

# **DRAFT RESPONSE DOCUMENT**

## **2016 DRAFT TAXATION LAWS AMENDMENT BILL (TLAB) AND DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL (TALAB)**

*Standing Committee on Finance*

**Presenters: National Treasury and SARS | 21 September 2016**



**national treasury**

Department:  
National Treasury  
**REPUBLIC OF SOUTH AFRICA**

# Consultation process

- The 2016 Draft Taxation Laws Amendment Bill (TLAB) and 2016 Draft Tax Administration Laws Amendment Bill (TALAB) were published for public comment on 8 July 2016.
- National Treasury and SARS received written comments from 64 organisations by deadline of 8 August 2016.
- Workshops with stakeholders to discuss their comments on the 2016 Draft TLAB were held on 15 and 16 August 2016.
- National Treasury and SARS briefed the Standing Committee on Finance (SCoF) on the draft bills on 24 August 2016.
- A consultation meeting on the proposed tax treatment of long term insurers due to the introduction SAM was held with the FSB, long term insurance industry and tax practitioners on 01 September 2016.
- The NT, SARS & DST provided feedback to taxpayers and tax advisors on progress with respect to the R & D tax incentive on 05 September 2016.
- Oral presentations by taxpayers and tax advisors on the draft bills were made at hearings by the SCoF on 14 September 2016.
- Another consultation meeting in respect of measures to prevent tax avoidance through the use of trusts (section 7C) and the circumvention of rules dealing with employee based share incentive schemes (sections 8C & 8CA) was held with taxpayers and tax advisors on 15 September 2016.
- Today, 21 September 2016, National Treasury and SARS present to the SCoF a draft response document containing a summary of draft responses to public comments received on the draft bills.

# Key issues raised during consultation process

The proposed amendments included in the draft bills that received most comments are:

## **Draft TLAB, 2016**

1. Aligning tax charging provisions that enable the Minister of Finance to change the tax rates in all the tax acts
2. Introducing measures to prevent tax avoidance through the use of trusts
3. Addressing the circumvention of rules dealing with employee based share incentive schemes
4. Extending the small business corporation regime to personally liability companies
5. Tax treatment of long term insurers due to the introduction of SAM
6. Research and Development Tax Incentive

## **Draft TALAB, 2016**

1. Prescription period for claiming input tax (VAT)
2. Timing of mineral and petroleum royalty final tax return
3. Funds, employment of staff and mandate of Tax Ombud

# Process to incorporate comments

- These are our (NT & SARS) initial draft responses for consideration by SCoF.
- The Minister of Finance has not yet approved these responses to allow process of consultation to be completed
- Minister will finalise responses after taking account of deliberations today, which will than be incorporated into the Bills that he will table.

# 2016 DRAFT TAXATION LAWS AMENDMENT BILL

## Key issues

# 1. Aligning tax charging provisions that enable the Minister of Finance to change the tax rates in all the tax acts (p.5)

The 2016 Draft TLAB contains a proposed amendment that seeks to align the tax charging provisions that will enable the Minister of Finance to change (whether it is for purposes of an increase or decrease) the tax rates in all the tax acts administered by SARS.

It makes provision for the rates announced by the Minister of Finance in the annual Budget to apply for a period of 12 months from the date of announcement unless Parliament passes the legislation giving effect to that announcement within that period of 12 months.

## Comment

- As the proposal currently stands, it amounts to delegation by Parliament of its plenary legislative power to the Minister of Finance. In terms of section 77 of the Constitution, a money bill is required to be passed by Parliament.

## Response

- Accepted. In order to be in line with the constitutional requirements, the wording of the charging provisions will be amended to provide that the rate changes announced by the Minister of Finance may be applied with effect from the date announced by the Minister of Finance subject to Parliament passing the relevant legislation seeking to give effect to that rate change within 12 months of the announced effective date.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (a) (pp.6 to 10)

The 2016 Draft TLAB proposes the introduction of a specific anti-avoidance measure in section 7C, which is aimed at curbing the tax free transfer of wealth through the use of low interest or interest free loans to trusts. The draft bill proposes that a notional amount of interest should be imputed to the lender in respect of low interest or interest free loans advanced to trusts. The effect of this proposal is to subject the lender of such loan to income tax on a deemed amount of interest.

