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The Standing Committee on Finance

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Dear Mr Wicomb and Ms Sepanya

SAICA COMMENTS ON THE DRAFT 2022 TAXATION LAWS AMENDMENT BILL, TAX ADMINISTRATION LAWS AMENDMENT BILL AND REVENUE LAWS AMENDMENT BILL

The National Tax Committee, on behalf of the South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make a submission to the Standing Committee on Finance on the 2022 Draft Taxation Laws Amendment Bill (DTLAB), Draft Tax Administration Laws Amendment Bill (DTALAB) and the Draft Revenue Laws Amendment Bill (DRLAB).

Our submission has addressed amendments to the following tax Acts –

- The Income Tax Act, 58 of 1962, as amended (the Income Tax Act);
- The Tax Administration Act, 28 of 2011, as amended (the TAA);
- The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and
- The Carbon Tax Act, 15 of 2019, as amended.

We have set out our comments on all the above in detail in **Annexure A**.

On a more general note, we wish to raise the following three general points regarding the current Bills:

1. We express concern that the drafting standard of the Explanatory Memorandum (EM) on the DTLAB this year is not at the standard that we are used to in previous years. This is reflected in the repetition of content[1] and incorrect referencing to provisions[2].

[1] For example, on page 5: the last two paragraphs; page 6: the first 8 paragraphs, page 23-24: the examples provided.

[2] For example page 5: Clause 1.1, reference in the heading to definition of "remuneration" in the Fourth Schedule (as only section 7B is being amended); page 15: Clause 2.3, references to sections 8F, 8FA and 50A, and effective dates that were not in agreement with the DTLAB (for example, page 6: Clause 1.1; page 11: Clause 1.6; page 31: Clause 5.4).

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These points seem to indicate that the Bills were rushed through without the proper review procedures having taken place which is of concern given that these are in respect of fiscal legislative changes.

2. Another concern is that we are unclear as to what extent our submissions during the Annexure C process are in fact being considered. Many Annexure C submissions (i.e. mere technical corrections) that were made in previous years by various taxpayers and organisations (including SAICA) seem to have gone unattended, without explanation. For this reason, we refer NT again to SAICA's submissions made during the 2020 and 2021 Annexure C process for ease of reference. We do, however, highlight in this current submission, the main areas of critical importance that we feel strongly should have been included but have not been considered in the 2022 DTLAB and DTALAB.

3. In conjunction to the above, NT's responses to stakeholders that NT will not engage on nor entertain matters outside of the bills that were not also included in the Budget Review is noted. However there seems to be no public record that affirms what matters, as submitted by stakeholders, the NT and Minister have considered to include in the budget or not. In this regard stakeholders remain in the dark whether matters not included in the Budget are just not a current policy or legislative imperative or whether its not within the relevant policy at all. Without this certainty of outcome, stakeholders repeat submissions in the hope of a clear position and outcome from NT. As Parliament noted, if stakeholders take the time to make submissions, they can expect a short explanation why the matters were not considered. We do, however, note that during the NT workshops held last week, NT has agreed to hold a workshop early in November to discuss all Annexure C issues that have not been addressed to date. We thank them for this and look forward to this meeting.

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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The South African Institute of Chartered Accountants

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ANNEXURE A

DRAFT TAXATION LAWS AMENDMENT BILL 2022

INCOME TAX ACT

Section 1 – Definition of "retirement annuity fund" (Clause 1(1)(*l*))

1. It is not clear why the value of each individual contract being transferred from one retirement annuity fund to another retirement annuity fund must exceed R495 000 and why, where the total member's interest in a retirement annuity fund is not transferred into another retirement annuity fund, the member's interest remaining after the transfer must exceed R495 000 for tax-free treatment to apply to the transfer. That is, why should the threshold be set at twice the *de minimis* amount of R247 500?

2. Submission: Clarity on the above should be provided and it is suggested that one times the *de minimis* amount would makes more sense rather than twice the *de minimis*. This would also favour taxpayers with smaller savings amounts.

Section 7B – Definition of "variable remuneration" (Clause 2(1)(d))

3. According to the EM, the amendment seeks to ensure that performance-based variable payments that form part of an employees' salary in the informal sector are included in "variable remuneration". The legislation, however, only includes remuneration that is based on "units produced" into the definition of "variable remuneration".

4. In addition, it is our understanding that performance or units produced by the informal sector will be regarded as casual wages and mostly even weekly or day wages. It is thus uncertain why there would be a mismatch between accrual and payment in these circumstances.

5. Submission: Clarity should be provided on why the informal sector was specifically mentioned in the EM but not included in the legislation (this inclusion though would have required a definition of the "informal sector" to be inserted into the legislation). The context and reason for the amendment is therefore unclear given that the reason for change and proposal is the exact same wording as well.

6. Clarity is also required on what is meant by "units produced" because in certain industries, especially in the agricultural industry, payments are made based on "outputs" (eg. number of crates packed) rather than "units produced". The EM does not address this aspect as all.

7. A proviso has also been added to ensure that the date of accrual as relates to deceased employees is retained as the day prior to date of death – that is, changes have been made in the legislation to clarify the fact that section 7B does not apply in instances where the employee is deceased. Thus, the normal variable remuneration rules (taxation

is payable on the date of payment not on date of accrual) will not apply to an amount paid to a deceased employee.

8. The proposed wording makes reference to a payment made to a deceased employee instead of amounts that accrued to a deceased employee (accrual date being a day prior to the date of employee's death). The proposed wording will create unintended confusion on when section 7B is applicable.

9. Submission: To achieve the objective of the proposed amendment without causing any ambiguity, we propose that the proposed wording should make reference to accrual instead of payment to a deceased employee. The proposed amendment should read as follows:

10. "Provided that this section shall not apply in cases where the variable remuneration accrued to a deceased employee prior to the date of death."

Section 9D – Treatment of amounts from hybrid equity instruments (Clause 4(1)(c))

11. The amendment provides for an exclusion, from the amount to be taken into account in determining the net income of a controlled foreign company (CFC), of income that accrued to that company in respect of a foreign dividend from a hybrid equity instrument held in any other CFC in terms of section 8E(2), including any similar amount adjusted in terms of section 31.

12. Submission: The same exclusion for dividends in respect of section 8E hybrid equity instruments should be extended to dividends from third party-backed instruments in terms of section 8EA.

13. Clarity should also be provided on what is meant by "*any similar amount adjusted in terms of section 31*".

Section 10(1)(i)/paragraph 5(1) of the Eighth Schedule – Apportioning of interest exemption/CGT annual exclusion on cessation of residency (Clause 5/22)

14. The problem is created as a result of the natural person having two years of assessment in a single 12-month tax period when he/she ceases to be a South African tax resident. In this instance the natural person may double-up on the interest exemption as well as the CGT annual exclusion (as the exemption and annual exclusion are available per year of assessment and are currently not apportioned in instances where the year of assessment is less than a 12-month period).

15. The proposed amendment provides for an apportionment of the interest exemption and the CGT annual exclusion to cater for instances where the individual's year of assessment is less than 12 months.

