

## ADMINISTRATIVE PROVISIONS:

*This **draft legislation** is released for public information. The amendments contained in this draft are merely proposals which are **subject to change and final approval by the Minister of Finance**. Early comments on this draft will be considered for possible inclusion in a revised draft Bill.*

*It is the intention to release the revised draft Bill in the first seven days of October, prior to the commencement of the informal Parliamentary process.*

*There will be an opportunity to comment on the revised draft Bill, either directly to the National Treasury and SARS or during the public hearings in the Parliamentary Committees in mid-October 2003.*

*Due to time constraints, it will not be possible to respond individually to comments received. However, receipt of comments will be acknowledged and fully considered by the National Treasury and SARS.*

*Comments may be submitted to either:*

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### **Amendment of section 1 of Act 58 of 1962**

. Section 1 of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (1) for the words in the definition of “assessment” preceding paragraph (a) of the following words:

“‘assessment’ means the determination by the Commissioner, by way of a notice of assessment including a notice of assessment in electronic form served in a manner contemplated in section 106(2)—”.

### **Amendment of section 3 of Act 58 of 1962**

. Section 3 of the Income Tax Act, 1962, is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:

“(1) The powers conferred and the duties imposed upon the Commissioner by or under the provisions of this Act or any amendment thereof may be exercised or performed by the Commissioner personally, or by any officer or person engaged in carrying out the said provisions under the control, direction or supervision of the Commissioner.”;

- (b) by the substitution in subsection (2) for the words preceding the proviso of the following words:

“Any decision made and any notice or communication issued or signed by any such officer or person may be withdrawn or amended by the Commissioner or by the officer or person concerned, and shall for the purposes of the said provisions, until it has been so withdrawn, be deemed to have been made, issued or signed by the Commissioner.”.

#### **Amendment of section 4 of Act 58 of 1962**

. Section 4 of the Income Tax Act, 1962, is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding the proviso of the following words:

“(1) Every person employed or engaged by the Commissioner in carrying out the provisions of this Act shall preserve and aid in preserving secrecy with regard to all matters that may come to his or her knowledge in the performance of his or her duties in connection with those provisions, and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his or her lawful representative nor suffer or permit any such person to have access to any records in the possession or custody of the Commissioner except in the performance of his or her duties under this Act or by order of a competent court.”;

- (b) by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) Every person so employed or engaged as contemplated in subsection (1) shall, before acting under this Act, take and subscribe before a magistrate or justice of the peace or a commissioner of oaths, such oath or solemn declaration, as the case may be, of fidelity or secrecy as may be prescribed.”;

(c) by the substitution for subsection (4) of the following subsection:

“(4) Any person who acts in the execution of his or her office or carries out any provisions of the Act before he or she has taken the prescribed oath or solemn declaration shall be guilty of an offence and liable on conviction to a fine not exceeding R50.”.

#### **Amendment of section 35 of Act 58 of 1962**

. Section 35 of the Income Tax Act, 1962, is hereby amended—

- (a) by the deletion in subsection (2) of paragraph (c); and
- (b) by the addition of the following subsection:

“(3) The general provisions contained in Parts I to VI of Chapter III of this Act shall *mutatis mutandis* apply in respect of payments made to the Commissioner in terms of this section.”.

#### **Amendment of section 61 of Act 58 of 1962**

. Section 61 of the Income Tax Act, 1962, is hereby amended by the addition of the following paragraph:

“(h) any reference in section 76 to taxable income of a taxpayer is deemed to include a reference to the value of any property disposed of by that taxpayer under a donation.”.

## **Substitution of section 65 of Act 58 of 1962**

. The following section hereby substitutes section 65 of the Income Tax Act, 1962:

**“Returns to be in form and submitted at place prescribed by Commissioner**

**65.** All forms of returns and other forms required for the administration of this Act shall be in such form and be submitted at such place as may be prescribed by the Commissioner from time to time.”.

