

A second batch of legislation for inclusion in the **Revenue Laws Amendment Bill, 2005**, is hereby released for public comment.

It would be appreciated if comments on the draft legislation could be furnished by **Friday, 2 September 2005**. 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.

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# **REVENUE LAWS AMENDMENT BILL, 2005**

## **BATCH TWO**

## Amendment of section 1 of Act 58 of 1962

1. Section 1 of the Income Tax Act, 1962, is hereby amended by the substitution in the definition of “resident” for items (aa) and (bb) of subparagraph (ii) of paragraph (a) of the following items:

“(aa) for a period or periods exceeding 91 days in aggregate during the relevant year of assessment, as well as for a period or periods exceeding 91 days in aggregate during each of the **[three]** five years of assessment preceding such year of assessment; and

(bb) for a period or periods exceeding **[549]** 915 days in aggregate during **[such three]** those five preceding years of assessment.”.

(2) Subsection (1) shall—

(a) in respect of any person who by virtue of paragraph (a)(ii) of the definition of “resident” was a resident on 28 February 2005, come into operation on 1 March 2006 and applies in respect of any year of assessment commencing on or after that date; and

(b) in respect of any other person, is deemed to have come into operation on 1 March 2005 and applies in respect of any year of assessment commencing on or after that date.

*When the residence basis of taxation was introduced in South Africa in 2001, a three year period commencing from the date on which an expatriate becomes resident in South Africa is allowed during which foreign income and capital gains of the expatriates are not taxed in South Africa. This period was allowed through the operation of the definition of “resident” and its purpose was to encourage visiting expatriates with scarce skills to work in South Africa.*

*It is clear from international benchmarking that this period is not in line with the tax treatment in other tax jurisdictions and particularly Australia and Canada which have the same comprehensive exit taxes as South Africa does. It is proposed that the period that a person is physically present in the Republic before he or she becomes a resident be extended to five years to bring it more in line with international practice and to make South Africa more attractive for expatriates.*

## Amendment of section 8C of Act 58 of 1962

2. Section 8C of the Income Tax Act, 1962, is hereby amended by the addition in subsection (7) of the following paragraph to the definition of “restricted equity instrument”:

“(g) which is not deliverable to the taxpayer until the consideration in respect of that equity instrument has been paid; and”.

*One of the most popular methods of avoiding the payment of tax under section 8A, which section 8C has replaced, was to use a deferred delivery mechanism to reduce the amount of the incentive to be taxed in the hands of the employee. This was achieved by entering into a binding contract between the taxpayer and the employer or an associated institution in terms of which an equity instrument was sold to the taxpayer but delivery of the instrument would only be given once payment was made and the employee could only make payment after, say, five years. This ensured no gain or a small gain and no fringe benefit on an interest free loan by the employer. While the view is that the existing paragraph (a) of the definition of “restricted equity instrument” in section 8C already covers deferred delivery schemes as a restriction, as they prevent the taxpayer freely disposing of the instrument, it is proposed that the matter be placed beyond doubt.*

## Amendment of section 10 of Act 58 of 1962

3. Section 10 of the Income Tax Act, 1962, is hereby amended—

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

“(1) There shall be exempt from **[the] normal** tax—”;

*Section 10 provides for certain exemptions from normal tax. In terms of the general deduction formula income is determined by excluding from gross income all amounts which are exempt in terms of section 10. Currently, section 10 refers to exemption from tax, which includes all taxes imposed in terms of the Act, including for example the new proposed tax on non-resident entertainers and sportspersons. It is proposed that section 10 be clarified that the exemption only applies in respect of normal tax.*

(b) by the insertion in subsection (1) after paragraph (l) of the following paragraph:

“(lA) any amount received by or accrued to any person who is not a resident if that amount is or will be subject to tax on non-resident entertainers and sportspersons in terms of Part IIIA of this Chapter;”.

*This amendment is consequential upon the introduction of the tax on non-resident entertainers and sportspersons which will constitute a final withholding tax at a rate of 15 per cent. These amounts must therefore be exempt from normal tax.*

#### **Amendment of section 11 of Act 58 of 1962**

4. Section 11 of the Income Tax Act, 1962, is hereby amended by the substitution in paragraph (o) for the words following subparagraph (ii) preceding the proviso of the following words:

“exceeds the sum of the amount received or accrued from the alienation, loss or destruction, of that asset and the amount of any such capital allowance or deduction allowed in respect of that asset in that year or any previous year of assessment or which was deemed to have been allowed in terms of section 12B(4B) or 12C(4B) or taken into account in terms of section 11(e)(ix), as the case may be:”.

*Section 11(o) of the Income Tax Act, 1962, provides for the deduction of a loss incurred on the alienation, loss or destruction of certain depreciable assets (the so-called scrapping allowance). The deduction allowed is equal to the difference between the amount received or accrued from the disposal and the cost to the taxpayer of that asset, reduced by any depreciation already allowed for tax purposes in respect of that asset. Where an asset was used by the taxpayer for any period before that taxpayer became taxable, the use by the taxpayer during that non-taxable period is taken into account in determining the depreciation allowable during the years when the taxpayer is subject to tax. It is proposed that the depreciation as a result of use during the non-taxable years should also be accounted for in determining the amount of the allowance under section 11(o).*

Example: (5 year straight-line depreciation)

*X acquires depreciable asset with 5 year useful life for R100 and uses it in non-taxable trade for two years. X becomes taxable in year 3.*

*Depreciation allowance in years 3 to 5 must be determined as if the allowance had been claimed in previous two years, i.e. only the balance of R60 may still be depreciated.*

*If the asset is destroyed in year 4, the scrapping allowance is the remaining portion of the depreciation which would have been allowed, i.e. R20 as opposed to R60 which would be the case if the deemed depreciation in the non-taxable years had not been taken into account.*

## Amendment of section 12B of Act 58 of 1962

5. Section 12B of the Income Tax Act, 1962, is hereby amended—

(a) by the addition to subsection (1) of the following paragraph:

“(h) machinery, implement, utensil or article acquired by the taxpayer and which was or is brought into use for the first time by that taxpayer for the purpose of his or her trade to be used by that taxpayer in the generation of electricity from—

(i) wind;

(ii) sunlight;

(iii) gravitational water forces to produce electricity of not more than 30 megawatt; and

(iv) biomass comprising organic wastes, landfill gas or plants.”.

*As proposed in the Budget Review this year, the accelerated depreciation for investments in bio-diesel and bio-fuels will be extended to other forms of environmentally friendly energy sources. Renewable energy investment, such as solar energy and windmill technology will also benefit from a tax depreciation write-off of 50:30:20 per cent over three years. This amendment gives effect to this proposal.*

## Amendment of section 20A of Act 58 of 1962

6. Section 20A of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

“(2) Subsection (1) applies where the sum of the taxable income of a person for a year of assessment (**[before taking into account the set-off of]** determined without having regard to the other provisions of this section) and the absolute values of any assessed **[losses incurred in carrying on any trade during that year]** loss and **[the]** balance of assessed loss **[carried forward from the preceding year]** which were set off in terms of section 20 in determining that taxable income, equals or exceeds the amount at which the maximum marginal

rate of tax chargeable in respect of the taxable income of individuals becomes applicable, and where—”.

