) is approximately 925mg. Extrapolated to 1'000 cigarettes, this would amount to a weight of 0.925kg.
- iii. Furthermore, packaging and wrapping materials have not been taken into consideration. The inclusion of this into a weight declaration for import ranges from Gross Weight of between 13kg and 18kg per master case of 10'000 cigarettes. Therefore, resulting in a weight of between 1.3kg and 1.8kg per 1'000 cigarettes.
- iv. As indicated above, it is clear that the proposed 0.8 kilogram per 1'000 cigarettes is not practically workable, and accordingly TISA proposes that the threshold remains at the current level of 2 kilogram per 1'000 cigarettes.
- v. We repeat our previous requests for SARS to provide clarification around the manner and method of verification which will be employed to ensure compliance with this measure.

2.3.2 Commentary on the proposed amendment to Section 113(9) of the Act

- a. The proposed amendment to Section 113(9) of the Act, which is designed to prohibit the manufacture of cigarettes with a mass of tobacco per 1'000 cigarettes in excess of 0.8 kilogram is supported by TISA, however:
 - i. Clarification is required on how this measure will be administratively utilised to combat illicit trade, in particular surrounding the measurement, control, reporting and enforcement of this process.

3. AD PROPOSED FURTHER AMENDMENTS (SECTION 54 of the Act as it currently reads)

3.1 "Section 54 – Special Provisions regarding the importation of cigarettes

- (1) *The Commissioner may prescribe by rule-*
 - (a) *the sizes and types of containers in which cigarettes may be imported into the Republic;*

- (b) *distinguishing marks or numbers in addition to the stamp impression referred to in subsection (2) which must or must not appear on containers of imported cigarettes;*
- (c) *any other matter which is necessary to prescribe and useful to achieve the efficient and effective administration of this section.*
- (2) *No person may import any cigarettes unless-*
 - (a) *if entered for home consumption, a stamp impression determined by the Commissioner has been made on their containers; or*
 - (b) *if entered for storage in a customs and excise warehouse for export such stamp impression does not appear on the containers; and*
 - (c) *the cigarettes otherwise comply with the requirements prescribed by rule.*
- (3) *No imported cigarettes shall be sold or disposed of or removed from the customs and excise warehouse concerned except in accordance with the provisions of this Act.*
- (4) (a) *No cigarettes in containers bearing the stamp impression referred to in subsection (2), may be entered for removal in bond as contemplated in section 18 for transit through the Republic.*
- (b) *Any cigarettes in containers bearing such stamp impression so entered for removal in bond shall be liable to forfeiture in accordance with the provisions of this Act."*

3.2 Commentary on Section 54 – Special Provisions regarding the importation of cigarettes

- a. We propose that Section 54 is aligned in accordance with our comments on section 35A of the Act.
- b. In order to ensure certainty in application of the provision, we request that the special provisions in section 54 of the Act are harmonized with the proposed amendments to section 35A so that the same packaging and marking criteria is applied.

TISA (on behalf of all our members) remain committed to supporting the South African government and SARS in all concerted efforts to eradicate the scourge of illicit trade in tobacco products in the South African market and the resulting theft from the SA fiscus.