16. Submission: A simpler approach would be to provide that for any year of assessment that is shorter than 12 months (other than on death), all the exemptions should be pro-rated.

17. In addition to the above, various *other annual amounts* in the Income Tax Act are also potentially impacted by this scenario and would also need to be apportioned to ensure equity and fairness. Examples of this are for instance the section 12T tax-free savings limits and retirement fund contributions in section 11F.

18. A concern could be raised by individuals that cease to be resident and are deemed to have disposed of their world-wide assets (subject to certain exclusions) on ceasing residency in a particular year, that they would generally forfeit the balance of their CGT annual exclusion as they will most likely not have any further capital gains/losses in subsequent years. To provide for this, the annual exclusion for the period 1 March to 28/29 February, could be limited to the annual exclusion value, regardless of whether there is more than one year of assessment during this period.

19. The amendments come into operation on 1 March 2023 and apply in respect of years of assessment commencing on or after that date.

20. Submission: From a practical perspective, SARS' efiling system currently does not cater for the submission and assessment of two tax returns in 'one tax year'. It is thus hoped that the SARS efiling system will be updated to take this situation into account as well as the apportionment of the exemption and annual exclusion. This proposal should only be implemented from 1 March 2023 if SARS have confirmed that eFiling will be updated before such date.

Section 11(*e*) – Asset acquired as a government grant in kind (Clause 8(1)(c))

21. When a government grant in kind is acquired, the deduction provision in respect of wear and tear in section 11*(e)* of the Income Tax Act gives rise to a double benefit because it applies to the value of the asset and not the expenditure or cost incurred by the taxpayer (which would be Rnil). This creates an anomaly as, with cash government grants, the receipt of a government grant in kind is exempt from tax but the assets subsequently acquired using such cash government grants do not qualify for wear and tear allowances as the assets are treated as not having tax attributes in respect of which allowances can be deducted.

22. To address this anomaly, an amendment was made to section 11(*e*) as follows:

    "no allowance may be made in respect of any machinery, plant, implement, utensil or article acquired by the taxpayer as a government grant as defined in section 12P(1);".

23. Whilst we appreciate the attempt by the NT to address the tax leakages created in this scenario, the proposed amendment seems to target all government grants in kind (including government grants that are not exempt from tax). For a government grant to be exempt from normal tax, it must meet the requirements set out in section 12P. Not all

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government grants meet these requirements to be exempt from normal tax and taxpayers in such situations are liable to pay tax on these government grants received.

24. Submission: We propose that the proposed amendment should apply to assets acquired by the taxpayer as a government grant that is exempt from normal tax in terms of section 12P(2) or (2A).

25. Alternatively, taxpayers must be allowed a deduction of the wear and tear on the amount representing the tax paid or payable in respect of a government grant in kind that is not exempt from normal tax.

26. From a grammatical perspective, the term government grant should be in inverted commas, so as to read "…acquired by the taxpayer as a "government grant" as defined in section 12P(2) or (2A)".

Section 11D – Research and Development (Clause 34)

27. It is proposed that the incentive be extended in its current form until 31 December 2023. NT has, however, indicated that this incentive requires improvements to enhance its simplicity and certainty with respect to eligibility. NT thus committed to publishing a separate document soon after the publication of the 2022 DTLAB that will outline the intended changes to the incentive based on the review done by the government and public consultations held in 2021. NT noted that this will provide the public with more opportunity to provide comments and assist in formulating more concrete proposals to be included in the 2023 Budget Review.

28. Submission: The extension of the incentive and a further opportunity to comment on the proposed changes is welcomed.

29. As indicated in SAICA's pre-2023 budget submission, innovation (funded by research) drives value creation and consequently the creation of wealth for a country and its citizens. The importance of the role of governments over the last 100 years in either the direct creation of innovation or through indirect means by *funding innovation* that did not meet the corporate risk appetite, has been shown to be critical. Thus extending the R&D incentive is most welcomed and we look forward to commenting on proposed future enhancements to this incentive.

Section 12L – Energy efficiency savings tax incentive (Clause 9)

30. The energy efficiency savings (EES) tax incentive in section 12L of the Income Tax Act was introduced to encourage investments in energy efficient equipment and business practices by firms. It initially had a sunset date of 1 January 2023 and this has now been extended by three years to 31 December 2025 (ie. years of assessment ending before 1 January 2026).

31. Submission: This extension is welcomed but it is uncertain why the incentive is limited to this date considering the country's drive to decarbonise industries. The NT indicated that this incentive is one of the revenue recycling measures to limit the negative impact of the increasing carbon tax, yet this incentive has a shorter life span than the carbon tax that is being levied on businesses.

32. Revenue generated from the carbon tax should be used to provide incentives to change behaviour and promote decarbonisation by taxpayers.

Section 20 – Assessed losses (Clause 42(1)(a))

33. The restriction of the balance of assessed losses as relates to mining operations is not clear considering the examples and the policy intent of the mining ring-fencing provisions. The two examples are exactly the same, but the ordering should be different based on the proposed changes.

34. Submission: The examples should be adjusted to reflect the proposed changes to the section.

35. In view of the ordering rule/clarification for mining entities, consideration should be given as to whether there is a need for an ordering rule/clarification as there are other items that are included in taxable income. For instance, this is particularly relevant concerning the 10% deduction allowable in terms of section 18A(1), and this would, for instance, apply to all entities as well, not just mining entities.

36. The effective date of this proposed change is 19 January 2022.

37. Submission: The effective date should be in respect of years of assessment beginning on or after 19 January 2022.

Section 24 – Lay by agreements (Clause 13)

38. In order to mitigate against the adverse effect of an upfront inclusion of proceeds from lay-by arrangements, it is proposed that the current provisions of section 24, dealing with credit agreements and debtors' allowance be amended. In this regard, it is proposed that a new subsection be introduced in section 24 of the Income Tax Act that makes provision for a taxpayer to claim as an allowance against income, all amounts which are deemed to have accrued but which have not become due and payable to that taxpayer at the end of the taxpayer's year of assessment, to the extent that an amount was not claimed by the taxpayer as an allowance in terms of the provisions of section 11(j). This is subject to a condition that any allowance claimed must be included in the taxpayer's income in the following year of assessment.

39. The proposed amendment will come into operation on 1 January 2023 and apply in respect of years of assessment commencing on or after that date.

40. Submission: This relief is welcomed by SAICA considering the state of the country's economy and financial position of many of its citizens.

Paragraph 4 – Second Schedule (Clause 19(2))

41. The EM states that the amendment is effective from 1 March 2023 and will apply in respect of years of assessment commencing on or after that date, yet the DTLAB states that the effective date is 1 March 2023.

42. Submission: The DTLAB should be amended to align with the EM.

Section 4 – Taxation Laws Amendment Act, 2021 (Contributed tax capital) (Clause 41(1))

43. The following further proviso is added to the definition of "contributed tax capital" (CTC) in section 1 of the Income Tax Act:

    ": *Provided further that an amount transferred by a company as contemplated in paragraph (a) or (b) must not comprise a transfer of contributed tax capital unless all holders of shares in that class to which transfers are made within a period of 91 days before or after the date of that transfer are actually allocated an amount of contributed tax capital based on their proportional shareholding within that class of shares*:".