*Section 20A was inserted in the Income Tax Act in 2003 to ring-fence losses incurred by taxpayers in carrying on certain trades (mainly as hobbies). This section, however, only applies where the taxable income of the taxpayer equals or exceeds the amount at which the maximum marginal rate of tax for individuals becomes applicable. In calculating the taxable income for purposes of determining whether the section applies, all assessed losses incurred in that year and the balance of an assessed loss carried forward from the preceding year must be disregarded.*

*There is, however, some difficulty with the sequence of deductions in calculating the taxable income for purposes of this section. Certain deductions (such as medical expenses and deductible donations) are determined after the losses have been set off. If assessed losses are not taken into account, these deductions therefore also have to be redetermined. It is, therefore, proposed that the sequence of the deductions for purposes of determining whether this section applies to a taxpayer be clarified to avoid a circular calculation.*

### **Insertion of Part IIIA in Act 58 of 1962**

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

#### **“PART IIIA**

##### *Taxation of non-resident entertainers and sportspersons*

#### **Definitions**

**47A.** For purposes of this Part—

‘entertainer or sportsperson’ includes any person who is not a resident and who for reward—

- (a) performs any activity as a theatre, motion picture, radio or television artiste or a musician;
- (b) takes part in any type of sport; and
- (c) takes part in any other activity which is usually regarded as of an entertainment character;

‘specified activity’ means any personal activity exercised or to be exercised by a person as an entertainer or sportsperson, whether alone or with any other person or persons.

### **Imposition of tax**

**47B.** (1) Subject to subsection (3), there must be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the tax on non-resident entertainers and sportspersons, in respect of any amount received by or accrued to any entertainer or sportsperson or any other person who is not a resident (in this Part referred to as ‘the taxpayer’) in respect of any specified activity in the Republic.

(2) The tax on non-resident entertainers and sportspersons is a final tax and is levied at a rate of 15% on all amounts received by or accrued to a taxpayer as contemplated in subsection (1).

(3) Subsection (1) does not apply in respect of any person who is not a resident, if that person is an employee of an employer who is a resident of the Republic and where that employer is in terms of the Fourth Schedule to this Act required to deduct or withhold employees’ tax from any amount payable by that employer to that employee.

### **Liability for payment of tax**

**47C.** (1) A taxpayer must, within 30 days (or within such further period as the Commissioner may approve) after an amount contemplated in section 47B is received by or accrues to that taxpayer, pay to the Commissioner the amount of tax which is leviable in terms of this Part in respect of that amount.

(2) This section does not apply to any amounts received by or accrued to the taxpayer—

- (a) from which the full amount of tax has been withheld by a resident in terms of sections 47D; or
- (b) in respect of which the tax has been recovered from a resident in his or her personal capacity in terms of section 47G(1).

### **Withholding of amounts of tax**

**47D.** (1) Any resident who is liable to pay to a taxpayer any amount contemplated in section 47B(1) must deduct or withhold from that payment the amount of tax for which the taxpayer is liable under that section in respect of that amount.

(2) A taxpayer from whom an amount has been deducted or withheld in terms of this section is deemed to have received the amount so deducted or withheld.

### **Payment of amounts of tax withheld**

**47E.** (1) A resident must pay any amount deducted or withheld in terms of section 47D to the Commissioner before the end of the month following the month during which that amount was so deducted or withheld.

(2) The payment contemplated in subsection (1) is a payment made on behalf of the taxpayer in respect of his or her liability under section 47B in respect of that amount.

### **Submission of return**

**47F.** (1) A taxpayer must, together with the payment contemplated in section 47C, submit to the Commissioner a return in the manner and form and containing the information as may be prescribed by the Commissioner.

(2) A resident who pays to the Commissioner any amount in terms of section 47E, must together with that payment submit to the Commissioner a return in the manner and form and containing the information as may be prescribed by the Commissioner.



### **Personal liability of resident**

**47G.** (1) A resident who—

- (a) fails to deduct or withhold an amount of tax in terms of section 47D from any payment made to a taxpayer; or
- (b) deducts or withholds an amount of tax but fails to pay that amount over in terms of section 47E,

is personally liable for payment of that amount of tax, which can be recovered from that resident in terms of this Act as if it is a tax due by that taxpayer.

(2) Any amount recovered from a resident in terms of subsection (1) relating to a payment made by him or her to a taxpayer, is an amount of tax which is paid on behalf of that taxpayer in respect of his or her liability under section 47B in respect of that payment by the resident to that taxpayer.

(3) Subsection (1)(a) does not apply where the taxpayer has in terms of section 47C paid to the Commissioner the amount of tax payable under this Part in respect of the payment from which the resident has so failed to deduct or withhold the tax.

### **Recovery of amounts paid to Commissioner**

**47H.** (1) A taxpayer on whose behalf an amount deducted or withheld has been paid to the Commissioner under this Part, is not entitled to recover from the resident the amount so deducted or withheld.

(2) A resident who, in terms of section 47G, has in his or her personal capacity paid any amount of tax for which a taxpayer is liable under this Part, may recover the amount of tax so paid from the taxpayer.

### **Application of certain provisions**

**47I.** The provisions contained in Chapter III of this Act apply *mutatis mutandis* in respect of any tax on non-resident entertainers and sportspersons payable in terms of this Part.

### **Currency of payments made to Commissioner**

**47J.** If an amount deducted or withheld by a resident in terms of section 47D is denominated in any currency other than the currency of the Republic, the amount so withheld and paid to the Commissioner must be translated to the currency of the Republic at the spot rate on the date on which that amount was so deducted or withheld.

### **Notification of specified activity**

**47K.** (1) Any person who is primarily responsible for founding, organising, or facilitating a specified activity in the Republic and who will be rewarded directly or indirectly for that function of founding, organising or facilitating must, in the manner and form prescribed by the Commissioner—

- (a) notify the Commissioner within 14 days after the agreement relating to that founding, organizing or facilitating of that specified activity has been concluded of the fact that the specified activity is to take place; and
- (b) provide to the Commissioner such other details relating thereto as may be prescribed by the Commissioner.

(2) A person who will directly or indirectly receive any reward for the use of any location where a specified activity is to take place, must within 14 days after the agreement for the use of that venue is concluded notify the Commissioner of that specified activity and provide such other details relating thereto as may be prescribed by the Commissioner.”.

