Submission File

Ref: #766726

23 November 2020

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Parliamentary Standing Committee on Finance
3rd Floor
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Dear Sir

SAICA COMMENTS ON THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL OF 2020

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a further submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Taxation Laws Amendment Bill B – 27B2020 (TLAB20) and Tax Administration Laws Amendment Bill B28-2020 (TALAB20). Our submission has been divided into four parts, namely matters involving amendments to –

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

2. Estate Duty Act 45 of 1955, as amended (the ED Act)

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

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

We have set out our comments in detail in ***Annexure A*** *and have highlighted the changes from our first submission made on 10 October 2020 in red* but do wish to point the comments stemming from our original submission (and are thus in black) still remain valid.

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

Yours sincerely

David Warneke
Chairperson: National Tax Committee
The South African Institute of Chartered Accountants

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ANNEXURE A

TAX ADMINISTRATION LAWS AMENDMENT BILL 2020

Clauses 8(a), 21 and 34 / Paragraph 30 of the Fourth Schedule to the Act, Section 58 of the VAT Act, Section 234 of the TAA

The standard required before a person can be found guilty of a criminal offence

1. The original proposal made by NT was to remove the requirement for **"wilful conduct"** (i.e. intent) in relation to tax criminal offences.
2. The justification provided in the Explanatory Memorandum (EM) is that the National Prosecuting Authority (the NPA) has found it difficult to convict taxpayers for criminal tax offences due to is its inability to prove "wilful conduct" in relation to these offences.
3. The final bill released made a concession on this stance by splitting offences into two categories, one category with offences where 'wilfulness' is required and the other category where 'wilfulness or negligence' is required. For instance, section 234(1) states that "any person who wilfully…", meaning that negligence does not come into play. Therefore, there is only a criminal offence if there is a wilful submission of false documents. It already contains implicit protection from making a mistake in document submission or the negligence of a reasonable person. Subsection 2 pertains to 'wilfulness or negligence', meaning that negligence can be penalised in this case.
4. The first category includes intentional aspects of non-compliance where the nature of the non-compliance is such that the requirement of intent is implied, such as issuing a false document, obstructing or hindering a SARS official, assisting another person to dissipate their assets to impede tax collection and so on. The second category includes aspects of non-compliance that "strike at key duties that the tax system's broad application depends on", such as failing to register, submit returns, pay over tax that has been collected from a third party and so on.
5. It is evident from the nature of the items in the second category that would be easy for an unsophisticated taxpayer to either forget to comply with these items or not realise that they had to comply. The problem here is that the bar for criminal prosecution is actually lower for this category of offences than it is for the first category, which are more serious transgressions in that intent not to comply is implied by the nature of the transgression.
6. Since the second category merely requires wilfulness OR negligence, simply forgetting to submit a return on time, for example, or not realising that one was over the relevant threshold for registration would constitute negligence and thereby automatically, the commission of a criminal offence. As currently worded, the Bill would achieve nothing short of criminalising simple acts of negligent behaviour.
7. In our view, as expressed in our previous submission, the bar is too low in relation to the second category. The standard required before a person can be found guilty of a criminal offence has been considered by the highest court in the country, the Constitutional Court, where it was found that the basic tenant of blameworthiness and criminal liability is **intent** (*dolus*). These minor offences should be subject exclusively to civil sanction.The maximum penalty for the offences will be a fine or

two years' imprisonment and will be left to the presiding officer to decide what sentence is appropriate on conviction, considering all the aspects of the case.

8. This last statement appears to imply that SARS can apply selective prosecution, in that SARS officials are the ones selecting who gets reported for criminal prosecution and not the NPA. SARS could therefore select from taxpayers who have committed the same offence, which are to be criminally prosecuted and which are to receive civil sanction.

9. Submission: Minor offences should be subject exclusively to civil sanction and major offences to criminal sanction. The latter should be subject to mandatory reporting by SARS to the SAPS for investigation and NPA for prosecution where the facts on a *bona fide* basis allude to criminality.

10. In our view, our suggestions above align with the SARS Commissioner's strategy of treating voluntary taxpayers significantly differently from those who have the intent not to comply.

TAX ADMINISTRATION ACT

Amendment to section 95 of the TAA (Clause 29)

11. In terms of clause 29(a), SARS is seeking to legislate the issuing of an estimated assessment if a taxpayer fails to respond to a request for material in terms of section 46 of the TAA, after more than one request.

12. We have concerns regarding what SARS would view as a 'request for information'. We have seen many examples where taxpayers were not aware of requests for information, as the method of communication was uploading a letter on the taxpayer's or tax practitioner's eFiling profile, without notification that the correspondence had been uploaded.

13. Whilst technically this may constitute 'delivery', where the taxpayer or tax practitioner is unaware that new correspondence has been uploaded they will obviously not take action. In many cases, the only time a taxpayer becomes aware that documents have been 'requested' is when SARS' debt management starts calling the taxpayer to remind them to pay their outstanding debt which has arisen due to an additional assessment being issued as a result of non-response to an information request.