44. Submission: It appears that the current proposal is a wide anti-avoidance proposal that is trying to cover two aspects of concern simultaneously – that is, that there are multiple distributions and there are single distributions that are not being paid in proportion to the shareholders capital contributions.

45. The simple solution to this would be to allow a distribution of CTC only to the extent that all shareholders who participate in that distribution must do so in proportion to their CTC.

46. Should this not be acceptable to the NT, we set out below our concerns with the provided proposal in the DLTAB.

47. The effect of the proposed amendment results in an anomaly that is best explained with an example. Say a disproportional distribution of CTC is made ("distribution A"). Two months later, another disproportional distribution of CTC is made ("distribution B").

48. Applying the amendment to this example results in both distribution A and B being regarded as 'tainted'. However, this is impractical as it will require a backdating of the treatment of distribution A from a distribution of CTC to a dividend. However, distribution A may have occurred in a different financial year and may already have been reported on. It is further unclear whether penalties and interest would apply in such circumstances.

49. The word "*transfers*" in the third line of the proposal should be replaced with "*such transfers*", as it is unclear which types of transfers are being referred to. The word

"*transfer*" may otherwise simply mean "payment", which would potentially include any (ordinary) payments made by a company in the test, which would be unintended.

50. Furthermore, the words "*of contributed tax capital*" should be inserted after the word "*transfers*" in the third line. Failing this, companies may have been prohibited from declaring normal dividends prior to and after the transfer of CTC.

51. The words "*before or after*" should be "*before and after*". Provision should also be made for transfers on the same date as a current distribution.

52. After the word "*shares*" in the final line of the proposal, the words "*in each such transfer*" should be inserted so as to read "*shares, in each such transfer*", otherwise it is not clear in which transfers the proportional allocations of CTC must be made.

53. The section should thus read as follows:

54. "*Must not comprise a transfer of contributed tax capital unless all holders of shares in that class to which such transfers of contributed tax capital are made within a period of 91 days before, on and after the date of that transfer are actually allocated an amount of contributed tax capital based on their proportional shareholding within that class of shares in each such transfer:*".

VALUE ADDED TAX ACT

Various section 72 ruling changes (Clauses 27, 31, 32 and 33)

55. The effective date of the clauses dealing with the review of the section 72 decisions with regard to various VAT matters (cross-border leases of foreign owned ships, aircraft and rolling stock for use in the RSA; registration of certain foreign suppliers; flash title sales; pooling arrangements and documentary evidence for repossessions) is currently included as 1 January 2023.

56. However, all section 72 VAT rulings were withdrawn with effect from 1 January 2022.

57. Submission: To provide much-needed certainty in these complex cases and to ensure that vendors were not unnecessarily in breach of the legislation, these clauses should have had an earlier effective date than the proposed date of 1 January 2023, that is, they should have started from the date after the rulings were withdrawn i.e. 1 January 2022.

58. Alternatively, should the proposed effective date of 1 January 2023 remain, the legislation should provide for an exclusion from section 8(2) of the VAT Act which will apply upon deregistration. Vendors who duly complied with the VAT registration requirements when these rulings were withdrawn, may now face an exit VAT liability in respect of all enterprise-use assets on hand at the date the proposed amendments come into effect which will provide that these vendors will no longer be required to be VAT registered.

Vendors that duly complied with the law should not be unduly penalised due to a timing difference in the legislation.

59. The paragraph (a) to Clause 27 reads as follows: "*solely the use or the right of use of ships, aircraft, [and] rolling stock and parts directly in connection thereto under any rental agreement*".

60. However, the use of the conjunction "and" implies that the provision applies only if the right of use of all listed items (being ships, aircraft, rolling stock and parts) are provided together instead of individually (e.g., only ships, or only aircraft, etc.).

61. Submission: The words "and parts" should be "or parts".

62. The proviso (ii) to Clause 33 reads as follows: "*such person or body must elect in writing that the pool be treated as a separate enterprise for the purposes of this Act and applies for such pool to be registered separately in terms of section 50; and*".

63. Submission: The word "applies" in proviso (ii) should be "must apply".

64. The proviso (iii) to Clause 33 reads as follows: "*notwithstanding the provisions of section 54(1) and (2), the pool is treated for the purposes of this Act as a principal and not as an agent of shareholders, partners or members of such body.*"

65. Submission: The word "is" in proviso (iii) should be "shall be".

Section 9 (and 18D) – Time of supply (Clauses 28)

66. The proposed amendment clarifies the date of the time of supply and is consequential to amendments made in 2021 regarding VAT treatment of temporary letting of immovable property. The section now reads that the time of supply deemed to be made in terms of section 18D(2), is deemed to be the date within the tax period in which the agreement for the letting and hiring of the accommodation in a dwelling comes into effect.

67. Submission: Clarity is needed to determine what the position is when the property developer made an adjustment in terms of section 18D(2) based on the intention to only let the property for a period not exceeding 12 months but, due to a change in circumstances, the lease period is extended beyond 12 months. The property developer cannot be required to make another adjustment in terms of section 18(1).

68. It is also not clear what the position is if the property developer subsequently sells the property in these circumstances, as it will not qualify for a section 16(3)(o) deduction. It does not seem to be correct that two output tax adjustments are required, that VAT is levied on the sale and no input tax deduction is allowed.

69. Section 18D(5)(a) entitles the developer to claim a deemed input tax deduction where a property is sold within the 12-month temporarily applied period, at the time that such

property is sold. However, the position regarding the deemed input tax deduction allowed in sections 18D(5)(b) and (c) are not clear.

70. Submission: The intention seems to be to allow the input tax deduction only in the tax period when the property is subsequently sold, but this is not clear from the wording of sections 18D(5)(b) and (c) and this should be clarified.

71. It is not clear how s18D(4) interacts with section 16(4)(a)(ii), seeing that section 18D(3) stipulates that the subsequent sale takes place in accordance with section 9(3)(d). In view thereof that section 18D(3) stipulates that the subsequent sale takes place in accordance with section 9(3)(d), it is also not clear how section 18D(5) and section 16(3)(o) should be applied in view of the provisions of section 16(3)(a)(iiA) where the developer sells the property under an instalment credit agreement, or where the purchase price is paid over a period in time.

72. Submission: Clarity is required on the interaction between the above-mentioned sections.

Section 23 – Registration of foreign suppliers for VAT (Clauses 32)

73. The purpose of this section appears from the explanation in the EM to allow a foreign company to register as a branch of its local subsidiary. However, the wording of the section is not clear. Section 23(2A)(a) provides:

74. "*(2A)(a) Notwithstanding subsection (2) every person who is not a resident of the Republic, and who in terms of subsection (1) or section 50A, becomes liable to be registered in accordance with Chapter 3 of the Tax Administration Act, shall be deemed to be a branch of the registered vendor upon written application for registration by that registered vendor..*"

75. Submission: It is uncertain which registered vendor this subsection is referring and this this should be clarified in the legislation.