**Background**

*Visiting entertainers and sportspeople are, like all visiting foreign workers, responsible for paying South African tax on their South African source income. There are, however, a number of practical difficulties in collecting tax from these entertainers and sportspersons as they are generally only present in the Republic for short periods of time. It often happens that they then leave South Africa after the event without paying tax.*

**Proposed solution**

*It was, therefore, proposed in the Budget Review this year that a final withholding tax regime on gross payments to visiting entertainers and sportspeople will be introduced in line with international practice. This will ensure that the local entity that pays the entertainer or sportsperson can be held responsible and must withhold tax from payments to the entertainer or sportsperson.*

*In principle, the entertainer or sportsperson will be subject to tax on his or her worldwide income relating to the performance in the Republic. The withholding tax will, however, only apply in respect of payments made to the entertainer or sportsperson by a resident of the Republic. The entertainer or sportsperson will remain personally liable for declaring any foreign income to SARS and paying South African tax thereon also at the rate of 15 per cent. Payments made directly to third parties in respect of the performance in the Republic by the entertainer or sportsperson will also fall within the new provisions to ensure that the tax is not circumvented by arranging that payments be made directly to management companies.*

**Differentiated rate**

*In the Budget Review, however, it was proposed that the rate be set at 5 per cent for visiting residents of African countries and 15 per cent for residents of other countries. The lower rate for African residents was proposed in recognition of the special nature of South Africa's relationship with other African countries. We have, however, in the meantime obtained two legal opinions – one from Senior Counsel and one from the World Trade Organisation – that indicate that this is in contravention of the General Agreement on Trade in Services (GATS) as it provides preferential treatment to African countries. It is, therefore, proposed that a flat rate of 15 per cent be introduced in respect of all visiting entertainers and sportspersons.*

**Amendment of section 67A of Act 58 of 1962**

8. Section 67A of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (2) for paragraphs (a) and (b) of the following paragraphs:

- “(a) provides advice or completes or assists in completing any document, as contemplated in subsection (1), solely for no

consideration to that person or his or her employer or a connected person in relation to that employer or that person;

- (b) provides advice contemplated in subsection (1) solely in anticipation of or in the course of any litigation to which the Commissioner is a party[, **or in the course of such litigation**] or where the Commissioner is a complainant;”.

*Section 67A of the Income Tax Act, 1962, requires tax practitioners to register with SARS. This includes all persons who for reward provide advice or assist with the completion of any returns or forms that are required to be submitted to SARS. Certain persons are excluded from the provisions, such as persons providing advice in anticipation of litigation or as an incidental or subordinate part of providing goods or other services to another person. There is also an exclusion for persons who provide advice or assist in completing returns solely for no consideration to that person or his or her employer or connected person in relation to his or her employer. It is proposed that a reference also be inserted to a connected person in relation to the person providing the advice or assisting to complete the return to ensure that consideration may also not be paid to these connected persons for the advice or assistance.*

*Furthermore, there is an exclusion for persons who provide advice in anticipation of or in the course of litigation where the Commissioner is a party. It is proposed that this provision be extended to provide for criminal litigation where the Commissioner is not a party to the litigation, but where the Commissioner is a complainant.*

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

9. Section 75 of the Income Tax Act, 1962, is hereby amended by the insertion in subsection (1) after paragraph (aB) of the following paragraph:

“(aC) fails to withhold any amount of tax on non-resident entertainers and sportspersons and pay that amount over in terms of section 47D and 47E;

(aD) fails to inform the Commissioner of any specified activity as contemplated in section 47K.”.

*These amendments are consequential upon the introduction of the tax on non-resident entertainers and sportspersons and provide that it is a criminal offence if a resident fails to withhold the tax from any payment made to these entertainers and sportspersons or where the person who receives reward for the use of a venue where the performance is to take place fails to inform SARS of the performance as provided for in the new Part IIIA above.*

**Amendment of paragraph 1 of Fourth Schedule to Act 58 of 1962**

10. Paragraph 1 of the Fourth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution in the definition of “remuneration” for subitem (ii) of item (bA) of the following subitem:

“(ii) an allowance or advance paid or granted to that person in respect of accommodation, meals or other incidental costs while that person is by reason of the duties of his or her office obliged to spend at least one night away from his or her usual place of residence in the Republic: Provided that where—

(aa) such an allowance or advance was paid or granted to a person during any month in respect of a night away from his or her usual place of residence; and

(bb) that person has not by the last day of the following month either spent the night away from his or her usual place of residence or refunded that allowance or advance to his or her employer,

that allowance or advance is deemed not to have been paid or granted to that person during that firstmentioned month in respect of accommodation, meals or other incidental costs, but is deemed to have become payable to that person in that following month in respect of services rendered by that person;”.

*Employers generally compensate their employees for work-related travel where they are required to spend some time away from their usual place of residence by way of advances or allowances to cover subsistence costs. These allowances are not included in the taxable income of an employee to the extent that it is actually expended on subsistence costs. In order to alleviate the administrative burden of retaining and verifying proof of expenses, the Act makes provision for a per diem amount which is deemed to have been expended by the employee. Unfortunately some employees and employers are relying on this mechanism in order to artificially reduce and postpone employees' tax obligations. It was therefore announced in the Budget Review this year that Government will seek to eliminate this form of salary structuring by requiring a more direct and immediate link between a tax-free subsistence advance and the anticipated travel to which it relates. In order to address this, it is proposed that a provision be inserted to provide that if a subsistence allowance is paid to an employee during any month and that employee does not travel for business purposes by the end of the following month, that allowance will become subject to employees' tax in that following month.*

## Amendment of paragraph 20 of Eighth Schedule to Act 58 of 1962

11. Paragraph 20 of the Eighth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution in subparagraph (3) for item (a) of the following item:

“(a) is or was allowable as a deduction or is or was otherwise taken into account, in determining the taxable income of that person before the inclusion of any taxable capital gain; or”.

*The base cost of a marketable security or equity instrument acquired by an employee or director under a share incentive arrangement which is subject to tax under section 8A or 8C, is determined under paragraph 20(1)(h)(i). That paragraph provides that the base cost is equal to the market value of the marketable security or equity instrument that was taken into account in determining the section 8A or 8C gain. Under the general provisions for base cost, the expenditure incurred in acquiring an option which is used to acquire an asset is included in the base cost of that asset in terms of paragraph 20(1)(c)(ix). Similarly the strike price that is paid for the asset when the option is exercised is allowable in terms of paragraph 20(1)(a). In terms of paragraph 20(3)(a) any expenditure that is or was allowable in the determination of taxable income must be excluded from base cost to prevent a double deduction of the same expenditure.*

*However, in the case of a section 8A or 8C marketable security or equity instrument the option cost or strike price would already have been allowed as a deduction in computing the section 8A or 8C gain which was included in the income of the employee / director. In addition, in terms of the rules of interpretation the provision which specifically deals with the base cost of marketable securities and equity instruments overrides the general provisions. Some commentators have contended that paragraph 20(3)(a) does not exclude the cost of the option or share from the base cost of the marketable security or equity instrument. They argue that the cost of the option was merely “taken into account” in determining an amount included in income, and that it was not “allowable as a deduction”. This interpretation gives a result which departs completely from the economic reality. In order to put the matter beyond doubt it is proposed that paragraph 20(3)(a) be amended to include a reference to an amount that is or was otherwise taken into account in determining the taxable income of that person before the inclusion of any taxable capital gain.*

## Amendment of paragraph 30 of Eighth Schedule to Act 58 of 1962

12. (1) Paragraph 30 of the Eighth Schedule to the Income Tax Act, 1962, is hereby amended—

(a) by the substitution in subparagraph (1) for item (b) of the following item:

“(b) ‘B’ represents the amount of expenditure incurred in respect of that asset attributable to the period from the date that the asset

was acquired to the day before valuation date that is allowable in terms of paragraph 20 [in respect of that asset that is attributable to the period from the date that the asset was acquired to the day before valuation date];”;