14. In RCB stakeholder engagements with SARS, SARS has confirmed that it would endeavour to issue notifications via SMS or email in all instances where correspondence is sent via eFiling. There was also agreement that if a person did not respond to a request for information issued on eFiling, this would be followed up with a call before an assessment is issued.

15. The principle of notifying the taxpayer using a channel he or she elects for delivery was also contained in the 2014 Section 255 draft regulations which were never finalised. These regulations would have compelled SARS to allow taxpayers to elect an email address at which SARS was compelled to notify of documents "delivered" on eFiling.

16. However, there are instances where the above approach has not been applied.

17. There have also been instances where there have appeared to be discrepancies between contact details on eFiling and such details on the SARS database.

18. In a recent court case, *SIP Project Managers (Pty) Ltd v CSARS (Case No: 11521/2020)* - it was evident that the correspondence SARS claimed had been delivered via uploading on eFiling, was not actually uploaded on the taxpayer's profile and therefore had not been delivered.

19. Submission: Requests for information must be sent via multiple communication platforms and where a tax practitioner is the preferred contact, the correspondence should be sent both to the taxpayer and tax practitioner using the contact details on the taxpayer's RAV01 form.

20.	To give effect to the above, we propose that sections 251 and 252 of the TAA be amended to provide for the proposed multiple methods of communication to ensure delivery.

Amendment to Section 190(2) of the TAA (Clause 33)

21. The TAA currently provides that SARS may not authorise a refund until such time that a verification, inspection or audit of the refund is finalised. It is proposed that this provision be extended to also include "criminal investigations".

22. In some cases, these verifications, inspections, audits and "criminal investigations" by SARS takes months or years to finalise.

23. However, it remains unclear what the term "criminal investigation" entails and whether it will be applied per taxpayer or include entire industries etc.

24. The legislation must clarify whether "criminal investigation" referred to is in respect of a person against whom there is confirmed evidence of a crime committed and whether this crime was reported to the South African Police Service (SAPS) and a SAPS case number been obtained.

25. As SARS seeks to impact taxpayer rights by withholding refunds, unclear positions like investigating an entire industry and then blanketly withholding refunds, like in 2019 in the agriculture sector is not fair administrative process.

26. This change indicates and confirms that SARS will withhold all refunds until the audit / investigation has been completed, which is not according to the wording of this sub-section. The verification, inspection, audit or criminal investigation refers to the specific refund and not any refund.

27. As was evidenced in the Tax Ombud's prior year report on Systemic Issues at SARS, one of the issues identified was that refunds for one period were being withheld whilst an audit/verification was in progress for another period. Withholding of the refund should be relevant to the period under audit or investigation and not to unrelated periods. This mostly applies to VAT refunds.

28. A taxpayer currently has no recourse against this administrative decision made by SARS and SARS is also not compelled to provide reasons for the decision to withhold the refund.

29. Though not part of this specific matter, we have also previously raised concern with SARS' entwinement in the criminal justice system and how constitutional rights are protected and how powers are given within the constitutional mandate. This ranges from search and seizure, sanction, overlap of civil and criminal investigations, who decides on criminal investigation and prosecution if not SAPS and the NPA and who is overseeing the legality of all these processes as given it is outside of the jurisdiction of the Independent Police Investigative Directorate.

30. In regard to criminal intelligence gathering which is part and parcel of criminal investigations, we note in the 2017 OECD report SARS claims it conducts none at a

covert level[1]. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially puts SARS on equal footing to the historical Scorpions unit.

31. Whether this is a good or bad thing is a policy and political decision, but should then be fully aligned one way or another.

32. Submission: "Criminal investigation" for the purposes of withholding refunds should be defined and limited to a particular taxpayer and a reasonable timeline of 30 days in which SARS must finalise the verification, inspection, audit and criminal investigation relating to the specific refund should be included.

33. The administrative decision made by SARS should be subject to objection and appeal.

[1] http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.pdf

TAXATION LAWS AMENDMENT BILL 2020

ESTATE DUTY ACT

Amendments to sections 3(2)(bA) and 3(3)(e) of the ED Act (Clause 1)

34. The proposal in the TLAB20 is:

Property which is deemed to be property of the deceased includes -

"(e) *so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was allowed as a deduction in terms of paragraph 5 of the Second Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), to determine the taxable portion of the lump sum benefit that is deemed to have accrued to the deceased immediately prior to his or her death*."

35. NT / SARS explained the original reason for its introduction into the ED Act, in the Explanatory Memorandum on the Taxation Laws Amendment Bill, 2015 (4 December 2015), as follows:

"To limit the practice of avoiding estate duty through retirement contributions it is proposed that contributions that were made on or after 1 March 2015 to a retirement fund that did not receive a deduction should be included in the dutiable part of the estate for estate duty purposes."