76. This amendment does, however, not take into account scenarios where there is no South African group company that is registered for VAT. This situation should be provided for in the legislation. This could be done by allowing the non-resident company to register independently from its South African group companies.

77. Proviso (i) to this section deems all non-resident holding companies or subsidiaries which form part of the same group companies to constitute a single branch registration.

78. Submission: Only the non-resident holding companies or subsidiaries *which carry on any enterprise in SA* should form part of such branch registration, and then only if each such individual holding company or subsidiary *is required to register for VAT in SA* under section 23(1).

79. Proviso (ii) to this section states that such branch should also be deemed to be a separate enterprise from the registered vendor.

80. Submission: To ensure consistency throughout the VAT Act, the term "separate enterprise" should be "separate person".
81. The proviso should also state that such branch is deemed to be a separate *person* from the non-resident holding company or subsidiary and section 8(9) should also be made applicable to such branch.
82. Section 23(2A) is very difficult to understand without the necessary context surrounding the section or the type of scenarios the section is trying to cater for.
83. Submission: It is recommended that the section is redrafted to be clear and concise. Where needed, the use of definitions in a preamble should be used to avoid unnecessary repetition (e.g., repetition of the phrase "*separate branch which is separately registered*").
84. References to the same entity should also be consistent throughout the section (e.g., reference to "*single branch registration*", "*branch*", "*separate branch contemplated in paragraph (a)*", "*single branch registered separately in terms of paragraph (a)*", "*separate branch separately registered under paragraph (a)*", "*the separate branch which is registered separately in terms of paragraph (a)*" all refer to the same deemed single branch registration or VAT group.

CARBON TAX ACT

Section 5 – Carbon tax rate trajectory (Clauses 38)

85. The projected carbon tax rates are provided in the DTLAB and these include a carbon tax rate adjustment by US$1, US$2 and US$ 3/tCO2e for the 2023, 2024, and 2025 tax periods ending on 31 December, respectively. To determine the Rand equivalent annual carbon tax rate adjustment, the average exchange rate as defined in section 1 of the Income Tax Act should be used.
86. The proposed rate changes for 2026 is a rate of US$20/tCO2e rand equivalent and US$30 in 2030. The average exchange rate as defined in section 1 should once again be used to determine the Rand equivalent annual carbon tax rate adjustment.
87. From an international perspective, it is our understanding that the carbon tax rates are typically set in the currency of the country concerned. The concern is that South Africa has one of the most volatile currencies in the world. It has also been argued that pegging carbon prices to the US$ results in an additional externality (other than greenhouse gas emissions) and "causes conflicts of economic interest between domestic monetary independence and external stabilization" for countries that are exposed to the US$. This may be ascribed to fact that the US$ is the dominating global currency and that the US Federal Reserve frequently implements monetary policies that are not aligned with the global common interest. Taking these factors into account, it is unclear why the rates were provided in US$.

88. Submission: As mentioned in SAICA's submission dated 15 July 2022 on various carbon tax policy matters, because the impact of the proposed rate increases for many taxpayers is very large, it would be prudent for NT to explain why it has decided to indicate the proposed carbon tax rate increases in US$ and not South African Rands.

89. This is critical taking into consideration the dire economic situation that the country finds itself in and the volatility of the Rand as using a US$ rate will create significant uncertainties for business.

90. Clarification is also requested on the methodology and information that informed the new proposed rates of the carbon tax. It would be appreciated if detailed information could be provided on how the proposed tax rates were established.

91. Clarity is also sought on whether a formal stakeholder consultation process has been followed to support the new proposed carbon tax rates.

92. As mentioned above, to determine the Rand equivalent annual carbon tax rate adjustment, the average exchange rate as defined in section 1 of the Income Tax Act should be used. However, this definition refers to a year of assessment which would not always be the same as the period in respect of which the carbon tax is levied (ie. a calendar year).

93. Submission: A definition of "average exchange rate" should be included in the Carbon Tax Act and refer to the period that the carbon tax is levied.

94. No clarification is given on the structure and design of the tax-free allowances. This creates uncertainty for business on two levels, firstly in respect of the nominal rate of the tax as well as a "net rate" of the tax. This cannot be emphasized enough, and further clarity is required on this.

95. NT has communicated that a discussion paper would be published which would indicate how the allowances will be phased out.

96. Submission: It would be appreciated if an indication can be given of when this consultation paper will be published.

97. In addition to the above, it is suggested that a consultation workshop be arranged to further discuss the proposed design for the second phase of the carbon tax. Especially regarding the proposed design for the carbon offset allowance.

98. The uncertainty of the above creates difficulty when one considers forecasting models and impairment models for taxpayers who are carbon intensive. As such, dramatic and aggressive changes to the status quo without giving clear guidance on the position of Phase 2, will have a huge impact on many taxpayers.

Section 6 – Extension of first phase of carbon tax (Clauses 39)

99. It is proposed that the commitment to electricity price neutrality provided in terms of Sections 6(2)(c) and (d) of the Carbon Tax Act is extended by three years, from 31 December 2022 to December 2025 in order to incentivise the uptake of renewable electricity while protecting households from higher electricity prices over the short term.

100. No further clarity on NT's intentions from 1 January 2026 have been provided. Taking into account potential considerable electricity increases and various industries being

heavy reliance on Eskom, these increases could have material impacts on businesses and households.

101. Should these businesses pass the cost of carbon tax costs on, this would not encourage behavioural change and is misaligned with the "Polluter-Pays-Principle". The pass-through of carbon tax costs will result in heightened indirect costs for end users, while simultaneously disincentivizing behavioural change by suppliers - who continue to place reliance on "dirty energy", due to their ability to "pass-through" their carbon tax cost to end users.

102. Submission: NT should provide its intentions with regard to the future of the credit for the renewable energy premium and the electricity levy in order for businesses to plan appropriately and ensure that the "pass-through" of the costs does not occur.

DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL 2022

TAX ADMINISTRATION ACT

Section 221 – Employment Tax Incentive (ETI) understatement penalties (Clause 26)

1. The amendment facilitates the imposition of understatement penalties on ETI reimbursements improperly claimed. This is achieved by classifying ETI reimbursements as refunds for purposes of the TAA and specifically as refunds of tax for purposes of the understatement penalty provisions.

2. Submission: We agree with an understatement penalty being imposed in the above circumstances; however, this should only be imposed to the extent that the penalty imposed in terms of section 4(2) of the ETI Act is not also levied on the same amount.

3. Section 4(2) of the ETI Act levies a 100% penalty where the employer claims an ETI despite not being eligible in terms of section 4(1). That includes where the employee does not meet the required wage regulated amount or R2 000, where such wage is not regulated. This equates to the same penalty % for the understatement penalty behaviour of "gross negligence". In this regard we believe that only a single penalty should apply as the 100% is already onerous. The understatement penalty imposed should therefore either be excluded in full if an ETI Act penalty was imposed or should apply similar to paragraph 20(2B) of the Fourth Schedule where the penalty imposed in the ETI Act is deducted from the understatement penalty amount.