(b) by the substitution in subparagraph (2) for item (d) of the following item:

“(d) ‘B’ represents the amount of expenditure incurred in respect of that asset attributable to the period from the date that the asset was acquired to the day before valuation date that is allowable in terms of paragraph 20 [in respect of that asset that is incurred before valuation date];”;

(c) by the substitution for subparagraph (3) of the following subparagraph:

“(3) **[Despite the provisions of paragraph 20(3)(a) and 35(3)(a), where in respect of a pre-valuation date asset]** A person must determine the time-apportionment base cost of a pre-valuation date depreciable asset in terms of subparagraph (4) where—

(a) **[a]** that person has incurred expenditure contemplated [allowable] in **[terms of]** paragraph 20(1)(a), (c) or (e) on or after the valuation date;

(b) any part of the expenditure **[allowable]** contemplated in [terms of] paragraph 20(1)(a), (c) or (e) is or was allowable as a deduction in determining the taxable income of that person before the inclusion of any taxable capital gain; and

(c) the proceeds in respect of the disposal of that asset exceed the expenditure allowable in terms of paragraph 20 **[incurred before, on and after the valuation date]** in respect of that asset,

**[that person must determine the time-apportionment base cost of that asset in terms of subparagraph (4)].**”;

(d) by the substitution in subparagraph (4) for items (b), (c) and (d) of the following items:

“(b) ‘P<sub>1</sub>’ represents the proceeds attributable to the expenditure in B<sub>1</sub>, **[disregarding the provisions of paragraph 35(3)(a)]**;

(c) ‘A<sub>1</sub>’ represents the **[amount of]** sum of the expenditure allowable in terms of paragraph 20 in respect of the asset that is

incurred on or after valuation date, and any amount of that expenditure that has been recovered or recouped as contemplated in paragraph 35(3)(a) **[disregarding the provisions of paragraph 20(3)(a)]**;

- (d) 'B<sub>1</sub>' represents the sum [amount] of the expenditure allowable in terms of paragraph 20 in respect of the asset that is incurred before valuation date, and any amount of that expenditure that has been recovered or recouped as contemplated in paragraph 35(3)(a) **[disregarding the provisions of the paragraph 20(3)(a)]**”;
- (e) by the substitution in subparagraph (4) for item (f) of the following item:
- (f) “R<sub>1</sub>” represents the sum of the [total amount of] proceeds and any amount contemplated in paragraph 35(3)(a) in respect of that asset **[as determined in terms of paragraph 35 in respect of the disposal of the pre-valuation date asset, disregarding the provisions of paragraph 35(3)(a)]**”;
- (f) by the addition of the following subparagraph:
- “(5) For purposes of this paragraph—
- (a) the proceeds in respect of the disposal of an asset must be reduced by any selling expenses incurred on or after the valuation date;
- (b) to the extent that those selling expenses have reduced those proceeds they must be disregarded for the purposes of paragraph 20; and
- (c) ‘selling expenses’ means expenditure—
- (i) contemplated in paragraph 20(1)(c)(i) to (iv) incurred directly for the purposes of disposing of that asset; and
- (ii) which would, but for the provisions of item (b), have constituted expenditure allowable in terms of paragraph 20.”.

*Paragraph 30 contains two sets of formulae for determining the time-apportionment base cost of pre-valuation date assets.*

*Firstly, as a result of the wording of the paragraph, some commentators have interpreted it to have the effect that expenditure incurred before valuation date has to*



*be reduced by capital allowances claimed only up to valuation date and not allowances claimed after that date. This gives absurd results and it is proposed that this be clarified.*

*Secondly, paragraphs 30(3) and (4) contain the special depreciable assets formula where expenditure is incurred before and on or after valuation date. The standard proceeds formula in paragraph 30(2) has the effect that the higher the expenditure after valuation the more of the gain is taxed. As more expenditure is written off as capital allowances prior to valuation date, this can cause hardship. The formula was amended to ignore the capital allowances but an unintended consequence of this was that certain current costs were not removed from the expenditure. It is proposed that this be corrected.*

*Lastly, as mentioned above the proceeds formula has the effect that the greater the expenditure after valuation date the greater the gain that is taxed. Since selling expenses comprise post-valuation expenses they trigger the proceeds formula. This can have a marked effect on the amount of the gain or loss that is determined particularly where the historical cost is low in relation to the selling costs, such as agents' commission. It is proposed for the purposes of the formula that the selling costs be deducted from the proceeds from the sale of the asset which will result in a more equitable allocation of gains and losses.*

### **Amendment of paragraph 56 of Eighth Schedule to Act 58 of 1962**

13. Paragraph 56 of the Eighth Schedule to the Income Tax Act, 1962, is hereby amended by the substitution in the Afrikaans text for item (a) of subparagraph (2) of the following item:

“(a) ’n kapitaalwins daarstel wat by die vasstelling van die totale kapitaalwins of totale kapitaalverlies van daardie [skuldeiser] skuldenaar ingevolge paragraaf 12 (5) ingesluit is;”.

*The purpose of this amendment is to align the Afrikaans text with the English text of the Act.*

### **Amendment of section 1 of Act 91 of 1964**

14. (1) Section 1 of the Customs and Excise Act, 1964, is hereby amended—

(a) by the substitution for the definition of “**fuel levy**” of the following definition:

“**fuel levy**’ means, subject to subsection (4), any duty leviable under Part [5] 5A of Schedule No. 1 on any fuel levy goods which have been manufactured in or imported into the Republic;”;

- (b) by the substitution for the definition of “**fuel levy goods**” of the following definition:

“**fuel levy goods**’ means, subject to subsection (4), any goods specified in Part [5] 5A of Schedule No. 1, except any goods specified in any item of that Part for which a free rate of duty is prescribed as contemplated in section 37A(1)(a), which have been manufactured in or imported into the Republic;”;

- (c) by the insertion after the definition of “**regulation**” of the following definitions:

“**Road Accident Fund levy**’ means, subject to subsection (4), any duty leviable under Part 5B of Schedule No. 1 on any Road Accident Fund levy goods which have been manufactured in or imported into the Republic;

“**Road Accident Fund levy goods**’ means, subject to subsection (4), any goods specified in Part 5B of Schedule No. 1;” and

- (d) by the insertion after subsection (3) of the following subsection:

“(4)(a) Except as otherwise provided in this section or in any other section or as may be provided in any Schedule or rule, any provision in this Act for fuel levy or fuel levy goods shall be deemed to include in that provision, in respect of—

(i) fuel levy, the Road Accident Fund levy; or

(ii) fuel levy goods, Road Accident Fund levy goods.”