"Contributions that did not receive a deduction which have been included as part of any lump sums payouts to the retirement fund member or that have been used to offset the tax liability for annuity payments to the retirement fund member will not be included in the dutiable value of the estate (to avoid any potential double counting)."

36. In the subsequent amendment by Act No. 17 of 2017, the Taxation Laws Amendment Act, 2017 it merely added the underlined parts:

"… of section 11 (k) ***[or]****,* <u>*section 11(n)*</u> *or* <u>*section 11F*</u> *…"*

37. The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2019 - 21 January 2020 stated:

"In 2015, changes were made in section 3(2) of the Estate Duty Act by inserting a new paragraph (bA). The main aim of the amendments was to prevent individuals from avoiding estate duty by making a large contribution into a retirement annuity fund in the year the individual dies. Consequently, this paragraph makes provision for inclusion in the estate any amounts that have not been allowed as a deduction in terms of sections 11(k), 11(n) or 11F of the Income Tax Act (essentially the excess non-deductible contributions created by the large contributions made to the retirement annuity fund). However, section 3(2) (bA) erroneously includes not only excess contributions in terms of sections 11(k), 11(n) or 11F, but also amounts which are not taken into consideration in terms of the Second Schedule of the Income Tax Act."

"In order to close this loophole, it is proposed that retrospective changes be made to section 3(2)(bA) of the Estate Duty Act. The proposed changes should be deemed to have come into effect in respect of the estate of a person who died on or after 30 October 2019 and also applies to any contributions made on or after 1 March 2016."

38. It is agreed that section 3(2)(bA) be deleted and that the provision is moved to deemed property, or section 3(3). It originally was incorrectly included in property.

39. It solves a practical problem as well, as the REV267 was not amended and executors included these amounts as deemed property together with a "benefit due and payable from a fund" (see Account 2 - Property deemed to be property of the deceased as at the date of death (continued) on page 5-8). This of course was not correct, but was the only way to include this in the value of property in the estate.

40. Submission: SARS should amend the REV267. The return must allow the executor to separately declare these amounts as deemed property.

41. The 2019 amendment stated that the purpose of the provision was "to prevent individuals from avoiding estate duty by making a large contribution into a retirement annuity fund in the year the individual dies".

42. Submission: It was not the intention to only include the excess contributions made in the year of assessment of death as deemed property in the estate.

43. What the previous amendments missed, is the way the deduction is determined when the taxpayer is assessed for normal tax purposes.

44. Where a lump sum benefit accrues to a taxpayer during a year of assessment, paragraph 5 and, or, paragraph 6 provides for a deduction to be made. It reduces the lump sum benefit and it is only the net amount that is then included in the gross income of the taxpayer (under paragraph (e) of that definition in section 1(1) of the Act).

45. The deduction:

The deduction to be allowed, both for the purposes of paragraph 2(1)(a) and also for purposes of paragraph 2(1)(a)(ii) or (b) is an amount equal to so much of the person's own contributions that did not rank for a deduction against the person's income in terms of section 11F to any pension fund, pension preservation fund, provident fund, provident preservation fund and retirement annuity fund of which he or she is or previously was a member;

46. See paragraph 5(1)(a) and paragraph 6(1)(b)(i) of the Second Schedule to the Act.

47. Where no lump sum benefit accrued to the taxpayer, during a year of assessment, or a section 10C exemption applied, the 'excess contributions' carried forward from previous years of assessment, is added to the contributions made by the taxpayer in the current year of assessment. In this instance, the year of assessment during which the taxpayer died. This is in terms of section 11F(3)(c):

Any amount contributed to a pension fund, provident fund or retirement annuity fund in any previous year of assessment which has been disallowed solely by reason of the fact that the amount that was contributed exceeds the amount of the deduction allowable in respect of that year of assessment *is deemed to be an amount contributed in the current year of assessment*, *except to the extent that the amount contributed has been—*

(a) allowed as a deduction against income in any year of assessment;
(b) accounted for under paragraph 5(1)(a) or 6(1)(b)(i) of the Second Schedule; or

(c) *taken into account in determining the amounts exempt under section 10C*.

48. This resulting amount, being the excess contributions carried forward plus the contributions in the current year, qualifies for deduction when the taxpayer's taxable income is determined for the year of assessment (period in the year of death of the taxpayer). This excess is then deemed to be a contribution made in that year.

49. This deduction is then limited by section 11F(2)(a) – the R350 000; 27,5% and taxable income limit.

50. This begs the question, does the section 11F deduction, with respect to the excess contributions, work on a first in first out basis? This is relevant where there was an excess amount on 1 March 2016.

51. Submission: It should be clarified that the section applies to actual contributions made after 1 March 2016 and does not include deemed contributions (under section 11F).