## **Insertion of section 67 in Act 58 of 1962**

. The following section is hereby inserted in the Income Tax Act, 1962, after section 66:

**“Registration as taxpayer**

**67. (1) Every person who at any time, whether personally or in a representative capacity, becomes chargeable with any tax leviable under this Act, or who becomes liable in terms of this Act to furnish any return for the assessment of tax must, within 60 days after becoming so chargeable or liable, apply to the Commissioner to be registered as a taxpayer.**

**(2) Subsection (1) does not apply in respect of any person whose income is derived solely from net remuneration, as defined in paragraph 11B of the Fourth Schedule, and the employees’ tax required to be deducted or withheld from that net remuneration under the Fourth Schedule consists solely of Standard Income Tax on Employees.”.**

### **Amendment of section 75 of Act 58 of 1962**

. Section 75 of the Income Tax Act, 1962, is hereby amended—

- (a) by the insertion in subsection (1) after paragraph (a) of the following paragraph:

(aA) any person who fails to register as a taxpayer as contemplated in section 67;”.

### **Amendment of section 81 of Act 58 of 1962**

. Section 81 of the Income Tax Act, 1962, is hereby amended by the substitution for subsection (2) of the following subsection:

“The period prescribed in the rules within which objections must be made may be extended by the Commissioner where **[the Commissioner is satisfied that reasonable grounds]** exceptional circumstances exist [for] which gave rise to the delay in lodging the objection: Provided that the period for objection may not be so extended where—

(a) more than three years has lapsed from the date of the assessment; or

(b) the assessment was made in accordance with the practice generally prevailing on the date of that assessment.”.

### **Amendment of section 83 of Act 58 of 1962**

. Section 83 of the Income Tax Act, 1962, is hereby amended—

- (a) by the substitution in subsection (1A) for the words preceding the proviso of the following words:

“The period prescribed in the rules within which appeal must be noted may be extended by the Commissioner where **[the Commissioner is satisfied that reasonable grounds]** exceptional circumstances exist [for] which gave rise to the delay in noting the appeal:”;

- (b) by the insertion after subsection (4B) of the following subsections:
- “(4C) If at any stage during the hearing of an appeal, or after hearing of the appeal but before judgement has been handed down—
- (a) one of the judges dies, retires or becomes otherwise incapable of acting in that capacity, the hearing of an appeal shall be heard *de novo*, unless the court consists of three judges, as contemplated in subsection (4B), and the remaining judges constitute the majority of judges before whom the hearing was commenced, in which case the hearing shall proceed before the remaining judges and members; or
- (b) one of the members dies, retires or becomes otherwise incapable of acting in that capacity, the hearing of an appeal shall proceed before the President and remaining members.
- (4D) The judgement of the remaining judges and members contemplated in subsection (4C), shall be the judgement of the court.”;
- (c) by the addition in subsection (13) of the word “and” at the end of paragraph (c);
- (d) by the addition to subsection (13) of the following paragraph:
- “(d) hear any interlocutory application and decide on procedural matters as provided for in the rules of the tax court contemplated in section 107A.”.

#### **Amendment of section 83A of Act 58 of 1962**

. Section 83A of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (7) for the words of paragraph (b) preceding subparagraph (i) of the following words:

“within [30 days before the date of the hearing of the appeal] the period prescribed in the rules contemplated in section 107A, furnish the members of the board and the appellant with a written notice of the time and place of the hearing of the appeal and a dossier containing copies of—”.

## Insertion of Part IIIA in Chapter III of Act 58 of 1962

. The following Part is hereby inserted in Chapter III of the Income Tax Act, 1962, after Part III:

### “PART IIIA *Settlement of Dispute*”

#### **Definitions**

**88A.** (1) For the purposes of this Part—

‘dispute’ means a disagreement on the interpretation of either the relevant facts involved or the law applicable thereto, or of both the facts and the law;

‘settle’ means to resolve a dispute by compromising any disputed liability, otherwise than by way of either the Commissioner or the person concerned accepting the other party’s interpretation of the facts or the law applicable to those facts, or of both the facts and the law, and

‘settlement’ shall be construed accordingly.

