Submission File

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Ms Mmule Majola and Ms Adele Collins
National Treasury / South African Revenue Service

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Dear Majola and Ms Collins

SAICA COMMENTS TO THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL 2018

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill (DTLAB18) and Tax Administration Laws Amendment Bill 2018 (DTALAB18). As opposed to prior years, where a single submission has been made, our submission this year has been divided into three parts, namely matters involving amendments to –

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

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

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

We have set out in detail in Annexure A our comments in relation to the matters referred to point 1 above pertaining to the Act.

We would like to thank National Treasury (NT) and the South African Revenue Service (SARS) for the opportunity to comment on the draft bills. Please do not hesitate to contact us should you have any queries in relation to anything contained in this submission.

Yours sincerely

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Chairperson: TAA subcommittee

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The South African Institute of Charted Accountants

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ANNEXURE A

TAX ADMINISTRATION (EXCLUDING VAT)

The Income Tax Act –

Amendment of section 64K of the Act

1 The DTALAB2018 Explanatory Memorandum (EM) sets out that in order to ease the compliance and administrative burden the proposed amendment repeals the requirement for a person receiving a tax-exempt dividend to submit a return.

2 In terms of the actual proposed amendment, it appears that taxpayers who receive partially exempt dividends are also not required to submit a return anymore.

3 Submission: We submit that clarity must be given in the EM that it was the intention to exclude partial exemptions as well.

Amendment to paragraph 1 of the Fourth Schedule - definition of 'employee'

4 The DTALAB EM refers to the deletion of directors of private companies from the definition of 'employee' in terms of the Fourth Schedule to the Act.

5 However, we have reservations as to whether this is achieved given SARS and NT previous position that para (a) of the definition of 'employee' would in any event include such directors.

6 The EM to Act 19 of 2001 states:

Income Tax: Amendment of paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962 See notes on insertion of Paragraph 11C in the Fourth Schedule to the Income Tax Act, 1962. Subclauses (a) to (c): The definition of "employee" is amended to include directors of private companies which are not otherwise included in terms of paragraph (a) of the definition. A director of a private company will, therefore, be an employee for purposes of the Fourth Schedule in respect of any amount of Pay-As-You-Earn (PAYE) which is deemed to be deducted in terms of paragraph 11C.

7 It remains unclear when these directors will be otherwise included in regard to the amounts they receive as directors.

8 This position is emphasised in the same EM in relation to paragraph 11C

Income Tax: Insertion of paragraph 11C in the Fourth Schedule to the Income Tax Act, 1962 As was announced in the Budget Review this year, the possibility of bringing all company directors in to the PAYE income tax system was to be

investigated. In this regard, a new paragraph 11C of the Fourth Schedule to the Income Tax Act, 1962, is being proposed. It is proposed that the definition of 'remuneration' in the Fourth Schedule be amended to delete the exclusion relating to amounts paid or payable to directors of private 22 companies. This will have the effect that remuneration of a director of a private company will become subject to employees' tax.

9	Submission: To remove any uncertainty we submit that the Act should be amended by reinserting subparagraph (vii) of the definition of 'remuneration' in the Fourth Schedule which read *"but not including … (vii) any amount paid or payable to any director of any private company in respect of services rendered or to be rendered by such director to such company…."*.

Amendment to definition of 'provisional taxpayer'

10 The amendment to the definition of 'provisional taxpayer' to include taxable income as opposed to income creates many complications.

11 For example, a salary earner that holds an equity based portfolio may have multiple capital gains and losses over the year within their portfolio. The amendment would require that person to become a provisional taxpayer purely by virtue of potentially minor gains and losses arising from normal daily trading in the equity portfolio i.e. through unit trusts or shares directly. Furthermore, as there may be both gains and losses arising at different points within a tax year, the net effect will only be known at the end of the tax year.

12 Such an amendment will also require significant amendment to the IRP6 returns as they do not cater for questions relating to the nature of the capital gain or loss.

13	Submission: We submit that the amendment requires more detailed discussion and clarity regarding the impact of broadening the definition of provisional taxpayer as there may be unforeseen consequences of such an amendment.

Amendment of paragraph 1 of Seventh Schedule to the Act

14 Non-executive directors of companies were removed from the definition of 'employee' for purposes of the Fourth Schedule. Consequently, these directors are not subject to PAYE in terms of that schedule.

15 The proposed amendment aims to deem a non-executive director to be an employee as far as a taxable benefit in terms of the Seventh Schedule is concerned. These taxable benefits are included in the definition of remuneration and hence the non-executive director will be required to pay PAYE on such taxable benefit.