- (2) Subsection (1)(a), (b), (c) and (d) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*Section 1 contains the definitions used in the Customs and Excise Act. No definitions exist for “Road Accident Fund levy” and “Road Accident Fund levy goods”.*

*The proposed amendment to section 1 is as a result of the announcement by the Minister of Finance in the 2005 Budget that SARS will become the agency responsible for collecting the Road Accident Fund levy.*

*A further subsection is inserted after subsection (3) to include the “Road Accident Fund levy” in any provision relating to “fuel levy”, and “Road Accident Fund levy goods” in any provision relating to “fuel levy goods”.*

#### **Amendment of section 17 of Act 91 of 1964**

**15.** Section 17 of the Customs and Excise Act, 1964 is amended by the substitution for subsection (1) of the following subsection:

“(1) (a) Whenever any goods are taken to and secured in any State warehouse, the Commissioner may require rent to be paid for such period as the goods remain therein, at the rates fixed by rule.

(b) Goods removed from the State Warehouse shall be subject to the rate in force at the time of payment of the rent.”.

*Section 17(1) relates to State warehouse rent and empowers the Commissioner to charge rent, at a rate fixed by rule, on goods stored in any State warehouse for the period that such goods remain in the warehouse.*

*When the rate is adjusted during the period that goods are stored in the warehouse such goods can, upon their removal from the warehouse, potentially attract rent at different rates.*

*The proposed amendment stipulates that the rate to be used will be the rate in force at the time of payment.*

#### **Amendment of section 18 of Act 91 of 1964**

**16.** Section 18 of the Customs and Excise Act, 1964, is hereby amended—

(a) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

“(3) Subject to the provisions of **[sub-section]** subsection (4), any liability for duty in terms of **[sub-section]** subsection (2) shall cease when it is proved by the person concerned [-] within the period and in compliance with such procedures as may be prescribed by rule—“;

(b) by the substitution for paragraph (b) of subsection (3) of the following paragraph:

“(b) in the case of goods which were destined for a place beyond the borders of the common customs area, that such goods have been duly taken out of that area or **[, in circumstances and in accordance with procedures which the Commissioner may determine by rule,]** that the goods have been duly accounted for in the country of destination.”;

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

“(4) If the **[person concerned fails to submit any such proof as is referred to in subsection (3) within a period as may be prescribed by rule, he shall upon demand by the Controller forthwith pay the duty due on such]** goods **[.] have been diverted or deemed to have been diverted as contemplated in subsection (13), such person shall upon demand by the Controller pay—**

**(a) the duty and value-added tax due in terms of the Value-Added Tax Act, 1991 (Act No. 89 of 1999) as if the goods were entered for home consumption on the date of entry for removal in bond; and**

**(b) any amount that may be due in terms of section 88(2).”;** and

(d) by the substitution for paragraph (a) of subsection (13) of the following paragraph:

“(a) (i) No person shall, without the permission of the Commissioner, divert any goods removed in bond to a destination other than the destination declared on entry for removal in bond or deliver such goods or cause such goods to be delivered in the Republic except into the control of the **[department] Controller** at the place of destination; and

(ii) Goods shall be deemed to have been so diverted where—

(aa) no permission to divert such goods has been granted by the Commissioner as contemplated in subparagraph (i) and a person fails to furnish proof as contemplated in section 18(3) to the Controller within the period specified by rule; or

(bb) any such proof is the result of fraud or misrepresentation:

or

(cc) such person makes a false declaration for the purpose of this section.

(iii) Where any person fails to comply with or contravenes any provision of this subsection the goods shall be liable to forfeiture in accordance with this Act.”.

*Control over the movement of goods in bond through the Republic is important in order to protect the society and the fiscus from such goods illicitly finding their way into the local market. To further combat such diversions, three new amendments are being proposed:*

*Firstly, **subsection 18(3)** provides for the facts which must be proved by persons removing goods in bond in order to discharge their liability for the duty in respect of such goods.*

*The procedures that must be followed by persons to prove that their liability in respect of goods removed in bond had ceased, are not currently stipulated in the rules to the Act.*

*The proposed amendment thus empowers the Commissioner to prescribe such procedures by rule.*

*Secondly, **subsection 18(4)** places an obligation on a person who fails to submit the required proof relating to the termination of a removal in bond to pay the applicable duty due upon demand by the Controller.*

*No specific provision currently exists in subsection 18(4) concerning the payment of value-added tax (VAT) and forfeiture by a person who is called upon to pay the duty as contemplated in subsection (4).*

*The proposed amendment requires the payment of the duty and VAT, as well as any amount of forfeiture that may be due, in circumstances where goods have been diverted or deemed to have been diverted.*

*Finally, **subsection 18(13)** prohibits any person to divert, without the permission of the Commissioner, any goods entered for removal in bond to a destination other than the destination declared on the relevant removal in bond entry, or to deliver the goods to a place in the Republic other than into the control of the department at the place of destination.*

*Recent court cases have highlighted certain practical difficulties that officers encounter in proving diversion under the current wording of subsection (13).*

*The proposed amendment now also deems goods removed in bond to have been diverted where the required proof referred to in subsection 18(3) is not produced, or where any such proof produced is the result of fraud, misrepresentation or a false declaration. Failure to comply with the provisions of this subsection will also result in the applicable goods becoming liable to forfeiture.*

*Furthermore, the proposed amendment to subsection (13) also removes the obsolete reference to “department” and replaces it with a reference to “Controller”.*

#### **Amendment of section 20 of Act 91 of 1964**

17. Section 20 of the Customs and Excise Act, 1964, is hereby amended by the substitution for subsection (5) of the following subsection:

**“(5) Subject to the provisions of any item in any Schedule, [The] the duty on any deficiency in a customs and excise warehouse shall be paid forthwith on demand after detection of such deficiency. [:** **Provided that in the case of goods manufactured in any customs and excise manufacturing warehouse or in the case of goods in the process of manufacture and removal from one customs and excise manufacturing warehouse to another such warehouse, the Commissioner may allow working, pumping, handling, processing and similar losses and losses due to natural causes, between the time when liability for duty first arises and the time of removal of such goods from the warehouse in which the goods are so manufactured or in which such process of manufacture is completed, to the extent specified in Schedule No. 4 or 6, if he is satisfied that no part of such loss was wilfully or negligently caused.]”.**

*Subsection 20(5) provides for the payment of the duty on any deficiency found in a customs and excise warehouse.*

*The current proviso to subsection (5) is, however, also duplicated in item 608.01 to Schedule No. 6 to the Act.*

*The proposed amendment is consequential to the review of Schedule No. 6 and deletes the obsolete proviso on the basis that it already exists in the abovementioned item.*

#### **Amendment of section 28 of Act 91 of 1964**

18. Section 28 of the Customs and Excise Act, 1964, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The quantity must be calculated and may be adjusted by a tolerance of 0.25% in accordance with such procedures as may be prescribed by rule and the quantity so calculated and so adjusted shall be deemed to be the true quantity of such spirits for the purposes of this Act.”.