Section 240A – Recognition of controlling bodies (Clause 27)

4. It is proposed that the Independent Regulatory Board for Auditors (IRBA) be removed as a legislatively recognised controlling body (RCB) in terms of the TAA. According to the EM, this request is mainly due to the recent amendments to the Auditing Profession Act and regulating tax practitioners was outside of IRBA's mandate.

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5. It is noted that this follows the judgement against IRBA[3] in the High Court as relates to IRBA's legal ability to charge fees for tax practitioner regulatory matters.

6. According to the EM individuals registered with IRBA must now also be registered with a professional body accredited by IRBA and the only accredited body is SAICA, which is also a RCB under the TAA. All disciplinary matters of a non-auditing nature must now be referred to SAICA.

7. According to the EM, IRBA views tax practitioner activities as activities of a non-auditing nature and consequently, the removal of IRBA will have no impact on its members as the members are required by law to be registered with SAICA, which is already a recognised controlling body in terms of the TAA. This is not entirely accurate.

8. The effective date of this amendment is date of promulgation of the Income Tax Act.

9. Submission: The statement in the EM is incorrect as relates to registered auditors registered as tax practitioners with IRBA automatically getting tax practitioner status at SAICA by virtue of their compelled registration as a Chartered Accountant with SAICA. Tax practitioners registered with IRBA as their RCB will have to apply to SAICA, be registered with SAICA as their RCB, agree to its requirements and pay the relevant fee before SAICA becomes their RCB.

10. The persons registered with IRBA as a tax practitioner would thus still be required to go through the tax practitioner registration process with SAICA (and with SARS) and this would need to be done on or before the promulgation of the Act, otherwise they are not permitted to practice as tax practitioners for this period (section 240(b) of the TAA).

11. They will now also be subjected to numerous new requirements not previously applicable to them including minimum annual CPD, annual CPD verifications, tax compliance verifications, periodical criminal checks and probably also compulsion to do SARS' new induction program.

12. This again brings to the fore the concerns SAICA has previously expressed with SARS and NT separating Controlling Bodies between Registered and Statutory controlling bodies which has a discriminatory effect on both the Institutes and their members.

13. This distinction is also noted in the relevant High Court judgement which stated: "*Whilst the IRBA does not – unlike SAICA and other organisations – have to meet any requirements for recognition by SARS as an RCB and does not have similar administrative responsibilities, including the submission of reports to SARS and continuous professional development requirements for tax practitioners.*"

[3] East Rand Member District of Chartered Accountants and Another v Independent Regulatory Board for Auditors and Others (64848/19; 46298/20) [2022] ZAGPPHC 245 (11 April 2022) (saflii.org)

14. SARS used to justify the discrimination based on the fact that the Law Societies were differently regulated, hence expanding this to IRBA on “similar terms”. The replacement of the Law Societies to now mere members bodies and SARS then transferring the role of the controlling body to the Legal Practices Council more than ever embeds the inequity with IRBA’s removal.

15. Taking this into account, and the inequality (in respect of CPD and numerous other requirements) that has existed since the implementation of the different types of RCBs (legislative versus statutory RCBs), it is proposed that the LPC should also be removed as a RCB and that the legislative versus statutory body distinction should be abandoned.

16. This distinction continues to undermine any argument of just and equitable treatment under law for the tax profession. It also allows the legal professional to escape and undermine all the “ethical” and “competence” requirements SARS itself has set for the profession, taking into consideration that the legal profession does not have as core competencies tax law, tax administrative law, tax process and financial acumen. The law societies and relevant bar councils are like all other voluntary bodies, at liberty to decide to also register with SARS to enable their members to practice as tax practitioners. Alternatively, those members can apply at other current registered RCB’s for membership.

Section 256 – Tax compliance status (Clause 28(c))

17. To combat instances where taxpayers submit nil returns or otherwise incorrect returns in order to obtain a compliant ‘tax compliance status’, it is proposed that SARS has the right to revoke third party access to a taxpayer’s tax compliance status if this status is questioned by SARS due to fraud, misrepresentation or non-disclosure of material facts. Taxpayers will be given at least 10 business days’ notice to respond to SARS’ concerns before revocation takes place.

18. Submission: Although we agree with the proposal, it is submitted that the legislation is too vague in respect of SARS’ right to question the compliance status of the taxpayer. This is a very subjective criteria and could lead to abuse or an unnecessary delay in obtaining a tax clearance certificate.

19. SARS should be required to bear the onus of proving their concern before providing the taxpayer with 10 days to respond.

20. The amendment also seeks to propose that the tax compliance status of a taxpayer should include an indication that a taxpayer is a newly registered taxpayer between the dates that third party access to the system is provided and the date that the taxpayer reaches the date for the submission of a return or making of a payment in respect of any of the taxes for which the taxpayer is registered, or submitted a return or made a payment prior to such date. Users of the tax compliance status will thus be aware that the status is not based on actual returns or payments and that additional due diligence may be required.

21. The amendment currently reads as follows: “

“(d) an indication that the taxpayer is a newly registered taxpayer if the taxpayer, on the date referred to in paragraph (a), has not—

(i) reached the first date on which the taxpayer is required to submit a return or make a payment under a tax Act in respect of a tax for which the taxpayer is registered; or

(ii) submitted the return or made the payment, prior to the date referred to in subparagraph (i).;”

22. Submission: The words “*in respect of a tax*” in *(d)(i)* should be “*in respect of at least one tax*”.

DRAFT REVENUE LAWS AMENDMENT BILL 2022 – TWO POT RETIREMENT SYSTEM

INCOME TAX ACT

Section 1 – New definitions (Clause 1)

1. The proposals for the new two-pot retirement system are intended to come into operation on 1 March 2023 and they will apply in respect of years of assessment commencing on or after that date.

2. Submission: As admitted by the NT itself in its Media Statement dated 31 July 2022, the proposed date of implementation appears to be optimistic taking into consideration the need to change the fund rules, change the systems used by the funds (and SARS) as well as the training requirements needed to cater for the two-pot retirement system.

3. Although the need for individuals to access a portion of their retirement savings in the case of emergencies is recognised by SAICA and it would have been ideal to introduce these changes sooner, the processes to ensure the smooth implementation of these changes needs to first take place. The retirement industry and SARS should be consulted in order to determine the appropriate date on which it would be feasible to implement these changes noting the urgency of this matter for many individuals that were adversely affected by COVID and other life emergencies.

4. Notifying the public that they have rights to access their money but that they can’t because SARS and retirement funds systems could not accommodate it due to ongoing system development requirements, is not a desired outcome.

5. The two pot system results in the creation of a new “retirement pot” and a “savings pot” that can each receive retirement contributions from 1 March 2023. All prior contributions and growth (i.e. retirement interest) will have to be valued at the date immediately prior to implementation, to enable vesting of rights and these contributions will be referred to as

the "vested pot". The "retirement pot" and "savings pot" will thus be accumulated from 1 March 2023, which means that there is no seeding finance into either of these pots.

6. Submission: It is uncertain why the "savings pot" should start with zero. If an individual can currently access the "vested pot" fully on resignation, why can this portion not be transferred to the "savings pot" immediately?