### Comment

- While it is acknowledged that such loans are widely used as an estate planning tool in order to avoid estate duty and donations tax, however, the introduction of this provision in the Income Tax Act to address the avoidance of donations tax and estate duty is flawed as it uses an income tax instrument to address estate duty and donations tax avoidance.
- This will lead to various other complications regarding the interaction of this provision with the rest of the Income Tax Act.

### Response

- Accepted. The interest foregone in respect of interest free or low interest loans will no longer be treated as income but will be treated as an on-going and annual donation made by the lender on the last day of the year of assessment of the lender.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (b)

### Comment

- The proposed section 7C assumes as a starting point that all interest free or low interest loans to a trust are used for the purposes of avoiding estate duty or donations tax.
- However, this is not always the case as the inherent flexibility of trusts makes them an appropriate vehicle for many objectives other than tax avoidance. For example, trusts may be used as a vehicle to provide maintenance for children with disability, for Public benefit organisations, for employee share incentive schemes, as vehicles to protect assets from creditors, etc.

### Response

- Accepted. The scope of the proposed section 7C will be narrowed and apply to loans made to a trust by either a natural person or, at the instance of that person, a company in which that person together with connected persons in relation to that person hold an interest in that company of at least 20%.
- The following will be specifically excluded from the application of the proposed section 7C:
  - Special trusts that are created solely for the benefit of minors with disability;
  - Trusts that fall under public benefit organisations ;
  - Vesting trusts (in respect of which the vesting rights and contributions of the beneficiaries are clearly established);
  - Loan used by the trusts to fund the acquisition of primary residence;
  - Loans that constitute affected transactions and are subject to transfer pricing provisions;
  - Loans provided to the trust in terms of sharia compliant financing arrangement;
  - Loans that are subject to the provisions of section 64E(4) of the Act



## 2. Introducing measures to prevent tax avoidance through the use of trusts (c)

### Comment

- The proposed section 7C is ambiguous as it does not state whether the provision will apply to all loans currently in existence or only to loans entered into after 1 March 2017.
- It will be grossly unfair the provision is to apply to existing loans as this would be a retrospective amendment as some of the structures were created in anticipation of a particular tax treatment.
- If the provision is to apply to existing loans, individuals should be afforded the chance to adjust their tax affairs without facing unduly harsh tax treatment (such as capital gains tax for selling assets that are in the trust).

### Response

- Not Accepted. The proposed section 7C is intended to apply to all loans, including those in existence before 1 March 2017.
- The provision is not retrospective as it does not change the tax liabilities for previous years of assessment, but changes the tax treatment of these structures going forward.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (d)

### Comment

- The Income Tax Act currently contains attribution rules in section 7 and the Eighth Schedule. These rules aim to restore the economic benefit derived by any person by reason of transfer of property that has an element of generosity back to the person who made that transfer of property. In the case of interest free or low interest loans, the interest foregone triggers the operation of the attribution rules. In principle, the attribution rules will result in the person making an interest free or low interest loan being taxed on income or capital gains arising as a result of the loan funding.
- The proposed section 7C potentially results in double taxation as a notional interest charge will be included in the income of the same person making an interest free or low interest loan.

### Response

- Not Accepted. The current attribution rules indirectly deal with situation where interest is foregone. However, income must have been derived for the attribution rules to apply, and they apply with regard to certain instances (e.g., spouses and minor children).
- The proposed section 7C is still necessary as it addresses other issues.
- In addition, the revised proposed section 7C which deems interest foregone to be a donation will limit the unintended consequences.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (e)

### Comment

- The proposed section 7C proposes that the annual donations tax exemption of R100 000 contemplated in section 56 of the Income Tax Act will not be available for use in reducing the principal outstanding in respect of interest free or low interest loans.
- The denial of the annual donations tax exemption creates an uneven playing field and can be easily avoided by taxpayers.

### Response

- Accepted. The denial of annual donations tax exemption of R100 000 contemplated in section 56 will be deleted from the proposed provisions of section 7C.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (f)

### Comment

- The proposed section 7C creates uncertainty around loan arrangements involving foreign trusts. The available transfer pricing rules in section 31 of the Act also deems a notional amount of interest to have been received by a resident in the instance that an interest free or low interest loan is granted.
- The proposed section 7C is a more specific provision, and it will apply to these transactions. This will mean that the secondary adjustment in section 31 of the Act which further deems the notional interest to be a donation for purposes of donations tax will not be applicable in this regard.