*Subsection 28(2) provides for the ascertaining of the quantity of spirits by measuring the mass or volume thereof.*

*In storing spirits a certain amount of loss is inevitable given the nature of the product, resulting in the actual amount taken into storage differing from that reflected on the supplier's invoice. Investigating and administering each such instance is administratively impossible, as well as inaccurate.*

*The proposed amendment provides for a tolerance of 0,25 per cent (upwards or downwards) when ascertaining the quantity of spirits taken into storage in order to simplify the administration surrounding spirits.*

#### **Amendment of section 41 of Act 91 of 1964**

**19.** Section 41 of the Customs and Excise Act, 1964, is hereby amended by the substitution for paragraph (c) of subsection (4) of the following paragraph:

“(c) If any particulars referred to in paragraph (a) of any imported goods are not declared in the prescribed invoice or certificate in respect thereof or if any change in the particulars declared in any prescribed invoice or certificate relating to any imported goods which occurs after the date of issue of any such invoice or certificate is not forthwith reported to the Controller by the importer of such goods or if the Commissioner has reason to believe that an offence referred to in section 86 (f) or (g) has been committed in respect of any imported goods the Commissioner may determine a transaction value, origin, date of purchase, quantity, description or the characteristics of such goods according to the best information available to him, which shall, subject to the provisions of this Act. **[a right of appeal to the Minister, as contemplated in section 77B of the Act,]** be deemed to be the transaction value, origin, date of

purchase, quantity, description or the characteristics of such goods.”.

*Section 41 provides for invoices to be rendered and the particulars to be reflected on such invoices.*

*Subsection (4)(c) empowers the Commissioner to, subject to a right of appeal to the Minister, determine the transaction value, origin, date of purchase, quantity, description or characteristics of goods, where such particulars have not been declared on an invoice or certificate, or where a person commits certain offences in respect of such invoices or certificates.*

*Due to the introduction of internal administrative appeal, alternative dispute resolution and settlement procedures in Chapter XA of the Act, the right of appeal to the Minister has become obsolete.*

*The proposed amendment now deletes this obsolete right of appeal to the Minister.*

#### **Amendment of section 46A of Act 91 of 1964**

**20.** Section 46A of the Customs and Excise Act, 1964, is hereby amended by the substitution in subsection (1) for the definition of “circumvention” of the following definition:

“**circumvention**’ includes any circumvention of any provision of an enactment by—

- (a) trans-shipment, rerouting, false declaration concerning the country or place of origin or falsification of official documents; or
- (b) making any false declaration concerning fibre content, quantities, description or classification of goods[,

**as provided in article 5 of the Agreement on Textiles and Clothing included in Annex 1A of the Agreement established by the World Trade Organisation, kept by the Commissioner as contemplated in subsection 2].”.**

*Section 46A provides for the non-reciprocal preferential tariff treatment of goods exported from the Republic, for example, goods exported to the United States of America under the AGOA Agreement.*

*The reference to the “Agreement on Textiles and Clothing” (established by the World Trade Organisation) contained in the definition of “circumvention” in subsection (1), has become obsolete due to the lapse of that Agreement on 1 January 2005.*



*The proposed amendment retains the definition for “circumvention” and only deletes the reference to the above Agreement.*

#### **Amendment of section 47 of Act 91 of 1964**

**21.** (1) Section 47 of the Customs and Excise Act, 1964, is hereby amended—

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

“(1) Subject to the provisions of this Act, duty shall be paid for the benefit of the National Revenue Fund on all imported goods, all excisable goods, all surcharge goods, all environmental levy goods **[and]**, all fuel levy goods, and all Road Accident Fund levy goods in accordance with the provisions of Schedule No. 1 at the time of entry for home consumption of such goods: Provided that the Commissioner may condone any underpayment of such duty where the amount of such underpayment in the case of—

- (a) goods imported by post is less than fifty cents;
- (b) goods imported in any other manner is less than five rand; or
- (c) excisable goods is less than two rand.”; and

(b) by the substitution for subsection (7) of the following subsection:

“(7) To the extent that any goods, classifiable under any tariff heading or subheading of Part 1 of Schedule No. 1 that is expressly quoted in any tariff item, environmental levy item, **[or]** fuel levy item, Road Accident Fund levy item or item of Part 2, 3, **[5]** 5A, 5B or 6 of the said Schedule or in any item in Schedule No. 2, are specified in any such tariff item, environmental levy item, **[or]** fuel levy item, Road Accident Fund levy item or item, the item concerned shall be deemed to include only such goods classifiable under such tariff heading or subheading.”.

(2) Subsection (1)(a) and (b) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*Section 47(1) provides that duty shall be paid for the benefit of the National Revenue Fund on all imported, excisable, surcharge, environmental levy and fuel levy goods at the time of entry for home consumption thereof.*

*No provision currently exists to pay the Road Accident Fund Levy into the National Revenue Fund.*

*The proposed amendment to subsection (1) to pay the Road Accident Fund Levy into the National Revenue Fund is as a result of the announcement by the Minister of Finance in the 2005 Budget that SARS will become the agency responsible for collecting the Road Accident Fund levy.*

*The proposed amendment to subsection (7) is consequential to the amendment of subsection (1).*

#### **Amendment of section 48 of Act 91 of 1964**

**22.** (1) Section 48 of the Customs and Excise Act, 1964, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The Minister may from time to time by like notice amend or withdraw or, if so withdrawn, insert Part 2, Part 3, Part 4, **[Part 5]** Part 5A or Part 5B of Schedule No. 1, whenever he deems it expedient in the public interest to do so: Provided that the Minister may, whenever he deems it expedient in the public interest to do so, reduce any duty specified in the said Parts with retrospective effect from such date and to such extent as may be determined by him in such notice.”.

(2) Subsection (1) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*Section 48 (2) empowers the Minister to amend, withdraw, insert or reduce duties specified in certain Parts of Schedule No. 1 to the Act. No provision currently exists to allow the Minister to amend the Road Accident Fund levy.*

*The proposed amendment to subsection (2) is to allow the Minister to amend the Road Accident Fund levy and is consequential to the amendment of section 1 and divides the current Part 5 of Schedule No. 1 into a Part 5A in respect of fuel levy goods and a Part 5B in respect of Road Accident Fund levy goods.*

#### **Amendment of section 54 of Act 91 of 1964**

**23.** Section 54 of the Customs and Excise Act, 1964 is hereby amended by the insertion after subsection (3) of the following subsection:

“(4) (a) No cigarettes bearing the stamp impression referred to in subsection (2), may be entered for removal in bond as contemplated in section 18 for transit through the Republic.

(b) Any cigarettes bearing such stamp impression so entered for removal in bond shall be liable to forfeiture in accordance with the provisions of this Act.”.