7. We understand NT's intent of maximum preservation which is probably the reason for the split but people who would ordinarily seek to access the "vested pot" by any means, notwithstanding the punitive tax, will do so none the less. That includes resigning or exiting on changing jobs which was part of the main problem NT was trying to address. The 3 pot system just adds complexity and added costs as it has to be maintained for all taxpayers with these retirement savings. This in itself will erode retirement savings across all taxpayers and still not achieve NT intent, even if it is well intended.

8. Alternatively, consideration should be given to grandfathering only those 55 years and above to a "vested pot" or those with membership over 10 years to limit the time that this "vested pot" needs to be maintained and monitored.

9. In relation to the growth (returns) on the funds, the legislation is silent and should specifically clarify how these returns (and expenses) will be allocated as invariably investments won't be split per pot. Therefore, will the returns be kept in the different pots or will they be preserved until retirement and only be included in the "retirement pot"?

10. The legislation is also silent on how these amounts will be dealt with from an employees' tax perspective as currently retirement lump sum benefits and retirement lump sum withdrawal benefits are specifically included in the definition of "remuneration" in paragraph 1 of the Fourth Schedule. It is assumed that the intention is that these amounts will be subject to employees' tax and the employer would be required to apply for a directive in this regard. These requirements should be catered for in the legislation, for instance the definition of "remuneration" should now include paragraph (eD) of the gross income definition etc.

11. In terms of the new two-pot system, it is proposed that when an individual ceases to be a tax resident (emigrates) for an uninterrupted period of three years, or leaves South Africa at the expiry of the visa, the individual member will be allowed to withdraw all the funds from the different pots. In these instances, the "vested pot" will be taxed in accordance with the pre-1 March 2023 tax provisions, the "savings pot" will be included in gross income and the "retirement pot" will be taxed in accordance with the lump sum withdrawal tables.

12. The three-year waiting period poses the following practical problems as were explained in the SAICA submission on the draft TLAB2020 and these are once again set out below as we are still concerned that these changes will result in many practical and technical challenges for taxpayers, NT and SARS.

13. 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 a resident. The test for whether a natural person is not a resident consequently does not require that status to endure for an 'uninterrupted period of three years or longer'.

14. 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 Income Tax Act (such as sections 9H and 108 of the Income Tax Act) which have immediate tax consequences when ceasing to be a resident.

15. The three-year waiting period is clearly at odds with the existing tax treatment of natural persons who cease to be resident for tax purposes and has the potential to cause financial hardship due to double taxation arising as the country to which the person has emigrated may have the taxing rights on these amounts paid out after three years.

16. Submission: Considering that this is a fundamental policy shift, consideration should be given to the effects of the above (which to a certain extent result in a penalty on emigration) and the need to renegotiate double taxation agreements.

17. The requirement for the payment of a lump sum should be aligned with the requirements for ceasing to be a resident as defined in section 1 of the Income Tax Act.

18. Furthermore, the restrictions on accessing the “savings pot” on emigration should be removed as we understand the policy to be that the “savings pot” is available for withdrawal at any time without any conditions. Thus it should be made clear in the various definitions that the “savings pot” can be withdrawn at any time subject to the once per 12-month period and R 2000 limits.

Section 1 – Definition of “savings withdrawal benefit” (Clause 1(a))

19. Amounts contributed to the “savings pot” can be accessed without any conditions, but only one withdrawal can be made during any twelve-month period. An example is provided in the EM: *For example, if Person A makes a withdrawal on 21 March 2025, the next withdrawal can only be made on or after 22 March 2026. The minimum withdrawal amount is proposed to be R2 000. These withdrawals will be subject to the fund rules allowing them. Withdrawals from the “savings pot” will be added to taxable income in the year of withdrawal. This will therefore require that a “savings withdrawal benefit” be defined in section 1(1) of the Act. Should an individual opt not to make a withdrawal within a specific twelve-month period, the funds available in the “savings pot” come the subsequent twelve-month period will be available for withdrawal.*

20. Submission: Clarity is required on what is meant by "any twelve-month period" – does it relate to 12 completed months, or is it 365 days or 12 calendar months? It should also be stipulated that this period is calculated *from the date of the last withdrawal*.

MATTERS NOT ADDRESSED IN DRAFT TAX BILLS 2022

1. In addition to the various matters mentioned above, there are other areas of importance that we feel should have been considered in the 2022 DTLAB and the DTALAB. These include the following and are briefly discussed below:

   a. Home office allowances
   b. Penalty for exceeding assigned carbon budget
   c. Section 31 – Associated enterprise definition
   d. Constitutionality of various provisions in the legislation
   e. VAT refunds
   f. Information gathering (Chapter 5 of the TAA) – Verification process
   g. Section 104 of the TAA – Decisions subject to objection
   h. Section 190(2) of the TAA – Refunds of excess payments
   i. Section 252 – 255 of the TAA – Electronic delivery of documents

Home office allowances

2. In the 2021 National Budget, NT announced an initiative to explore the new ways of working which were accelerated by the COVID-19 pandemic. This was to incorporate a review of home office deductions, travelling, the gig economy etc. It was clearly indicated that this was not a quick process and would likely span multiple years.

3. Despite one informal request for input into the home office deduction, and SARS inviting comments on the interpretation note relating thereto (see SAICA's comments on this in 2021 and 2022), there has seemingly been no further progress on this initiative. No proposals were announced in the 2022 Budget and no draft amendments were proposed in either the 2021 legislative cycle or the current cycle on which comments have been invited.

4. Submission: SAICA is very supportive of this initiative and would like to actively participate in this process, however, clarity is needed on the policy direction that NT is considering in order for consultation to be valuable as well as estimated timing of implementation.

5. In the interim, our comments have not been considered and the strict requirements of section 23(b) still stand with no amendments/relaxations. We have also engaged with SARS on this matter, but their hands are tied as they need to comply with the requirements of the law, even if the legislation as they interpret it, leads to inequitable

treatment (such as the denial of the interest deduction on a bond used to finance a home office – discussed in more detail below). We understand that this concern has been raised by SARS with NT, yet despite this, there are still no legislative amendments in the 2022 DTLAB in this regard.

6. Of most concern, is the disallowance of a tax deduction for the interest on a bond as this is usually the largest deduction for taxpayers that have a home office. The reason for disallowing this deduction, according to SARS, is that section 23(m) – a section that prohibits the deduction of certain expenses for salaried earners (other than a few expenses, such as those allowed in terms of **section 11(a)**, for example, the rent, repairs or other expenses incurred in respect of a home office that is allowed under section 23(b)) – does not allow the deduction of interest on a bond on a home office because the interest is deductible under **section 24J** and not section 11(a) as required in terms of section 23(m).

7. Section 23(m) only applies to expenditure, losses or allowances **contemplated in section 11** and which relate to any employment in respect of which the taxpayer derives any remuneration. This begs the question whether section 24J is a section 'contemplated' under section 11. If it is, then section 24J interest will be prohibited by section 23(m) as section 23(m) only allows interest deductible in terms of section 11(a) as a deduction (section 23(m)(iv)). If it is not, then section 24J interest will remain deductible as it is not prohibited by section 23(m)(iv) as it is not an expense contemplated in section 11 and thus the section 11(a) argument no longer applies.