#### **Purpose of Part**

**88B.** (1) The basic principle in law is that it is the duty of the Commissioner to assess and collect taxes, duties, levies, charges and other amounts according to the laws enacted by Parliament and not to forgo any such taxes, duties, levies, charges or other amounts properly chargeable and payable.

(2) Circumstances may, however, require that the strictness and rigidity of this basic principle be tempered where it would be to the best advantage of the state.

(3) The purpose of this Part is to prescribe the circumstances whereunder it would be inappropriate and whereunder it would be

appropriate that the basic rule be tempered and for a decision to be taken to settle a dispute.

### **Circumstances where inappropriate to settle**

88C. It will be inappropriate and not to the best advantage of the state to settle a dispute, where, in the opinion of the Commissioner,—

- (a) the action on the part of the person concerned which relates to the dispute, constitutes intentional tax evasion or fraud and no circumstances contemplated in section 88D exist;
- (b) the settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice;
- (c) it is in the public interest to have judicial clarification of the issue and the case is appropriate for this purpose;
- (d) the pursuit of the matter through the courts will significantly promote compliance of the tax laws and the case is suitable for this purpose; or
- (e) the person concerned has not complied with the provisions of any Act administered by the Commissioner and the Commissioner is of the opinion that the non-compliance is of a serious nature.

### **Circumstances where appropriate to settle**

88D. The Commissioner may, where it will be to the best advantage of the state, settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS, having regard to *inter alia*—



- (a) whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of the Commissioner's resources;
- (b) the cost of litigation in comparison to the possible benefits with reference to—
- (i) the prospects of success in a court;
  - (ii) the prospects of the collection of the amounts due; and
  - (iii) the costs associated with collection;
- (c) whether there are any—
- (i) complex factual or quantum issues in contention; or
  - (ii) evidentiary difficulties,
- which are sufficient to make the case problematic in outcome or unsuitable for resolution through the alternative dispute resolution procedures or the courts;
- (d) a situation where a participant or a group of participants in a tax avoidance arrangement has accepted the Commissioner's position in the dispute, in which case the settlement may be negotiated in an appropriate manner required to unwind existing structures and arrangements; or
- (e) whether the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.

### **Power to settle and disclosure**

88.E (1) A dispute may be settled, as contemplated in section 88D, by the Commissioner personally or any official delegated by the Commissioner for that purpose.

(2) The Commissioner or the relevant delegated official must ensure that he or she does not have, or did not at any stage have, a personal, family, social, business, professional, employment or financial relationship with the person concerned.

## **Procedure for settlement**

88F. (1) The person concerned should at all times disclose all relevant facts in discussions during the process of settling a dispute.

(2) Any settlement will be conditional upon full disclosure of material facts known to the person concerned at the time of settlement.

(3) All disputes settled in whole or in part, as contemplated in section 88D, must be evidenced by a written agreement between the parties in the format as may be prescribed by the Commissioner and must include details on—

(a) how each particular issue was settled;

(b) relevant undertakings by the parties;

(c) treatment of that issue in future years;

(d) withdrawal of objections and appeals; and

(e) arrangements for payment.

(4) The written agreement will represent the final agreed position between the parties and will be in full and final settlement of all or the specified aspects of the dispute in question between the parties.

(5) The Commissioner must, where the dispute is not ultimately settled, explain the further rights of objection and appeal to the person concerned.

(6) Subject to section 88G, the Commissioner and delegated official must adhere to the secrecy provisions with regard to the information relating to the person concerned and may not disclose the terms of any agreement to third parties unless authorised by law or by the person concerned.

(7) SARS must adhere to the terms of the agreement, unless it emerges that material facts were not disclosed to it or there was fraud or misrepresentation of the facts.

(8) The Commissioner has the right to recover any outstanding amounts in full where the person concerned fails to adhere to any agreed payment arrangement.

## **Register of settlements and reporting**

**88G.** (1) The Commissioner must—

(a) maintain a register of all disputes settled in the circumstances contained in these regulations; and

(b) fully document the process in terms of which each dispute was settled, which document must be signed on behalf of the Commissioner and the person concerned.