16 This creates a contradiction in that the VAT and PAYE will now be determined not in relation to the nature of the appointment of director but by the means of payment for the serving in this role.

17 Submission: We submit that such an amendment once again creates uncertainty as to the nature of the non-executive directors' earnings. Treating non-executive directors as employees purely for fringe benefits provided but to classify the role and the resultant earnings as being that of an independent supplier of services muddies the waters once again.

18 The amendment will require the non-executive director to be placed onto the payroll and taxed on a benefit without regard to their total earnings. The taxable benefit may be below the threshold thus generating no monthly PAYE on the benefits provided.

19 Furthermore, there will be no cash to withhold against if the payments do not coincide with cash payments whereby setoff can be applied, and even that may be legally challenging to apply as the cash payments would not be processed via payroll.

20 We therefore submit that this amendment be withdrawn.

21 Should the concern be that income tax will not be payable or different valuation rules will be applied, then an inclusion in gross income should be done that refers to the valuation rules in the Seventh Schedule and the VAT Act should then also be amended accordingly so that VAT can be accounted for on this amount as consideration to be the director for the supply of his or her services rather than a deemed supply by the employer as vendor to the director as per section 18(3) VAT Act.

Tax Administration Act

Section 42 of the TAA Act

22 It has been proposed in terms of section 42 of the TAA to provide the taxpayer with an audit engagement letter to ensure it is notified of the commencement of an audit.

23 The EM indicates that the proposed amendment aims to ensure that taxpayer be notified at the start of an audit as part of efforts to keep all parties informed.

24 Following on recent case law, the proposal is to require that SARS issues an audit engagement letter and thereafter a report on the progress of the stage of completion of the audit. Whilst this amendment is welcomed, we note that there is no provision made in terms of the proposed amendment for a time frame within which SARS must issue the audit engagement letter and it is also not clear whether this must be issued before the actual commencement of the audit.

25 The amendment further does not indicate by whom the audit engagement letter should be issued.

26 While Section 42 specifically determines that SARS needs to provide the taxpayer with a report indicating the stage of completion of the audit there is no provision for an audit finalization letter. Taxpayers have been struggling to obtain confirmation from SARS on whether audits have been completed even after more than a year has lapsed since SARS has performed the relevant audit.

27 Submission: Whilst we therefore welcome the proposed amendment, we submit that the public notice should ensure that meaningful information is provided both in terms of the audit engagement letter and the subsequent progress reports issued as well as specifying the level of authority of the SARS official that is able to issue such a letter.

28 It must further be clarified that a taxpayer should not be required to request these reports and that SARS is obliged to issue the engagement letter within a specified time before commencement of the audit, and that the subsequent progress reports are issued at 90 day intervals without any request from the taxpayer.

29 It is also suggested that legislation specifically include the provision of an audit finalization letter, similar to the proposed audit engagement letter with reference to the date of commencement.

Deletion of section 125(2) the TAA Act

30 Section 125(2) of the TAA was deleted by section 26 of TALAA 2017.

31 The EM states:

The proposed amendment is a technical correction. The right of the appellant or his or her representative to appear at the hearing before the tax board is implicit.

32 Section 125(2) TAA Act deals with right of appearance at the tax court and not the tax board as indicated above.

33 Furthermore, the deletion of this provision means that the right of appearance is regulated by Rule 42 as there is no express rule otherwise and the Right of Appearance in Courts Act 62 of 1995 would then apply, barring all non-legal practitioners from appearing.

34 Submission: The deletion is major policy change if upheld and not a technical correction as indicated in the EM. The nature of tax and its complexity does not make it in the public interest to uphold this change in policy. Should SARS and NT maintain the deletion we would seek engagement on this matter given the policy change.

Section 191 – Diesel rebate set off against VAT liability

35 Currently the VAT 201 form compels the taxpayer to set off the diesel rebate against the VAT liability payable.

36 The SARS assessment and credit push payment facility also generates a payment for only the net amount.

37 Set-offs are dealt with in section 191 TAA Act and the TAA Act only deals with 'tax' under a tax act as defined in section 1, i.e. excluding taxes payable under the Customs and excise legislation.

38 This legal anomaly and arguable unlawful situation has created much practical difficulties.

39 For example, where a vendor submits a VAT return for a VAT liability of R10 but claims a diesel rebate of R2, only a liability of R8 is payable. However once SARS initiates a verification or audit on the diesel rebate and does not do the set off, a VAT underpayment dispute ensues and well as a customs dispute.

40 Submission: NT needs to take a policy decision if it want to enable the set off of diesel rebates against VAT as tax debt in terms of the TAA or not. In case of the latter, SARS has to amend its VAT 201 return.