52. The principle, relevant to the amendment, is that it is only once SARS issued an assessment (for the period of assessment until date of death), that the amount that did not rank for a deduction against the person's income in terms of section 11F will become known.

53. When the fund makes application for the tax to be withheld, SARS will only take the excess amount as reflected on the latest IT34 into account as a deduction. The same applies on assessment. The contributions made during the year that exceeds the limits, is not taken into account.

54. It is possible that where the executor submits a return of income and the election, by the nominees is then made thereafter, that SARS may take the excess amount as determined on the first assessment into account as a deduction.

55. When the nominees make an election to take an annuity, there is no lump sum. The excess contributions are not carried forward to the estate or nominee and, whilst it is lost to the nominee (for purposes of section 10C), it would then also not be added to property in the estate.

56. The same would apply where the amount elected by the nominee as a lump sum is less than the excess contributions.

57. The original version stated as follows:

2. (1) Section 3 of the Estate Duty Act, 1955, is hereby amended by the insertion in subsection (2) after paragraph (b) of the following paragraph:

> *"(bA) so much of the amount of any contribution made by the deceased in consequence of membership or past membership of any pension fund, provident fund, or retirement annuity fund, as was not allowed as a deduction in terms of section 11(k) or (n) of the Income Tax Act, 1962 (Act No. 58 of 1962), or paragraph 2 of the Second Schedule to that Act or, as was not exempt in terms of section 10C of that Act in determining the taxable income as defined in section 1 of that Act, of the deceased;".*

(2) Subsection (1) comes into operation on 1 January 2016 and applies in respect of the estate of a person who dies on or after that date in respect of contributions made on or after 1 March 2015.

58. We agree that this wording forced, in a sense, the nominees to elect to take a lump sum, at least to the value of the excess contributions carried forward (if possible).

59. However, where a nominee elects to use the total retirement interest to buy an annuity, there will be no deduction allowed under the Second Schedule. This is in terms of paragraph (iv) of the proviso to paragraph 3A of the Second Schedule - no lump sum benefit shall be deemed to have so accrued to the extent that the lump sum benefit was utilised to purchase or provide the annuity. As there is then no deduction, there will be no deemed property under the proposal.

60.	Submission: The above may well be the intention, but then it is not clear why section 10C has been left out. It would reduce the annuity, or living annuity, taken in the period 1 March to date of death and as such, reduces the excess contributions at the beginning of the period of assessment.

INCOME TAX ACT

Withdrawing retirement funds upon emigration (Clause 2(i), (n) and (p))

[Applicable provisions: Section 1 of the Act, the definitions of "Pension Preservation Fund", "Provident Preservation Fund" and "Retirement Annuity Fund"]

61. The proposed amendment reads:

> T*he definitions of "pension preservation fund", "provident preservation fund" and "retirement annuity fund" in section 1 of the Income Tax Act currently allow members to take pre-retirement lump sum withdrawals from such retirement funds if the member has emigrated and that emigration is recognised by the South African Reserve Bank (SARB). However, the Minister of Finance announced in this year's*

budget that the current foreign exchange control regime will be modernised and that 'emigration' will be phased out.

62. The TLAB20 proposes that the 'emigration' provisions in the definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” be replaced with a 'residence' based test i.e. members will be able to take pre-retirement lump sum withdrawals if they are 'not a resident for an uninterrupted period of three years or longer'.

63. The proposed three year waiting period poses the following practical problems as set out below.

64. The definition of 'resident' for natural persons relies on whether a natural person is “ordinarily resident" in the Republic or whether they meet a time-based “physical presence” test. If a natural person does not meet either of the tests, that person will not be considered to be a resident. The test for whether a natural person is not a resident does not consequently require that status to endure for an 'uninterrupted period of three years or longer'. To arbitrarily require a three year waiting period for retirement fund members to access their pre-retirement lump sum withdrawal benefits is inconsistent with the definition of 'resident' and other existing provisions in the Act (such as sections 9H of the Act) which have immediate tax consequences when ceasing to be a resident.

65. The proposed three year waiting period does not take into consideration those retirement fund members who recently emigrated with SARB approval.

66. If these retirement fund members have not accessed their retirement benefit they will have to wait a period of three years before accessing their pre-retirement fund lump sum benefits, causing unnecessary financial hardship on tax/exchange control compliant emigrants and ignoring their legitimate 'non-resident' status.

67. The proposed three year waiting period has the effect of making an investment in a retirement annuity fund (in particular) less attractive than that of pension, provident and preservation funds. While members of pension and provident funds can take pre-retirement lump sum withdrawals when they terminate their employment relationship (and members of preservation funds can do so once prior to retirement), members of retirement annuity funds who become non-resident will have to wait three years to access their pre-retirement benefits.