8. SARS argues that section 24J is '**contemplated in section 11'** by means of section 11(x). Section 11(x) states that there shall be <u>allowed as a deduction</u> from the income of a person '*any amounts which in terms of any other provision in this Part (encompassing section 5 to 37G), are <u>allowed to be deducted</u> from the income of the taxpayer'*. This section, according to SARS thus includes section 24J, as it is 'contemplated in section 11', even though it is not deductible under section 11.

9. However, it is our understanding that section 24J is a standalone deduction provision under Part I of Chapter II and is not reliant on section 11(x) as the 'deduction' section. Should this not be the case, then interest would be deductible under both section 24J and section 11(x), which clearly cannot be.

10. In addition to the above, it seems inequitable from a policy perspective, that a person renting a house with a home office, would entitled to deduct the rental paid (allowed in terms of section 23(m)(iv)), yet a person who owns the house would not be able to deduct the interest on the bond.

11. <u>Submission:</u> We are of the view that section 11(x) does not include section 24J and thus this interest in respect of a home office should be allowed as a deduction and not be prohibited by section 23(m)(iv). Legislative clarity is urgently required in this regard as the legislative interpretation concerns would impact various other section in the Income Tax Act as well.

12. We have also highlighted, in our previous submissions mentioned above, various other legislative concerns regarding the home office deduction and will not repeat them here, but we do urge NT to consider these as a matter of urgency.

Penalty for exceeding assigned carbon budget

13. In the February 2022 Budget documentation it was stated that in order to address concerns about double penalties from companies under the carbon tax and carbon budgets, a higher carbon tax rate of R640 per tonne of carbon dioxide equivalent will apply to greenhouse gas emissions exceeding the carbon budget. These amendments will be legislated once the Climate Change Bill is enacted.

14. NT indicated in Parliament that because the Climate Change Bill has not yet been enacted, the proposed penalty was not included in the DTLAB.

15. Submission: As the mandatory carbon budgeting system comes into effect on 1 January 2023, at which time the carbon budget allowance of 5% will fall away, the penalty should have aligned with this date and the provision should have been made for this penalty in the current DTLAB. Furthermore, we note that the penalty cannot be included in the Climate Change Bill as it is not a money bill.

16. Thus, should the intention be that the Climate Change Bill and the mandatory carbon budgeting process will be implemented the same time (which will be after 1 January 2023), then the current carbon budgeting process should be extended, as it expires at the end of 2022.

Associated enterprise definition – Section 31

17. The previously proposed (but deferred) amendment relating to the insertion of the term "associated enterprise" in section 31 of the Income Tax Act (as an alternative to the term "connected person" in the definition of "affected transaction") would result in the inclusion of transactions between associated enterprises in the ambit of section 31, thereby broadening the scope of the transfer pricing rules.

18. NT in its presentation on 30 October 2019 entitled "Revised Joint presentation to the Standing Committee on Finance (SCoF) and the Select Committee on Finance (SCoF) on the Response to the 2019 Tax Bills – 2019 Medium term budget policy statement" said the following:

19. "*SARS will further provide guidance on the interpretation of the term "associated enterprise". In order to give SARS and taxpayers more time to consider the interpretation of the term "associated enterprise", it is proposed that the effective date of this provision be postponed by a year from 1 January 2020 to 1 January 2021.*"

20. The "associated enterprise" amendment has, however, subsequently been deferred to 1 January 2023. SARS did briefly touch on this definition in its Draft Interpretation Note

(IN) on section 31 released early this year, but this Draft IN still refers to associated enterprises as contemplated in Article 9 of the OECD Model Tax Convention. The Draft IN also attempts to define the term in the Annexure but the Annexure, however, simply repeats Article 9 of the Model Tax Treaty and does not provide a domestic definition.

21. We do, however, note that the footnote states that additional guidance on the definition will be provided separately. As there are only four months before this section becomes effective, this guidance is needed urgently.

22. Submission: In order to provide certainty to taxpayers, it is imperative that clear guidance is given in relation the proposed inclusion of the term "associated enterprise" in section 31.

23. Should guidance not be provided soon, it is proposed that the effective date be postponed to 1 January 2024.

Constitutionality of various provisions in the legislation

24. SAICA has over the years expressed its concerns over the constitutionality of powers provided to either the Commissioner of SARS (CSARS) or NT. Examples of these include:

    a. The constitutionality of the default judgment procedures in terms of section 172 -176 of the TAA (see SAICA's 2020 TLAB submission dated 20 October 2020 and the Annexure C 2021 Budget Review submission dated 23 November 2020) where SARS argues that these procedures fall outside of judicial oversight and are thus not subject to judicial review;

    b. the removal of the requirement of "wilfulness" from certain statutory offences that could result in selective or arbitrary prosecution by SARS (see SAICA's Annexure C 2021 Budget Review submission dated 23 November 2020); and

    c. the powers of CSARS to prescribe the List of Qualifying Physical Impairment and Disability Expenditure (see SAICA submissions dated 24 May 2019 and 31 May 2021) allowing CSARS to determine what is tax deductible or not.

25. Added to this list is NT's power in terms of section 10(1)(r) as discussed in the previous SAICA submissions. Section 10(1)(r) of the Income Tax Act affords NT the power to declare free of tax, any gratuity (other than a leave gratuity) received by or accrued to any person from public funds upon his retirement from any office or employment, or from funds of the Land and Agricultural Bank of South Africa upon his retirement as a member of the board of the said bank.

26. Submission: In all the above examples, CSARS or NT have been given the power to provide relief from taxation. It is submitted that this power is unconstitutional and invalid as only Parliament may, in terms of the Constitution, levy taxes.

27. Secondary legislation that prescribes tax deductible expenditure would therefore also be legislation of a "money bill" subject to section 77 of the Constitution and which the Executive must excuse itself to allow the legislative authority of the Legislator - meaning that the Executive does not have the power to change the legislation and the proposed changes in the secondary legislation would need to follow the normal legislative process allowing the legislator (Parliament) to consider public comments before approving any changes to the law.

28. These sections should be revisited to ensure that Parliament approves the levying (or not) of taxes in these particular circumstances.

VAT refunds

29. In 2020 various concerns, including those raised by SAICA, were raised with SARS, NT and Parliament, regarding the delay in the payment of VAT refunds by SARS. Unfortunately, this situation is still problematic in many cases.

30. Submission: In order to protect taxpayer rights, legislative changes should be introduced to provide that –

- a VAT audit must be completed within a maximum period of six months, provided that the taxpayer submits information and documents to SARS timeously;
- SARS' requests for relevant material must be clearly relevant to the audit at hand and not overly broad and onerous;
- while that audit is conducted, SARS may not continuously roll out further audits until the audit for the original periods has been finalised;
- only the VAT refunds for the original audit periods may be withheld;
- SARS at the outset must set a deadline with the taxpayer for the audit finalisation;
- any extension of the audit must be supported by a full motivation for the extension; and
- once the audit is finalised, SARS must issue an assessment within one month from the date of finalisation; and
- interest on VAT refunds withheld for the period exceeding 21 days from the verification or confirmation of banking details is payable without the taxpayer having to request such payment.