(2) The Commissioner must on an annual basis provide to the Auditor-General and to the Minister of Finance a summary of all disputes which were settled in whole or in part during the period of 12 months covered by that summary, which must—

(a) be in such format which, subject to section 4(1)(b), does not disclose the identity of the person concerned, and be submitted at such time as may be agreed between the Commissioner and the Auditor-General or Minister of Finance, as the case may be; and

(b) contain details of the number of disputes settled or part settled, the amount of revenue forgone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers or sections of the public.”.

## **Amendment of section 89quat of Act 58 of 1962**

. Section 89quat of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (4) for the proviso of the following proviso:

“Provided that—

(a) where any interest is payable to the taxpayer on any amount in respect of any period in terms of the provisions of section 88, no interest shall be payable to the taxpayer in terms of the

provisions of this subsection in respect of the said amount and period; or

(b) where the refund by the Commissioner is delayed due to any default or delay by the taxpayer to comply with any provision of this Act or with any request by the Commissioner, the period in which interest shall be payable shall be suspended from the date of that the taxpayer is in default or fails to comply until the date of compliance by that taxpayer.”.

#### **Amendment of section 106 of Act 58 of 1962**

. Section 106 of the Income Tax Act, 1962, is hereby amended—

- (a) by the substitution in subsection (2) for the word “and” at the end of paragraph (c) of the word “or”;
- (b) by the insertion in subsection (2) after paragraph (c) of the following paragraph:  
“(cA) if transmitted to that person by electronic means;”;
- (c) by the addition in subsection (2) of the word “or” at the end of subparagraph (iii) of paragraph (d); and
- (d) by the addition in subsection (2) to paragraph (d) of the following subparagraph:  
“(iv) if transmitted to the company or its public officer by electronic means;”.

#### **Amendment of paragraph 6 of Fourth Schedule to Act 58 of 1962**

. Paragraph 6 of the Fourth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution for subparagraphs (1) and (2) of the following subparagraphs:

“(6) (1) If an employer fails to pay any amount of employees’ tax for which **[he]** that employer is liable within the period allowable for payment thereof in terms of paragraph 2, that employer shall—

(a) where the Commissioner is satisfied that the employer's failure was due to an intent to postpone payment of employees' tax or otherwise evade that employer's or any employee's obligations under this Act, pay a penalty not exceeding an amount equal to twice the amount of the employees' tax which that employer so fails to pay; or

(b) in any other case, pay a penalty equal to 10 per cent of such amount,

in addition to any other penalty or charge for which **[he]** that employer may be liable under this Act.

(2) The Commissioner may **[if he is satisfied that the employer's failure to pay the amount of employees' tax was not due to an intent to postpone payment of such tax or otherwise evade his obligations under this Act and was not designed to enable the employee concerned to evade such employee's obligations under this Act]** remit the whole or any part of the penalty imposed under sub-paragraph (1)(b).”.

#### **Insertion of paragraph 6A of Fourth Schedule to Act 58 of 1962**

. The following paragraph is hereby inserted in the Fourth Schedule to the Income Tax Act, 1962, after paragraph 6:

“6A. Where an amount of employees' tax which has been deducted or withheld by an employer in accordance with paragraph 2 has not been paid over to the Commissioner within the period prescribed in paragraph 2, any person who—

(a) is responsible for performing the duties imposed on that employer in terms of paragraph 2; or

(b) is directly or indirectly vested with authority over the amount so deducted or withheld,

shall be personally liable for the payment to the Commissioner of that amount and for any penalty contemplated in paragraph 6(1)(a) which may be imposed in respect of that amount.”.

### **Amendment of paragraph 19 of Fourth Schedule to Act 58 of 1962**

. Paragraph 19 of the Fourth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution in subparagraph (1) for the words in subitem (ii) of item (e) preceding the proviso of the following words:

“(ii) in respect of which a notice of assessment relevant to the estimate has been issued by the Commissioner not less than **[fourteen]** 60 days before the date on which the estimate is submitted to the Commissioner:”.