68. Submission: The proposed three year waiting period is clearly at odds with the existing tax treatment of natural persons who cease to be resident for tax purposes. It also has the potential to cause financial hardship and an unnecessary distinction between different retirement funds. We still propose it should be withdrawn

69. In order to ensure parity between emigrants and non-residents, it is suggested that the emigration requirement be retained (for those natural persons who have already emigrated) and a new requirement requiring a member's 'non-residence' status be added. SARS already recognises the emigration status of members (for preservation funds and retirement annuities) as well as the immediate non-resident

status of members (for retirements from all retirement funds). SARS already has criteria which it considers as acceptable proof of a natural person's emigration and/or non-residence and there is consequently no reason that these same criteria cannot be applied to determine a preservation fund/retirement annuity fund member's non-resident status.

70. Submission: The following wording is proposed:

71. **Definition of Pension Preservation fund**

(v)(c)(ii) a member shall, prior to his or her retirement date, be entitled to the payment of a lump sum benefit contemplated in paragraph 2 (1) (b) (ii) of the Second Schedule where a member—
(*aa*) was a resident who emigrated from the Republic and that emigration was recognised by the South African Reserve Bank for the purposes of exchange control; or

(bb) ceased to be resident in the Republic ;

72. **Definition of Provident Preservation fund**

(v)(c)(ii) a member shall, prior to his or her retirement date, be entitled to the payment of a lump sum benefit contemplated in paragraph 2 (1) (b) (ii) of the Second Schedule where a member—
(*aa*) was a resident who emigrated from the Republic and that emigration was recognised by the South African Reserve Bank for the purposes of exchange control; or

(bb) ceased to be resident in the Republic ;

73. **Definition of Retirement Annuity Fund**

(x) that a member shall, prior to his or her retirement date, be entitled to

(dd) the payment of a lump sum benefit contemplated in

Paragraph 2 (1)(b)(ii) of the Second Schedule where a member—
(*A*) was a resident who emigrated from the Republic and that emigration was recognised by the South African Reserve Bank for the purposes of exchange control; or

(B) ceased to be resident in the Republic ;

Amendment to section 1 Definition of "REIT" (Clause 2(o))

74. The wording of the amendment has the effect that provided all the equity shares of a REIT are listed, preference shares may be issued by the REIT.

75. Submission: This appears to contradict the rationale for the amendment as referred to in 3.7 of the Draft EM.

Amendment to section 7C (Clause 3)

76. The proposed amendment will apply to preference shares issued by companies, the shares of which are held by trusts, and will force dividends to be declared annually at a rate at least equal to the 'official rate of interest'. This treatment will apply even if there was a genuine commercial reason for the issuing of preference shares by the company as a form of funding.

77. Submission: The amendment should be reconsidered.

Amendment to section 9(2)(k) (Clause 5)

78. It is proposed to have section 9(2)(k) of the Act amended by replacing the words "attributable to" with "effectively connected with".

79. Section 9(2)(b)(i), section 9(2)(c), section 9(2)(e), section 9(2)(l)(i)(aa) and section 9(2)(l)(ii) have the same reference of "attributable to". However, no similar changes have been proposed to these sections.

80. It is proposed to only have section 9(2)(k) amended by referring to amounts "effectively connected with" as opposed to "attributable to" with reference to a permanent establishment.

81. Section 9(2)(k) is not the only instance where the reference "attributable to a permanent establishment" is set out.

82. The draft EM determines that "the proposed amendment is a consequential amendment which deletes the words "attributable to" a permanent establishment and replaces them with the words "effectively connected with" a permanent establishment as a matter of consistency with the rest of the Act and brings the wording in line with the OECD Model Tax Treaty".

83. All taxpayers will be impacted when determining the source of income in terms of section 9 of the Act.

84. Submission: It is submitted that the term "effectively connected with" has also been amended in respect of the interest and royalties articles of the OECD Model Tax Treaty. It would therefore make sense to also amend the sections as set out above in respect of interest and royalties to ensure alignment.

85. It is recommended to also amend section 9(2) to ensure alignment with the OECD Model Tax Treaty as it relates to interest and royalties.

Amendment to section 9D (Clause 6)

86. The purpose of section 9D is to achieve parity in treatment, insofar as possible, with the position where the South African resident owned the passive offshore assets directly and not through a foreign company. Had assets of a capital nature been

held by an individual, special trust or insurer in respect of its individual policyholder fund, the inclusion rate upon disposal of the assets would not have been 100%.

87. The new proviso to section 9D(2A) says that " 'D' represents an amount equal to the amount **deducted** in respect of any dividend **paid by that controlled foreign company** for the purposes of the dividends tax contemplated in Part VIII of this chapter" (our emphasis).

88. Where a South African resident company (A) holds an indirect interest in a South African resident company (B) through a CFC, the new proviso to section 9D(2A) does not achieve an equitable result. This is because, had the interest in company B been held directly by company A and not through a CFC, the dividend would have been exempt from dividends tax in terms of section 64F. The result of the new proviso will be that the dividend will in effect be subject to income tax in the hands of company A whereas it would have been entirely exempt from both income tax and dividends tax were the interest in company B held by company A directly. The same anomaly arises in respect of any other beneficial owner that would have qualified for an exemption from dividends tax in terms of section 64F.