Penalties

Amendment of section 222 of the TAA Act

41 The EM to the DTALAB2018 explains that:

> *Ad paragraph (a): The proposed amendment is a technical correction. The Tax Administration Act uses the term "submit a return required under a tax Act or by the Commissioner" – refer for example sections 25 to 27. "Default in rendering a return" is old wording taken from section 76 of the Income Tax Act, 1962.*

42 Administrative non-compliance penalties are dealt with in Chapter 15 of the TAA Act. The purpose of Chapter 15 is to ensure the widest possible compliance with the provisions of a tax Act and the effective administration of tax Acts, and also to ensure that an administrative non-compliance penalty is imposed impartially, consistently, and proportionately to the seriousness and duration of the non-compliance.

43 The fixed amount penalty table set out in section 211 of the TAA provides for a sliding scale of penalties based on the amount of the assessed loss or taxable income of the preceding year.

44 Non-compliance is defined in section 210(2) as the failure to comply with an obligation that is imposed by or under a tax Act and is listed in a public notice issued

by the Commissioner. This excludes inter alia non-compliance in respect of which an understatement in terms of Chapter 16 has been imposed.

45 The purpose of Chapter 15 administrative non-compliance penalties is by its very nature drafted to strictly but proportionately penalise non-compliance events. Previously this included the non-rendition of a tax return but since the TAA Act came into effect in 2012, SARS has, except for a few exceptions, not issued any notices to declare the non-rendition of tax returns as a non-compliance event.

46 This has led to the untenable position where Chapter 16 understatement penalties are now being applied in an artificial manner by the tax Courts and leading to a disproportionate liability whilst the same Courts are not considered to properly examine the 'prejudice' aspect.

47 Section 222(3)(b) of the TAA Act provides that the shortfall, for purposes of calculating the understatement penalty, is the sum of the difference between the amount properly refundable for the tax period and the amount that would have been refundable if the understatement were accepted.

48 With regards to the proposed amendment to section 222(3)(b), the DTALAB EM sets out as follows:

> *Pursuant to recent case law, it appears to be arguable that if no return is submitted, there could not be a shortfall under section 222(3)(a) of the Tax Administration Act as SARS would never "accept" a failure to render a return (refer ITC 13725 & VAT1426/IT13727&VAT1096 par [25] to [27]). Although this argument was not accepted in the case, if may be accepted in other matters. The amendment is accordingly proposed to provide clarity on this issue. The alternative proposal is based on the possibility that if such an argument ever was accepted, it could be applicable to all the scenarios under section 222(3) as the additional assessment that SARS may impose pursuant to the understatement could conceivably result in tax chargeable under (a), refundable under (b), or even an amount carried forward under (c). Each one uses the amount that SARS would have "accepted" in the calculation of the shortfall. It is, therefore, alternatively proposed that clarity is provided in respect of the whole of subsection (3) under a new subsection (4)(b).*

49 Submission: We submit that it is not appropriate to amend the TAA Act as the judgments referred to in the DTALAB EM were, in our view based on flawed reasoning.

50 Too wide a definition given to 'prejudice' which will give rise to unintended consequences.

51 The Administrative Non-Compliance penalty in Chapter 15 is the appropriate penalty provision which is designed for and suitable for purposes of dealing with or penalising the non-rendition of a tax return and as a result of the proposal an artificial situation is

created whereby 'tax' must be deemed to be nil (see amendment of section 222 of the TAA Act).

52 We propose that a notice is issued whereby the non-rendition of a return is made subject to the administrative non-compliance penalty and that it does not fall within the USP provision.

53 Furthermore, should SARS still be unsatisfied that the fixed penalty is sufficient, the law provides for appropriate remedy's in the form of estimated assessments and jeopardy assessments which are for this exact purpose, namely failure to submit a return.

Tax practitioner regulation

Amendment of section 240 of the TAA Act

54 The proposed amendment is explained in terms of the DTALAB EM is as follows:

An amendment is proposed to ensure that persons or registered tax practitioners that are tax non-compliant as a result of outstanding returns or tax debts are not registered or are deregistered, respectively. If a registered tax practitioner has been thus non-compliant repetitively or for a continuous period of at least three months during a period of six months and does not remedy the non-compliance within the period specified in a notice delivered by SARS, the practitioner will be deregistered as a tax practitioner. The tax practitioner may be reregistered once he or she is remedies the tax non-compliance and the above conditions are no longer met.

55 The meaning of 'repetitive' which is in the context of an alternative test to 'for a continuous period of at least six months' is entirely unclear and therefore open to interpretation.