31. A further concern is that SARS cannot make any part payments of VAT refunds withheld. The taxpayer must provide security for 100% of the VAT withheld. A part refund is not possible.

32. Submission: Part payment of VAT refunds should be allowed where the taxpayer cannot provide security for 100% of the VAT withheld.

Verification process – Information gathering (Chapter 5 of the TAA)

33. Chapter 5 of the TAA addresses information gathering and in its title, sets out 4 processes and states that the chapter covers the "General rules for inspection, verification, audit and criminal investigation".

34. However, on closer inspection of the Chapter 5 guidelines, no rules are set out for verification.

35. Procedurally this has become untenable as SARS practice has become to use verification as the catch all process from "desk audits, to verification to even forensic audits".

36. In practice and substance none of these procedures differ from "field audits", other than in scope.

37. The primary reason why the practice is untenable is that SARS does not abide by fair administrative practices and seem to make up the rules of these catch-all processes as it goes along.

38. SARS is a creature of statute and should operate within the confines of that statute, while balancing its powers with the rights of taxpayers. Employing practices and tactics that have no defined empowering legislation seems to be outside that scope as merely relying on a single undefined word does not justify SARS's actions in this regard.

39. However, it must be acknowledged that SARS does require various information gathering processes to be legislated, but such processes should be defined and constitute fair administrative practices, such as is the case for inspections, field audits and criminal investigations.

40. Submission: It is submitted that Chapter 5 of the TAA should be expanded and additional sections inserted that define what a "verification" is and what SARS processes fall thereunder. It should also identify and insert the relevant taxpayer rights and fair administrations provisions, similar to what occurs in the remainder of Chapter 5. This includes giving notification and reasons for commencement, protection of taxpayer rights regarding the reasonability of requests, compelled feedback after certain time periods and the notification of completion of the verification and its outcomes.

Decisions subject to objection – Section 104 of the TAA

41. In *Barnard Labuschagne Inc v CSARS & MoF CASE NO: 23141/2017 (15 May 2020)* the judge states the following in his judgement at [70]:

"In my opinion, the fact that SARS allocated payments incorrectly and subsequently, made a decision to recover a debt based on an incorrect amount, was a legitimate reason for the applicant to have raised an objection. I find the applicant's contention opportunistic and mischievous as the applicant was bent over backwards to confer to itself its own jurisdiction to hear its dispute and thereby disregarding the dispute resolution mechanism as set out in the TAA."

42. We have reviewed the relevant provisions of the TAA including section 104 and section 3 of the Income Tax Act and find no remedy of objection to SARS making incorrect account entries or allocations.

43. Submission: To effect the remedy that the honourable judge was of the impression exists in the TAA, we propose the insertion of a new section 104(2)(d) TAA which gives the taxpayer the right to object against any entry on the taxpayers account added by SARS which does not properly reflect an assessment or payment or other entry in law and for which SARS has refused to reverse.

Refunds of excess payments – Section 190(2) of the TAA

44. The TAA currently provides that SARS may not authorise a refund until such time that a verification, inspection, audit or "criminal investigation" has been finalised.

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

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

47. 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.

48. As SARS impacts taxpayer rights by withholding refunds, lack of legislative clarity in this regard should not continue. An example is the 2019 investigation of an entire industry, the agriculture sector, followed by a blanket withholding of refunds.

49. The verification, inspection, audit or criminal investigation in the section should refer to the specific refund in question and not any refund, as required in section 190(2).

50. As was evidenced in the Tax Ombud's 2019 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. As stipulated in section 190(2), 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.

51. 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.

52. Though not part of this specific matter, we have also previously raised concerns with SARS' involvement in the criminal justice system, 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 oversees the legality of all these processes as they are outside of the jurisdiction of the Independent Police Investigative Directorate.

53. In regard to criminal intelligence-gathering, which is part and parcel of criminal investigations, we note in the 2017 OECD report that SARS claims it conducts no criminal intelligence-gathering activities at a covert level[4]. SARS doing investigations and then also paying and sourcing counsel for NPA matters essentially puts SARS on equal footing with the historical Scorpions unit.

54. 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.

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

56. To ensure that SARS does not turn into a *quasi* Scorpions Unit, it should ensure that its actions do not overlap with those of the NPA and SAPS whose role it is to follow up on criminal matters and who have the prosecution rights in this regard.

Electronic delivery of documents – Section 252 – 255 of the TAA

57. Sections 251 and 252 of the TAA state that delivery of notices, documents or other communication is regarded as having been delivered if it is:

    (d) sent to the person's last known electronic address, which includes—

    (i) the person's last known email address;

    (ii) the person's last known telefax number; or

    (iii) the person's electronic address as defined in the rules issued under section 255(1).

[4] https://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles-first-edition-63530cd2-en.htm

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58. The section 255 rules at paragraph 3(2) state that delivery will occur for electronic filing communications when SARS correctly submits it on the users electronic filing page.

59. We note the judgment in *SIP Project Managers (Pty) Ltd v CSARS (Case No: 11521/2020)* clarifying the law that 'correctly submitted' means 'when the user can access it'.

60. This judgment is welcomed as it aligns the law of delivery for electronic filing pages to that of other electronic communications under the same rules.

61. Of concern was, as held in the judgment, that the applicant's version that the letters were not sent on the dates reflected therein remains accordingly unchallenged, and there can be no *bona fide* dispute of fact on this point.

62. This has been our members experience as well.

63. It is pertinent to note that in section 1 TAA "date of assessment" means -

(a) in the case of an assessment by SARS, the <u>date of the issue</u> of the notice of assessment; …

64. The law may now be clear that date of issue for the purpose of section 252-255 and the rules is not the "letter date" or even the date that SARS adds something in the back end, but rather the date that the taxpayer can access to it on his eFiling profile.

65. <u>Submission</u>: Though the law is now clear, it remains a problem in practice that SARS' letters are dated before the taxpayer can access them and that SARS calculates the days from the date of the letter or when uploaded on the backend and not from date that the taxpayer is able to access it on eFiling.

66. It is submitted that the solution lies in the draft section 255 TAA rules that were issued in 2016 and never implemented, where it was proposed in a new clause 4(2)(a)(iii) that[5]:

(2) A SARS electronic filing service must—

(a) provide a registered user with the ability to—

(iii) <u>nominate an alternative electronic address to which the SARS electronic filing service must deliver a notification of the submission of an electronic filing transaction by SARS to the registered user's electronic filing page.</u>

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[5] https://www.sars.gov.za/wp-content/uploads/Legal/Drafts/LAPD-LPrep-Draft-2016-24-Draft-Replacement-Rules-for-Electronic-Communication-under-Section-255-of-the-TAA-15-March-2016.pdf

67. It will then be easy to align the “date of delivery” as being the date when the email notification entered the communicators system, which is again aligned to what the rule already states for other SARS electronic communications.

This will also address taxpayers’ long held concern that eFiling is not a proper or appropriate notification method and will avoid taxpayers being subject to SARS’ sporadic “other notifications”, like SMS etc. which only work in respect of certain products and services.