### **Amendment of paragraph 20A of Fourth Schedule to Act 58 of 1962**

. Paragraph 20A of the Fourth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution for subparagraph (1) of the following subparagraph:

“(1) Subject to the provisions of subparagraphs (2) and (3), where any provisional taxpayer is liable for the payment of normal tax in respect of any amount of taxable income derived by **[him]** that provisional taxpayer during any year of assessment and the estimate of his or her taxable income for that year required to be submitted by him or her under paragraph 19(1) during the period contemplated in paragraph 21(1)(b), 22(1) or 23(b), as the case may be, was not submitted by him or her on or before the last day of that year or, if the period for the payment of provisional tax due by him or her in respect of such period has under paragraph 25(2) been extended to a date later than the end of such year, on or before such date, the taxpayer shall, unless the Commissioner has estimated the said taxable income under paragraph 19(2) or has increased the amount thereof under paragraph 19(3), be required to pay to the Commissioner, in addition to the normal tax chargeable in respect of such taxable income, an amount by way of additional tax equal to 20 per cent of the amount by which the normal tax payable by him or her in respect of such taxable income exceeds

the sum of any amounts of provisional tax paid by him or her in respect of such taxable income within any period allowed for the payment of such provisional tax under this Part or within any extension of such period under paragraph 25(2) and any amounts of employees' tax deducted or withheld from his or her remuneration by his or her employer during such year.”.

### **Amendment of paragraph 21 of Fourth Schedule to Act 58 of 1962**

. Paragraph 21 of the Fourth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution in subparagraph (1) for items (a) and (b) of the following items:

- “(a) within the period of six months reckoned from the commencement of the year of assessment in question, one half of an amount equal to the total estimated liability of such taxpayer (as determined in accordance with paragraph 17) for normal tax in respect of that year, less the total amount of—
- (i) any employees' tax deducted by the taxpayer's employer from the taxpayer's remuneration during such period; and
  - (ii) any tax proved to be payable to the government of any other country which will qualify as a rebate under the provisions of section 6quat; and
- (b) not later than the last day of the year of assessment in question, an amount equal to the total estimated liability of such taxpayer (as finally determined in accordance with paragraph 17) for normal tax in respect of that year, less the **[sum of the amounts]** total amount of—
- (i) any employees' tax deducted by the taxpayer's employer from the taxpayer's remuneration during such year and the amount paid in terms of item (a); and
  - (ii) any tax proved to be payable to the government of any other country which will qualify as a rebate under the provisions of section 6quat.”.

### **Amendment of section 12 of Act 9 of 1999**

. Section 12 of the Skills Development Levies Act, 1999, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Subject to subsection (2) if **[any levy remains unpaid after]** an employer fails to pay the levy by the last day for payment thereof as contemplated in section 6 (2) or 7 (4), that employer shall—

(a) where the Commissioner or the chief executive officer of the SETA or its approved body, as the case may be, is satisfied that the employer’s failure was due to an intent to postpone payment of the levy or otherwise evade that employer’s obligations under this Act, pay a penalty not exceeding an amount equal to twice the amount of the levy which that employer so fails to pay; or

(b) in any other case, pay a penalty of 10 per cent of that unpaid amount **[is payable]**,

in addition to the interest contemplated in section 11.”.

### **Amendment of section 7 of Act 4 of 2002**

. Section 7 of the Unemployment Insurance Contributions Act, 2002, is hereby amended by the insertion after subsection (4) of the following subsection:

“(4A) Where an amount of an employee’s contribution which has been deducted or withheld by an employer in terms of this section has not been paid over to the Commissioner or the Unemployment Insurance Commissioner, as the case may be, any person who—

(a) is responsible for performing the duties imposed on that employer in terms of this section; or

(b) is directly or indirectly vested with authority over the contributions so deducted or withheld,



shall be personally liable for the payment to the Commissioner or the Unemployment Insurance Commissioner of that amount and for any penalty contemplated in section 13(2) which may be imposed in respect of that payment.”.

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