56 Submission: Repetitive should be defined.

57 Regarding the time period of the continuous non-compliance, in our view, this is not aligned to the period of non-compliance with respect to submission of tax returns in terms of which an administrative non-compliance penalty is imposed. In this regard, the penalty is imposed only on the second incidence of non-compliance.

58 Submission: Furthermore, the non-submission of returns should be aligned to section 210 TAA Act.

59 Furthermore, based on our ongoing interaction with SARS over the last few years, specifically with regards to the shortcomings in SARS systems. resulting in such compliance anomalies arising as below:

a. Unexplained journal entries appearing on a taxpayer's statement of account resulting in a 'compliant' taxpayer now being noted as 'non-compliant';

b. Outstanding tax returns appearing on a taxpayer's statement of account for years in respect of which that taxpayer was not required to submit a return, resulting in the taxpayer being seen as non-compliant;

c. Delays in processing suspension of payment requests; and

d. Delays in SARS resolving the above (just some examples of the issues that have arisen in the past) or other issues which may arise

60 We believe that there is a significant risk that tax practitioners may be disadvantaged as a result of the systemic SARS issues rendering such tax practitioner as being 'non-compliant' with no clear indication as to how the non-compliance arose or how the matter will be resolved, unless a fair procedure exists in relation to these contested positions.

61 Submission: Given the impact that a deregistration would have on a tax practitioner and the taxpayers he or she has as clients (and the inability to do mass transfers of and notifications to clients should a deregistration occur), this power should be subjected to more checks and balances to eliminate "accidental" or "deregistration's in error" due to SARS systems or vacuums in law.

62 One of the specific matters listed above in relation to the suspension of debt process also creates much legal uncertainty as to when an "outstanding tax debt" that is disputed still exists and is "continuously outstanding".

63 There is currently no time frame within which and no prescribed manner whereby SARS must notify a taxpayer of its decision to grant or approve a suspension of payment.

64 There is currently a concern that there is a lack of cohesion between the definitions of 'tax debt' and 'outstanding tax debt' as relates to section 162, 164 and 169 and it remains arguable whether the suspension and subsequent prohibition to collect in section 164(6) means no tax debt that is due and payable arises.

65 Should this argument not be sustainable, the time period between application and granting payment suspension creates a vacuum that would lead to very harsh and unfair implications for tax practitioners.

66 Submission: It is submitted that even if the proposal refers to section 256(1)(a) and (b) of the TAA Act, given the severity of the consequences, we submit that this vacuum in relation to debt suspension be specifically rectified for this power by SARS to be effective fairly.

Section 240 (3) of the TAA Act – Prohibition to register

67 Section 240(3) prohibits registration as in section 240(1), namely by a Recognised Controlling Body or SARS.

68 However technically, only SARS can register a person as tax practitioner in terms of subsection (ii) of section 240(1) as with a RCB the person becomes a member and 'falls under jurisdiction' of the RCB.

69 Submission: In this regard, section 240(3) should only refer to (ii) and not 240(1) in totality.

70 Furthermore, should the cross reference be maintained, it should be excluded from the new subsection (d) as SARS are empowered to confirm the tax status and now to determine registration accordingly and not RCB's.

Section 240A(1) TAA Act Statutory bodies – Legal Practice Council (LPC)

71 On the 27-28 August 2018 SARS will be hold a workshop with RCB's regarding strategic matters, of which one of the matters to be discussed is the current model, including the split between statutory and other RCB's and the requirements of members.

72 However, as of 1 November 2018, the LPC will replace the four law societies and Bar councils as the statutory regulator of the legal profession with those bodies being relegated to mere member bodies.

73 In this regard it would seem untenable to retain section 240A(1)(b) & (c) in its current form as it would create a distinction with section 240A(2) RCB's that does not exist in relation to these entities.

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

Technical corrections

Amendment of section 44 of the TAA Act

75 The EM to the DTALAB2018 explains that the proposed amendment is a technical correction to align the use of a term in paragraph (3) with paragraph (4).

76 Submission: There is currently no paragraph 4 in section 44 of the TAA Act and as a result the explanation provided does not provide any guidance on the reason for the amendment. Clarity is therefore requested as to the nature and reasoning of the amendment.

CUSTOMS & EXCISE

Insertion of section 114A in the Customs & Excise Act

Application of TAA Act to write off or compromise of debt

77 In the DTALAB EM it is proposed that the provisions of the TAA Act applies 'with any necessary changes as the context may require' to the writing off or compromise of any duty, interest, penalty or forfeiture incurred under this Act and owed to the Commissioner for the benefit of the National Revenue Fund.

78 Submission: We submit that the phrase 'with any necessary changes as the context may require' is exceptionally vague and therefore open to interpretation. We propose that the wording is narrowed down so that it provides legal certainty.