### Response

- Accepted. A rule will be inserted in section 7C which will outline the interaction between section 31 and section 7C. Where the loan arrangement constitutes an affected transaction and section 31 applies, section 7C will not apply.
- As a result, for purposes of section 7C, no donation will be deemed in respect of a loan arrangement that has been subject to the transfer pricing rules in section 31 of the Act.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (g)

### Comment

- There is no need for the introduction of a further specific anti-avoidance measure aimed at curbing the tax free transfer of wealth through the use of interest free loans to trusts. South Africa has its case law, and in particular, a Supreme Court of Appeal judgement that regards interest free or low interest loans as a continuing donation to the extent of the interest foregone by the lender in the hands of that lender. .

### Response

- Not accepted. With regard to the reliance on the available case law in dealing with the avoidance highlighted, this will require a facts and circumstances analysis of every loan arrangement to determine the amount or rate of interest applicable in every instance. This is not a viable option.
- The proposed specific anti-avoidance measure introduces a standard rate of interest that will apply in these cases.

## 2. Introducing measures to prevent tax avoidance through the use of trusts (h)

### Comment

- The proposals in section 7C are contrary to the Davis Tax Committee (DTC) report on Estate Duty and National Treasury and SARS should have waited until the DTC had completed its work before making the proposals to the taxation of trusts.

### Response

- Noted. While the proposed amendments contained in section 7C do not address all the concerns raised and proposals made in the DTC report, the proposed section 7C does address several of the key DTC concerns through different avenues.
- Specifically, section 7C addresses the avoidance of donations tax and estate duty through the use of loan structures in the transfer of assets to trusts. In monetary terms, the issue of estate pegging is mitigated by taxing low or no interest free loans as donations as long as the loan is in existence.
- In doing so, tax leakage from such loan structures is significantly reduced. The issue of such tax avoidance is central to many of the DTC concerns.

# 3. Addressing the circumvention of rules dealing with employee based share incentive schemes (a )

(pp. 11 to 15)

- The 2016 draft TLAB proposes various provisions that aim to align the taxation of the benefits derived by a person in respect of share incentive schemes that he or she participates in by virtue of his or her employment.
- The principle behind these proposals is that dividends in respect of restricted equity instruments that are received by employees during the restriction period (prior to vesting) should form part of remuneration and dividends should be taxed at the marginal personal income tax rate applicable to an employee.
- In addition, a deduction is proposed with regards of any amount incurred and paid by an employer company in establishing a share incentive scheme in acquiring the shares on behalf of the employees.

# 3. Addressing the circumvention of rules dealing with employee based share incentive schemes (b)

## Overall comment:

Numerous concerns have been raised by taxpayers on the proposals.

- In the first instance taxpayers argue that the granting of the corporate deduction, although welcomed, results in a lack of symmetry and equity in the tax system as no deduction is granted for the dividends paid by the employer company that will be fully taxable in the hands of an employee. The limitation of the deduction only to amounts incurred and paid to establish the scheme is very limited.
- Secondly, BBEE restricted share schemes might be negatively affected by the proposal to tax dividends as remuneration. The argument being that the dividend flows are the reason such schemes are a viable incentive and taxing the dividends at the marginal rates might be detrimental.
- Thirdly, there is a lot of concern by taxpayers in respect of complex administrative challenges and changing of payroll and other systems as dividends would instead be subject to PAYE if treated as remuneration and not the current dividends tax treatment.
- Lastly, it is noted that in the 2016 Budget Review the original concern was the circumvention of the current specific anti-avoidance rules that aim to the characterisation of an amount that relates to services or employment as a capital receipt through dividend stripping.



# 3. Addressing the circumvention of rules dealing with employee based share incentive schemes (c)

## Overall response:

- Noted. It is proposed that the original proposal (treating pre-vesting dividends as remuneration and clarifying the tax treatment of costs incurred to provide employees with restricted equity instruments) be withdrawn for now. Even though this proposal is being removed from the 2016 TLAB, National Treasury retains its principled policy stance on this issue and will continue to consider this policy consideration and the surrounding concerns and complexities of its introduction.