89. Submission: The inclusion of a net capital gain of a CFC in the hands of a natural person or special trust at the rate of 40% and not 100%, should be retained. (subsection (2A) paragraph (f)).

90. Paragraph (f) of the proviso to subsection (2A) should refer to a dividend paid "**to**" a CFC and not "**by**" a CFC. It is also uncertain how a dividend in specie would be treated.

91. It would be better to refer to "an amount equal to the amount of dividends tax withheld in terms of section 64G or 64H, or of dividends tax paid as contemplated in section 64EA(b) read with section 64FA, in respect of any dividend paid to that controlled foreign company".

92. The proviso to subsection (2A) should not apply to taxpayers listed in section 64F.

Amendment to section 9H (Clause 7)

93. The proposed amendment to section 9H introduces economic double taxation - i.e. there is taxation both at the level of the company that ceases to be South African tax resident and in respect of the South African tax resident shareholder.

94. Submission: We suggest that the proposed amendment be withdrawn.

Amendment to section 9K (Clause 9)

95. The mere transfer of the listing of a share to an exchange outside the Republic should not constitute a deemed disposal of the share.

96. In reality there has been no disposal of the share and the transfer of the listing would not be accompanied by the receipt of any proceeds which could be used to fund the resulting tax liability.

97. Upon cessation of an individual's tax residence in South Africa, a capital gains tax exit charge must be calculated and it is unclear why an exception to this rule must be made in the case of the transfer of the listing of a share, simply because the South African Reserve Bank will phase out the approvals process for the transfer of a listing abroad.

98. Submission: We propose that the proposed amendment be withdrawn.

Section 10(1)(o) – Exemptions for remuneration earned whilst outside SA (Clause 10)

99. Section 10(1)(o)(i) provides exemptions from tax in respect of the remuneration earned by an officer or crew member of a ship engaged in the international transportation of goods and passengers if he/she is outside the Republic for 183 days during a year of assessment.

100. Section 10(1)(o)(ii) exempts remuneration earned by a South African tax resident who is an employee and renders services outside South Africa on behalf of an employer (South African or foreign) and in the course of rendering said service is outside the Republic for periods exceeding 183 full days, of which more than 60 full days must be continuous, in any 12-month period beginning or ending in a year of assessment.

101. These sections require that the person must be outside the Republic for 183 (or more) days, with section 10(1)(o)(ii) adding an additional requirement that more than 60 days should be continuous. The announcement of the national lock down with effect from 26 March 2020 midnight in South Africa accompanied by the travel bans that were implemented world-wide, resulted in many individuals being unable to leave South Africa to perform their duties in the country of residence of their foreign employers.

102. This has left many travellers wishing to leave the country stranded and falling foul of the section 10(1)(o)(i) and (ii) requirements. Through no fault of their own, these employees are unable to meet the requirements of section 10(1)(o)(i) and section 10(1)(o)(ii) as well as the Double Tax Agreement provisions (Article 14 and or 15 of most of SA treaties, have reference).

103. National Treasury has made changes in the TLAB2020 so in order to qualify for exemption, the number of days that a person spent working outside South Africa will be reduced to more than 117 days in any 12-month period, for years of assessment ending from 29 February 2020 to 28 February 2021. The current requirement in section 10(1)(o)(ii) that more than 60 of the days abroad should be a continuous period remains as is.

104. Although we appreciate this late relaxation of the 'number of days' rules as stipulated above, the concern, however, is that the 66 days is not sufficient as many were able to leave South Africa but they were not able enter the countries they were returning to for work due to travel bans being imposed in those countries.

105. In addition to the above, the concern is that irrespective of the number of days the individuals were unable to leave South Africa, the remuneration earned during this time is regarded as being from a South African source as the services were rendered in South Africa. Thus the section 10(1)(o)(ii) exemption would not apply to this income, meaning that it would be taxable in South Africa.

106. The foreign employers have largely continued running their payrolls as usual and foreign taxes have been withheld from the remuneration paid to these individuals. The individual would thus be subject to double taxation and only a section 6quat(1C)(a) deduction may be available as the income earned whilst in South Africa is from a South African source (not from a foreign source).

107. Submission: Although reducing the number of days to 117 may assist in many instances, the concern is that the remuneration earned by individuals for services rendered whilst working in South Africa during lockdown would be regarded as being from a South African source and taxable in South Africa and the section 10(1)(o)(ii) exemption would not be applicable to this remuneration.

108. The Secretariat of the Organisation for Economic Co-operation and Development (OECD) has issued recommendations that encourage the tax authorities to focus on minimising or eliminating unduly burdensome compliance requirements given the restrictions in place in a number of countries and on preventing hardship for taxpayers in the context of the COVID-19 crisis which has resulted in involuntary and temporary changes to the place where employment is usually performed.