*Section 54 provides for special provisions regarding the importation of cigarettes. Subsection (2) places a prohibition on the importation of cigarettes, unless certain requirements are complied with.*

*In recent court cases cigarettes in transit were found to bear the diamond stamp impression (as proof that the excise duty thereon has been paid) and health warnings that are required in respect of cigarettes intended to be entered for home consumption. These types of cigarettes were previously found in the Republic in circumstances that suggested that diversion had taken place. Attempts to detain the transit cigarettes were frustrated, due to the fact that the current wording of subsection (2) does not prohibit the transit of cigarettes bearing the abovementioned marks.*

*The proposed insertion of subsection (4) aims to specifically prohibit cigarettes entered for removal in bond through the Republic to bear the diamond stamp impression and further provides that any cigarettes bearing such a stamp impression and entered for removal in bond through the Republic shall be liable to forfeiture under the provisions of the Act.*

#### **Amendment of section 75 of Act 91 of 1964**

**24.** (1) Section 75 of the Customs and Excise Act, 1964, is hereby amended—

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

“(c) a drawback or a refund of the **[ordinary]** customs duty, **[anti-dumping duty, countervailing duty, safeguard duty,]** surcharge **[and]**, fuel levy and Road Accident Fund levy actually paid on entry for home consumption on any imported goods described in Schedule No. 5 shall be paid to the person who paid such duties or any person indicated in the notes to the said Schedule, subject to compliance with the provisions of the item of the said Schedule in which those goods are specified; and”;

(b) by the substitution for paragraph (d) of subsection (1) of the following paragraph:

“(d) in respect of any excisable goods or fuel levy goods described in Schedule No. 6, a rebate of the excise duty specified in Part 2 of Schedule No. 1 or of the fuel levy and of the Road Accident Fund levy specified respectively in [Part 5] Parts 5A and 5B of Schedule No. 1 in respect of such goods at the time of entry for home consumption thereof, or if duly entered for export and exported in accordance with such entry, or a refund of the excise duty or fuel levy actually paid at the time of entry for home consumption shall be granted to the extent and in the circumstances stated in the item of Schedule No. 6 in which such goods are specified, subject to compliance with the provisions of the said item and any refund under this paragraph may be paid to the person who paid the duty or any person indicated in the notes to the said Schedule No. 6[;]: Provided that any rebate, drawback or refund of Road Accident Fund levy shall only be granted as expressly provided in Schedule Nos. 3, 4, 5, or 6 in respect of any item of such Schedule.”;

(c) by the substitution for paragraph (a) of subsection (1A) of the following paragraph:

“(a)(i) a refund of the fuel levy leviable on distillate fuel in terms of Part **[5] 5A** of Schedule No. 1; and

(ii) a refund of the Road Accident Fund levy leviable on **[diesel as contemplated in section 5 of the Road Accident Fund Act, 1996 (Act No.56 of 1996)]** distillate fuel in terms of Part 5B of Schedule No. 1; or

(iii) only a refund of such Road Accident Fund levy, shall be granted in accordance with the provisions of this section and of item 540.02 of Schedule No. 5 or item 640.03 of Schedule No. 6 to the extent stated in those items;”;

(d) by the insertion after subsection (1C) of the following subsection:

“(1D) The provisions of subsections (1A)(c), (1B)(b), (1B)(c) and (1B)(e), shall only apply in respect of refunds paid by

the Commissioner on the day before the levying of the Road Accident Fund levy in terms of this Act comes into operation.”;

- (e) by the deletion of subsection (13);
- (f) by the substitution for the proviso preceding paragraph (a) in subsection (18) of the following proviso:

**“[Subject to the provisions of the proviso to subsection 20(5) and items 412.07, 412.08, 412.09, 531.00, 532.00, 608.01, 608.02, 608.03, 608.04, 615.01, 615.02 and 615.03 of Schedules Nos. 4, 5 and 6 no] No** rebate or refund of duty in respect of any loss or deficiency of any nature of any goods shall be allowed, except as provided for in any item of Schedules Nos. 4, 5 and 6 and the Notes thereto, but the Commissioner may allow the deduction from the dutiable **[quantity] quantities** of the undermentioned goods of a quantity equal to the following percentage stated **[below]** in each case **[,namely]—“;**

- (g) by the substitution for paragraph (a) of subsection (18) of the following paragraph:

“(a) in the case of unpacked spirits (ethyl alcohol), imported or manufactured in the Republic, received in and entered for use and used in such a customs and excise manufacturing warehouse for such purposes, and in accordance with such procedures as the Commissioner may prescribe by rule, 1,5 per cent of the quantity so entered;”;

- (h) by the substitution for paragraph (b) of subsection (18) of the following paragraph:

“(b) In the case of unpacked spirits, imported or manufactured in the Republic—

(i) removed between such licensed customs and excise warehouses and received in any such customs and excise warehouse and entered for such purposes and in accordance with such procedures as the Commissioner may prescribe by rule, 0,25 per cent of the quantity so removed; and

(ii) received for such purposes in such customs and excise storage warehouse and entered for such purposes and in accordance with such procedures as the Commissioner may prescribe by rule, 0,25 per cent of the quantity so entered.”;

- (i) by the deletion of paragraph (bA);
- (j) by the substitution for paragraph (c) of subsection 18 of the following paragraph:

“(c) in the case of wine and other fermented beverages manufactured in the Republic, 0,5 per cent of the quantity so manufactured on which duty is paid;”;

- (k) by the deletion of paragraph (cA); and
- (l) by the substitution for subsection (21) of the following subsection:

“(21) Except with the permission of the Commissioner, which shall only be granted in circumstances which he on good cause shown considers to be **[exceptional]** reasonable and subject to such conditions as he may impose in each case, any goods entered under any item of Schedule No. 3, 4 or 6 for manufacturing purposes or such other purpose as may be specified in the notes to such item shall be used for the purpose specified in such item at the time of such entry, or such other purpose, within **[five]** two years from the date of such entry.”.

(2) Subsection (1)(a), (b), (c) and (d) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*Section 75 provides for specific rebates, drawbacks and refunds of duty. Six amendments to the section are proposed.*

**Section 75(1)(c)** empowers the Commissioner to pay a refund or drawback of any ordinary customs duty, anti-dumping duty, countervailing duty, safeguard duty, surcharge and fuel levy paid on imported goods described in Schedule No. 5 subject to the necessary compliance with the notes to the Schedule, as well as with the provisions of the applicable item to the Schedule.

*The definition of “ordinary duty” was deleted by the Customs and Excise Amendment Act, 1990 (Act No. 59 of 1990) and as a result of the deletion a consequential amendment should have been made to section 75(1)(c) to delete the reference to “ordinary customs duty” appearing in that section and to replace it with a reference to “customs duty”.*

*The proposed amendment now effects the required consequential amendment and further deletes, in view of the current definition of “customs duty” contained in the Act, references in that section relating to anti-dumping, countervailing duty and safeguarding duty.*

*Furthermore, and consequential to the amendment of section 47(1)(a), provision is made for a rebate, refund or drawback in respect of the Road Accident Fund levy.*

**Section 75(1)(d)** *provides for rebates, refunds and drawbacks in respect of excisable goods and fuel levy goods. No provision currently exists that allows the Commissioner to grant a rebate, refund or drawback in respect of the Road Accident Fund levy.*

*The proposed amendment is consequential to the amendment of sections 1 and 47(1) and empowers the Commissioner to grant a rebate, refund or drawback in respect of the Road Accident Fund levy, provided that such a rebate, refund or drawback will only be granted as expressly provided in Schedule Nos. 3, 4, 5, or 6 in respect of any item in such Schedule.*

*The proposed insertion of **subsection (1D)** is a transitional provision and is required in order to deal with the recovery from the Chief Executive Officer of the Road Accident Fund of any Road Accident Fund levies refunded by the Commissioner prior to the date on which the levying of the Road Accident Fund levy in terms of this Act comes into operation.*

**Subsection (13)** *makes provision for the approval by the Commissioner of formulas used in the manufacturing of excisable products. These formulas are highly technical chemical formulas which do not add any benefit concerning the control of these products.*