## Revised proposal – tackling avoidance by means of “dividend stripping”:

- Even though the broader policy principle is not being pursued this year, it is necessary to put a stop to tax avoidance that is currently being achieved through “dividend stripping”. This practice of anti-avoidance occurs if the value derived from the restricted shares is liquidated in full or in part by means of dividend distributions that are effected a short time before the restrictions fall away effectively avoiding the current 8C anti-avoidance provision that taxes the growth in the value of vested shares.
- The current specific anti-avoidance rules in the legislation which target avoidance schemes relating to benefits derived from restricted shares or share-based incentive schemes do not deal adequately with some schemes where the restricted shares allocated to employees are liquidated in return for an amount qualifying as a dividend instead of a restricted share with an imbedded gain in its. As such, the targeted measure will subject only those types of dividends to remuneration treatment.

# 4. Extending the small business corporation regime to personally liability companies (p. 21)

## Comment

- When the new Companies Act came into effect, the definition of a private company in the new Companies Act expressly excluded a personal liability company. This means that personal liability companies cannot benefit from the small business regime as the current provision dealing with the small business regime specifically allows, *inter alia*, a private company to qualify as a small business.
- In order to correct this, it is proposed in the draft 2016 TLAB that personal liability companies should be expressly included in the definition of a “small business corporation” with effect from 1 March 2016 and that personal liability companies should only benefit from the favourable small business tax regime for the years of assessment ending on or after that date. However, the exclusion of personal liability companies from qualifying as small business corporations had no policy basis. This exclusion was a result of an unintended error made when technical corrections were made to section 12E for purposes of updating that provision with the introduction of the New Companies Act.
- As such the inclusion of personal liability companies should be retrospective.

## Response

- Partially accepted. The effective date will be changed from 1 March 2016 to 1 March 2013.
- As such, personal liability companies will benefit from the favourable small business tax regime in respect of years of assessment commencing on or after 1 March 2013.
- This date is proposed as years of assessment prior to the 2013 year of assessment would have prescribed.
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# 5. Tax treatment of long term insurers due to the introduction of SAM (a) (pp. 24 to 27)

## Proposed amendments in the 2016 Draft TLAB

- The 2016 Draft TLAB that was released for public comment on 8 July 2016, proposes amendments in relation to the tax treatment of long term insurers due to the imminent change of current regulatory basis to SAM.

## Overall comment on the proposed amendments in the 2016 Draft TLAB

- At issue is the transitional rules and the phasing in period of 6 years proposed in the 2016 Draft TLAB aimed at stabilizing tax collections by SARS and minimizing the financial impact on long term insurers as a result of changes to the adjusted IFRS basis of valuation for tax purposes.
- These rules are intended to cater for the difference in treatment of negative liabilities under the new regime (coming into effect when SAM comes into effect, presumably 2017) and the previous rules that applied for tax purposes.
- Another problem is that the current IFRS reporting standard permits different treatment for negative liabilities. Therefore, it would be difficult to have a one size fits all amendment in the tax legislation.
- Another issue is the fact that there are bigger players and smaller players in the long term insurance industry, therefore the impact is different.

# 5. Tax treatment of long term insurers due to the introduction of SAM (b)

## Meeting with Financial Services Board (FSB), long term insurance industry and tax practitioners on 1 September 2016

- On 1 September 2016, a meeting was held with FSB, long term insurance industry and tax practitioners. During the meeting, the following amendments were proposed in the 2016 Draft TLAB:
  - Clarification of the meaning of liabilities
  - Changes be made in section 29A(15) to the phasing in of negative liabilities
  - Introduce a new section 29A(16) that excludes negative liabilities that are recognised as an asset for accounting purposes and reported as such to the shareholders.
  - Clarification to the definition of risk policy

## Additional comments considered following the consultative meeting:

### Comment

- The proposed amendment to the definition of “adjusted IFRS value” relating to deferred tax liabilities determined in accordance with IFRS as annually reported by the insurer to shareholders in the audited annual financial statements is limited to the policyholder fund and not risk policy fund.