109. Rather than changing the number of days in the section 10(1)(o), we suggest that, as was done in the UK, Ireland and Australia, the presence of an individual in South Africa, if such presence is shown to result from travel restrictions related to COVID-19, be disregarded. The time period to determine this will of course be unique to each individual but will ensure that taxpayers will not be prejudiced by the effects of COVID-19.

110. Should this not be accepted, we propose that a temporary relief measure be incorporated in section 10(1)(o)(ii) by removing or reducing the requirement for a person to be physically outside South Africa when rendering services to non-resident employers if the reason for this was due to restrictions of travel due to COVID-19.

111. The temporary relief measures should also be applicable to section 10(1)(o)(i) and not just section 10(1)(o)(ii). Changes should also be considered in respect of the DTA's (clause 14 in most South African treaties and clause 15 in the model OECD treaty) – that is, the 183 days in any 12-month period should not be applied in the 2020 and 2021 tax years.

Amendment to section 10(1)(q): Bursary (Clause 10)

112. The reason provided for amendment was to close down various abusive structures utilising salary sacrifice as the basis to render the income as exempt.

113. Section 10(1)(q) of the Act provides an exemption from tax, in respect of bona fide scholarships or bursaries granted to enable any person to study at a recognised educational or research institution, provided that certain conditions are satisfied.

114. A number of amendments have been proposed in order to close down abusive schemes that have become prevalent in the industry. These schemes are focused on the provisions of section 10(1)(qA) where bursaries are provided to relatives of employees and rely on salary sacrifices to fund school fees. The concern with these structures appears to be two-fold: the conversion of taxable remuneration to exempt remuneration and that these bursaries are not bona fide bursaries or scholarships.

115. Two of the proposed amendments seek to close down salary sacrifice structures by first removing the exemption in cases where salary sacrifices have funded the benefit and secondly, by disallowing the employer's deduction for the bursary in such case.

116. There are a large number of legitimate bursary schemes in place, which do have an element of salary sacrifice, which will be negatively impacted by the proposed changes.

117. These proposals cannot be evaluated in isolation and require a review against the backdrop of South Africa's current educational system. "The South African education system, characterised by crumbling infrastructure, overcrowded classrooms and relatively poor educational outcomes, is perpetuating inequality and as a result failing too many of its children, with the poor hardest hit". (https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/).

118. Similarly, the exemption in respect of bursaries/scholarships granted to relatives of employees is aimed at assisting lower income-earning employees.

119. Submission: It is entirely possible to have a valid and properly implemented salary sacrifice structure to fund bona fide bursaries to employees and to relatives of employees and the proposed amendment will close down these existing and valid bursary programmes. It appears from the proposed amendment that NT is seeking to ensure that bursaries are provided on an "on top of" package basis which is a highly desirable goal and an ideal to strive for, however, financially it may mean that fewer employees are able to benefit from bursaries going forward.

120. In communicating previous proposals for the increase of the monetary limit in respect of bursaries and scholarships granted by employers to employees or relatives of qualifying employees it was stated that the monetary limits associated with bursaries and scholarships granted to relatives were revised in order to support

skills development and to encourage the private sector (employers) in the provision of education and training to employees and relatives of their employees.

121. Submission: This proposed amendment and policy change undermines these positive strategic policy positions and intentions previously adopted, tabled and communicated by Parliament and NT.

122. The most substantial and a seemingly unintended impact of this amendment will be to employer provided bursaries, in terms of which, employers assist their employees to further their studies, on a tax-free basis, provided the criteria, as defined, are satisfied.

123. Submission: This amendment will thus dissuade employers from continuing to provide bursaries to relatives of their employees, to enable them to further their education due to the substantial financial implications of the amendment. The current economic outlook only indicates more financial strain to come and removing the employers' contribution to education will worsen this impact for many employees.

124. Consideration should be given to the substantial positive effect and contribution that legitimate employer provided bursaries to relatives of their employees has had in assisting such persons to further their studies. The private sector should be encouraged to continue the provision of education and training and not be dissuaded from doing so through the implementation of restrictive amendments such as the one proposed.

125. The proposed approach on salary sacrifices could be regarded as necessary, albeit too broad as the nuisance sought to be addressed can be effectively addressed without the need for such a drastic, unnecessary and unjustified amendment that has seemingly unintended consequences.

126. Currently the amendment to this section is stated as follows:

127. "by the deletion in subsection (1) in paragraph (i) of the proviso to paragraph (q) if the word ''and'' after subparagraph (aa), the insertion of the word ''and'' after subparagraph (bb) and the addition of the following subparagraph:…"

128. Submission: As there is no subparagraph (aa) in relation to paragraph (i) in subsection (1) and the word "if" should be "of", it appears the amendment should have read as follows:

129. "..by the deletion in subsection (1) in **paragraph (ii)** of the proviso to paragraph (q) **of** the word "and"… "

130. The point above, excluding the correction of the word "if", applies equally to section 10(1)(qA).

Amendment to section 12R (Clause 18)

131. The proposed amendment to section 12R will have the effect that allowances will no longer necessarily be available to investors for the full 10 years after they commenced to carry on a trade in a Special Economic Zone.

132. Relying on the promised duration of the incentive, business have validly invested in Special Economic Zones.

133. Submission: Shortening the period of which the incentive will be enjoyed will thus have the effect of undermining confidence in future incentives provided by the State and should be reconsidered

134. The provisions of sections 12R will cease to apply "in respect of any year of assessment commencing on or after 1 January 2031. The removal of the alternative "10 years after the commencement of the carrying on of a trade in a Special Economic Zone" from the sunset clause means that qualifying companies will no longer benefit from the SEZ tax incentive for a 10-year period, as was initially intended when the SEZ provisions were introduced in the Act.

135. Is it also unclear as to how taxpayers must treat buildings that would have qualified for the allowance under section 12S, but have not yet claimed the full value of the section 12R building allowance by the sunset clause date (i.e. whether the taxpayer would continue to claim the accelerated building allowance, or whether sections 13 or 13quin would apply to the remainder of the allowance once the section 12S provision ceases to apply).

136. Submission: We recommend that the sunset clause retains the alternative end date of 10 years after the commencement of the carrying on of a trade in a SEZ, to ensure that all taxpayers who qualify for the SEZ benefits would be on an equal footing. Alternatively, we request that it be clarified that the remaining building allowances would qualify under the other building allowance sections in the Act.

Amendment to section 45 (Clause 33)

137. The purpose of having a zero base cost is to create a potentially punitive situation if the parties seek to abuse the benefits of this section. On the other hand, parties who genuinely use the section for which it was intended, should not be prejudiced.

138. It therefore it is not clear why:

a. the holders of the debt or shares have a zero base cost and suffer capital gains, which gains are then disregarded, provided the parties remain part of the same group;

b. when they cease to form part of the same group within six years, which is a minimum period for non-abuse, the base costs are restored without any tax being suffered, and therefore it is not clear why this anti-abuse provision is included in the first place; but

c. no relief is given for the holder of the debt or share if there is no de-grouping within the six-year period, or if the parties de-group after the period of six years, and one would have expected that this is precisely the time when the reinstatement of base cost should have occurred instead, but it does not.

139. Submission: Relief appears to be given to the holder in a non-compliant scenario, but not to a holder in a compliant scenario. This surely should not be the case and should be reconsidered.

Amendment to section 46 (Clause 34)

140. The proposal affects 'live' transactions and not all transaction that will be impacted will be done with an avoidance intent as conceded. It is therefore unfair to treat them all the same with retrospective effect.

141. Submission: The amendment should apply to unbundling transactions that are entered into after the date of promulgation of the Taxation Laws Amendment Act or another date in the future given that it impacts legitimate transactions as well that do fall within the policy intent.

Amendment to section 64EB (Clause 37(1)(a))

142. Submission: The proposed change to the wording will have the effect that if there are multiple consecutive cessions of the right to dividends, all cedents will potentially be subject to dividends tax on the same dividend. This is economic double taxation.

Amendment to paragraph 64B of the Eighth Schedule to the Act (Clause 51)

143. The proposed wording would appear to apply to the situation in which a controlled foreign company holds shares in a non-South African resident company listed on the Johannesburg Stock Exchange.

144. By virtue of their listing on the Johannesburg Stock Exchange, such shares may be said to be 'located, issued or registered' in South Africa.

145. Submission: It is submitted that such shares be excluded from the proposed amendment.

146. Furthermore, the wording of section 9H(5) of the Act should be amended to cater for the 'to the extent' wording proposed by this amendment.

VALUE ADDED TAX ACT

Insertion of new paragraph (y) to section 11(2) of the VAT Act (Clause 64)

147. The Draft EM on the DTLAB20 indicates that the proposed section 11(2)(y) provides for the zero rating of telecommunication services provided between telecommunication services providers and is aimed at complying with the requirements of the International Telecommunication Regulations concluded at the World Conference on International Telecommunication held in Dubai in 2012 (effective 2015) (Dubai ITR), to which South Africa is a signatory.

148. The current proposed wording of section 11(2)(y) is ambiguous as it is not clear whether the proposed zero rating applies to all services supplied to International Telecommunication Service Providers by Telecommunication Service Providers registered in the Republic of South Africa, or whether zero rating under this provision applies only to international telecommunication services as contemplated in Dubai, 2012.

149. Submission: It is recommended that the wording of the proposed section 11(2)(y) should be amended to clarify the ambit of the services that would qualifying for zero rating under this provision.