### Response

- Not accepted. The proposed amendment was intended to cater only for policyholder fund. Unrealised gains on assets allocated to the risk policy fund are not earned for the benefit of specific policyholders as in the case of policyholder funds under the trustee basis of taxation.

# 5. Tax treatment of long term insurers due to the introduction of SAM (c)

## Comment

- The proposed “adjusted IFRS value” definition is silent on the treatment of Deferred Acquisition Cost (“DAC”) and Deferred Revenue Liability (“DRL”). The treatment of DAC and DRL is not consistent throughout the industry.

## Response

- Accepted. Given the various interpretation for the treatment of DAC, it is recommended that consensus be reached with all insurance companies on the tax treatment before an amendment is made. Therefore, proposal relating to the treatment of DAC and DRL should not be considered in the 2016 TLAB process but be considered for the 2017 TLAB process.

## Comment

- The proposed definition of “adjusted IFRS value” envisages a reduction of the IFRS policyholder liabilities on a net reinsurance basis as reflected in the annual financial statements without a corresponding adjustment to the reinsurance asset allocated to the policyholder fund or risk policy fund.

## Response

- Not accepted. It is submitted that the reference to amount of liabilities “*net of amounts recognised as recoverable under policies of reinsurance*” is sufficiently clear as reference is made to amounts as opposed to assets or liabilities that are recognised as recoverable under policies of reinsurance. The explanatory memorandum will give further examples clarifying the reduction of IFRS policyholder liabilities by amounts recoverable under policies of reinsurance.

# 5. Tax treatment of long term insurers due to the introduction of SAM (d)

## Comment

- The proposed change to “adjusted IFRS value” and phasing-in rules/transitional rules creates effective date problems for insurers with a 30 June year end. Some insurers with 30 June year end may materially misstate their interim financial statement results if the Insurance Act comes into operation before /on 30 June 2017.

## Response

- Accepted. It is acknowledged that the effective date may create difficulties for insurers with 30 June year end. In order to cater for these circumstances, recommendations have been made to FSB to make the Insurance Act to come into operation, but not earlier than 01 July 2017. Furthermore, although it is acknowledged that some insurers with a 31 December year end may theoretically have difficulty in finalising amounts, however, during the consultation meetings with the insurance industry and tax practitioners, it was submitted that the amendments to the financial statements are known in advance.

# 5. Tax treatment of long term insurers due to the introduction of SAM (e)

## Comment

- The proposed phasing-in rules/ transitional rules are welcomed however, the amendment may create some abuse whereby insurance companies may change their accounting approach and reflect negative liabilities going forward as assets on a gross basis.

## Response

- Noted. Some insurance companies may change its accounting approach on treatment of negative liabilities. The proviso will be added to ensure that basis of determining the asset will be consistent with the basis of disclosure of policy liabilities and assets for financial reporting in 2015.

# 5. Tax treatment of long term insurers due to the introduction of SAM (f)

## Comment:

- It is proposed that an exception is made for cell captives to use an “adjusted IFRS” basis. Under IFRS 10, a cell can only be consolidated by the cell owner if it first meets the definition of “deemed separate entities”. IFRS 4 defines an insurance contract and the measurement of liabilities as dependent on the classification of contracts as an insurance or investment contract. Due to the above IFRS’s statements and the fact that the shareholders agreement is read in conjunction with insurance contract, the impact is that first party cell arrangements are not recognised in the income statement.
- Third party cell arrangements are recognised but the inclusion of cell underwriting profits and expenses do not impact the company’s net results, as the result of cell activities that are transferred back to the cell owner (reinsured third party cell owner resulting in a NIL Profit for third party cell arrangements in the Income Statements). The current basis of IFRS is that the cells profits are not in the Annual Financial Statements. However, currently for Income Tax purposes, tax is paid on the cells profits.
- It is therefore proposed that section 28 (short term insurance) and 29A (long term insurance) should use “adjusted IFRS” as a basis for the valuation of insurance liabilities but the effect of IFRS 10/IFRS 4 on the cell captive arrangement should be ignored.

## Response:

- Accepted. Changes will be made in the 2016 Draft TLAB so that the provisions for taxation of both short term and long term insurance business should use an “adjusted IFRS” as a basis of calculating liabilities.



# 6. Research and Development Tax Incentive

## (a) (pp. 32 to 35)

The Minister of Science and Technology appointed a Task Team to make recommendations on how the R&D tax incentive could be improved. One of the issues identified by the Task Team is the fact that delays in processing approvals could possibly result in tax assessments prescribing before the approval decision is communicated to the taxpayer.

The 2016 draft TLAB proposes that a provision should be added that will allow SARS to re-open and re-assess a previous year's tax return in order to grant an R&D deduction that would've been deducted if approval was granted timeously.

### Comment

- Some taxpayers requested that a single-tranche deduction be allowed in the current year, rather than going back to the specific year(s) that the application(s) was (were) submitted. It appears that this is linked to the comments on uncertainty surrounding the inclusion of the proposed amendment in the Income Tax Act, rather than the Tax Administration Act (TAA). Taxpayers want comfort that affected R&D deductions can be claimed by way of reduced assessments without impacting the otherwise prescribed status of their tax returns. The provision should be moved back to TAA to reduce uncertainty on re-opening of assessments.

### Response

- Not accepted. Consideration was given to amending the TAA. However, this section was specifically designed to remove the concern taxpayers have raised, i.e. it was intended to narrow the scope of the re-opening of tax returns to R&D adjustments.
- SARS has no intention of reopening assessments to audit any issues other than R&D. However, any illegal contraventions, such as fraud, would still be open for audit if assessments are reopened.

# 6. Research and Development Tax Incentive (b)

## Comment

- There was a request to allow a partial deduction whilst a taxpayer is waiting for pre-approval.

## *Response:*

- Not accepted. Prior to 1 January 2014, this was possible – taxpayers could claim 100 per cent of R&D expenditure on incurral (subject to audit), and were only required to submit an application to the R&D adjudication committee if they wanted to claim the 50 per cent uplift.
- The policy intent was to have a higher hurdle in place for obtaining the 50 per cent uplift. In a meeting in 2013 with industry, it became apparent that taxpayers saw no distinction between claiming 100 per cent of R&D expenses and the 50 per cent uplift. For this reason, it was agreed that they should be merged, which then required adjudication on 150 per cent.
- As stated on the SARS website, when calculating Provisional Tax, it is important not to assume that the Minister of Science and Technology will approve the application, as this is subject to penalties.
- However, for R&D expenses of a revenue nature, taxpayers can claim a section 11(a) deduction for 100 per cent of such expenses in the interim.

# 6. Research and Development Tax Incentive (c)

## Comment

- Some taxpayers raised the concern that SARS could impose penalties and interest for the underpayment of the second provisional tax payment. This could arise in a case where a taxpayer claimed 150 per cent of R&D expenses before the R&D projects were approved and, as a result, the taxable income and tax liability is lower than it would have been in the absence of the deduction.

## Response:

- Not accepted. With reference to the previous response, SARS has made it clear on their website that taxpayers should not assume an approval before receiving a letter signed by the Minister of Science and Technology (or a person to which this responsibility is delegated).

# 6. Research and Development Tax Incentive (d)

## Comment

- Some taxpayers submitted comments on issues other than the proposed amendment.

## Response

- Noted. Many of the issues raised are linked to the recommendations of the Task Team set up by the Minister of Science and Technology.
- The Task Team completed its report towards the end of May. In the limited time available before the start of the 2016 legislative cycle, it was proposed that an immediate solution which could be implemented is the current proposal, which allows taxpayers to reopen assessments and claim the deduction due to them even though the assessments had prescribed.
- The main complaint with respect to this incentive is the long delays taxpayers have experienced in receiving an approval/disapproval from the Minister of Science and Technology, who is advised by the adjudication committee.
- The Department of Science and Technology is currently working on measures to reduce the backlog, for example an online application process is set to go live in January 2017. This should substantially improve the efficiency of the system.

# **2016 DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL**

## **Key issues**

# 1. Prescription period for claiming input tax (VAT)

The VAT system has, since its inception in 1991, permitted the claiming of input tax against output tax in a tax period after the supply in order to, for example, cater for late receipt of a tax invoice required for the claim. Equally, however, the period for making such a claim was limited to five years. The limitation was moved to the Tax Administration Act, 2011, (TAA) where it gave rise to unintended consequences. The 2016 draft TALAB proposes amendments to reinsert the limitation in the Value-Added Tax Act, 1991, (VAT Act).

## Comment

- Clarification is sought as to the circumstances when input tax may only be claimed in the tax period in which the supply occurred. In addition, under which circumstances, would the five-year period still be applicable? It is submitted that the proposed amendment be scrapped to prevent confusion among vendors and tax practitioners.

## Response

- Partially accepted. The Memorandum of Objects will be amplified to clarify that the proposed amendment does not limit input tax claims to the tax period in which the supply occurred, but merely aims to reinsert the previously repealed section 44(1) in order to allow for an input tax claim in respect of a particular tax period if received by the Commissioner within five years after the end of that tax period. Hence the proposed amendment aims to maintain the five year prescription rule that has always applied to VAT input tax claims, as a result of the fact that this is unique to VAT and is thus better regulated in the VAT Act than the TAA.

## 2. Timing of mineral and petroleum royalty final tax return

The payment of mineral and petroleum resources royalties under the Mineral and Petroleum Resources Royalty (Administration) Act, 2008, largely follows the provisional tax scheme in the Fourth Schedule of the Income Tax Act, 1962. The 2016 draft TALAB proposes amendments to achieve greater alignment with the Fourth Schedule, particularly with regard to interest and penalties, with the aim of to improving payment automation.

### Comment

- It is proposed that the current provision that the final royalty return is due 12 months after the tax year be retained. The period was increased to 12 months from the then 6 months period, with effect from the 2014 tax year, as the shortened filing period resulted in unnecessary and costly administrative burdens for both the taxpayer and SARS mainly due to the fact that the Corporate Income Tax (CIT) and Royalty Tax computations are interdependent.

### Response

- Accepted. The 12 month period will be retained.

# 3. Funds, employment of staff and mandate of Tax Ombud (a)

The tax dispute resolution process consists of objection, alternative dispute resolution, appeal to the tax board, in simple cases, or the tax court, in more complex cases, and finally access to the normal court system. The Tax Ombud's office was created by the TAA to provide taxpayers with an accessible and affordable remedy service, procedural or administrative matters that would fill a gap that existed between SARS' internal processes in this area and access to the Public Protector or normal court system. The 2016 draft TALAB proposes amendments to enhance the Tax Ombud's independence and effectiveness, as well as extending the Tax Ombud's mandate.

## Comment

- The draft amendment is not clear as the preposition “of” in the phrase “funds of SARS” denotes ownership of the funds by SARS and therefore control of the funds by it. Hence, a clear separation is still not achieved between the funds owned and thus controlled by SARS on the one hand, and those for use and controlled by the OTO on the other hand. The ring-fenced funds of the Tax Ombud cannot at the same time be said to be the “funds of SARS”.

## Response

- Accepted. The proposed amendment will be reworded to clarify that the expenditure connected with the functions of the office of the Tax Ombud is paid in accordance with the budget approved by the Minister for the office. Reference to this amount being paid “out of the funds of SARS” will be removed.



# 3. Funds, employment of staff and mandate of Tax Ombud (b)

## Comment

- It is not clear whether only the staff from SARS will be appointed in the office of the Tax Ombud as they must be employed in terms of the South African Revenue Service Act, 1997, (SARS Act). The deletion of secondment but the inclusion that they must be employed in terms of the SARS Act makes it unclear as to how employment in the Office of the Tax Ombud will be done.

## Response

- Accepted. The proposed amendment will be reworded to clarify that the Tax Ombud must appoint the staff of his or her office who must then be employed in terms of the SARS Act. The reference to the SARS Act is essential if the Tax Ombud's staff are to enjoy the same conditions of service as SARS staff.

## Comment

- While the extension of the mandate of the Tax Ombud is welcomed it is noted that such a review may only be conducted at the request of the Minister of Finance. This is entirely impractical. The Tax Ombud should have the power to initiate an investigation of his own accord and not require a mandate from the Minister to do so. Alternatively, the initiative to investigate may be made subject to the Minister's prior approval.

## Response

- Accepted. The proposed amendment will be reworded to expand the mandate of the Tax Ombud to review, on own initiative with approval of the Minister, any systemic and emerging issue related to a service matter or the application of the provisions of the TAA or procedural or administrative provisions of a tax Act.

# Thank you

## QUESTIONS ?