*The provision is now deleted as a result of the review of the whole of Schedule No. 6.*

**Subsection (18)** *provides for a loss allowances on certain excisable products. The current provisions provide for different percentages of loss allowances which unnecessarily differentiate between different excisable products.*

*The proposed amendment is the result of a review of Schedule No. 6 and now affords excisable products equal treatment as far as possible in respect of transport and actual manufacturing losses.*

**Subsection (21)** *provides that, except with the permission of the Commissioner, any goods entered under any item of Schedule No. 3, 4 or 6 must be used for the purpose specified in that item within five years from the date of such entry.*

*The five year period is not consistent with similar provisions contained in the Act. Section 19(9)(a), for example, provides that goods stored or manufactured in a customs and excise warehouse must be removed from such warehouse within two years from the date of such storage or manufacture.*

*The proposed amendment aims to achieve uniformity within similar provisions in the Act by amending the five year usage period to a two year period.*

### **Amendment of section 76B of Act 91 of 1964**

25. Section 76B of the Customs and Excise Act, 1964, is hereby amended by the substitution for the heading of the following heading:

**“76B Limitation on the period for which refund and drawback claims will be considered and the period within which [such claims] applications therefor must be received by the [Commissioner] Controller [-]”.**

*Section 76B provides for non-discretionary prescription periods in respect of refund and drawback claims and the period within which such claims must be received by the Controller.*

*The proposed amendment is a textual amendment aimed at correcting the heading of section 76B by clarifying the periods that are referred to, replacing the reference to “claims” received with a reference to “applications” received and by deleting the reference to the “Commissioner” and replacing it with a reference to the “Controller”.*

### **Amendment of section 77C of Act 91 of 1964**

26. Section 77C of the Customs and Excise Act, 1964, is hereby amended by the substitution for subsection (1) of the following:

**“(1) Any person who intends submitting an appeal as provided for in this Part must do so within such time as may be prescribed by the Commissioner by rule.”.**

*Section 77C provides for the submission of appeals. Subsection (1) provides for the periods within which internal administrative appeals must be submitted to the Commissioner in certain circumstances.*

*Prescribing set submission periods hampers the flexibility required to administer internal administrative appeals in some instances. For example, the person concerned may elect first to enter into correspondence regarding the decision, or request more detailed reasons be provided, before deciding whether an internal administrative appeal would be appropriate.*

*The proposed amendment to subsection (1) is aimed at improving the administrative arrangements surrounding internal administrative appeals and increasing flexibility by providing for the periods within which appeals must be submitted, in the rules to the Act.*



**Amendment of section 77D of Act 91 of 1964**

27. Section 77D of the Customs and Excise Act, 1964, is hereby amended—

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

**“Request for reasons and [Time] time within which a request or an appeal must be considered.”;**

(b) by the substitution for subsection (1) of the following subsection:

“(1) (a) Any person contemplated in section 77B may request reasons for a decision.

(b) The Commissioner may prescribe by rule—

(i) the procedures to be complied with when reasons are requested and the time within which such request must be delivered to the Commissioner;

(ii) the period within which—

(aa) a request for reasons; or

(bb) an appeal,

must be considered.

(c) The Commissioner must notify in writing the person who—

(i) requested reasons, of those reasons; or

(ii) lodged an appeal, of the final decision,

within the periods prescribed in such rule.”; and

(c) by the deletion of subsection (2).

*Section 77D was inserted by section 147 of Act No. 45 of 2003 and prescribes the time in which internal administrative appeals as contemplated in Part A of Chapter XA of the Act must be considered.*

*Subsection (1) prescribes that an internal administrative appeal must be considered by the Commissioner within a period of 90 days from the date of the lodging of the appeal.*

*It is considered that the 90 day limitation period may in practice be detrimental to the appellant in that, for example, sufficient time may not be available for an appellant to obtain information in support of his or her appeal from overseas suppliers or manufacturers.*

*The proposed amendment to subsection (1) empowers the Commissioner to prescribe the period within which an appeal will be considered by rule. This*

*amendment will make it possible for the Commissioner to manage the complete internal administrative appeal process by making rules, coupled to prescribed limitation periods and sufficient provision for extensions on proper grounds, in respect of the various sub-processes that collectively make up the internal administrative appeal process.*

*Subsection (2) provides that no appeal shall, unless the period is on good cause shown extended by the Commissioner, be considered later than 180 days after the date of the decision.*

*The proposed deletion of subsection (2) is consequential to the amendment of subsection (1).*

### **Amendment of section 77F of Act 91 of 1964**

**28.** Section 77F of the Customs and Excise Act, 1964, is hereby amended by the deletion of subsection (2).

*Section 77F provides for the decision of the Commissioner or an appeal committee relating to an appeal.*

*Subsection (2) provides that the period within which a person may institute judicial proceedings following the consideration of his or her appeal, shall commence on the day the Commissioner or chairperson of the committee advises the person concerned of the final decision of the appeal.*

*Provisions relating the institution of judicial proceedings against the State, the Minister, the Commissioner or an officer are contained in section 96 and should not be duplicated elsewhere in the Act.*

*The proposed amendment deletes subsection (2) consequential to the amendment of section 96, which now provides for the period of extinctive prescription in respect of matters decided under various dispute resolution procedures, including the internal administrative appeal procedure.*

### **Amendment of section 91 of Act 91 of 1964**

**29.** Section 91 of the Customs and Excise Act, 1964, is hereby amended by the substitution for the heading of the following heading:

**“91. [Admission of guilt] Administrative penalties”.**

*Section 91 empowers the Commissioner to administratively deal with contraventions of the Act as an alternative to prosecution.*

*The imposition of a penalty under section 91 is not regarded as a conviction in respect of a criminal offence.*

*The proposed amendment of the heading of section 91 aims to better convey the objectives of the section.*

### **Amendment of section 96 of Act 91 of 1964**

**30.** Section 96 of the Customs and Excise Act, 1964, is hereby amended by—

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

“(a) (i) No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the “litigant”) and the name and address of his or her attorney or agent, if any.

(ii) Such notice shall be in such form and shall be delivered in such manner and at such places as may be prescribed by rule.

(iii) No such notice shall be valid unless it complies with the requirements prescribed in this section and such rules.”; and

(b) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

“(b) Subject to the provisions of section 89, the period of extinctive prescription in respect of legal proceedings against the State, the Minister, the Commissioner or an officer on a cause of action arising out of the provisions of this Act shall be one year and shall begin to run on the date when the right of action first arose[.] : Provided that where any proceedings are instituted

concerning any decision defined in section 77A(1), such date shall begin to run on the date—

(i) of a final decision as contemplated in the rules for Part A of Chapter XA;

(ii) when the Commissioner advises the person who made use of the alternative dispute resolution procedures contemplated in the rules for Part B of Chapter XA that agreement has not been achieved at the conclusion or termination of such procedures; or

(iii) on the date a dispute is not settled and the Commissioner advises the person concerned as contemplated in section 77O(5) of Part C of Chapter XA.”.

*Subsection (1)(a) deals with the notice of action and the period for bringing action where judicial proceedings are instituted against the State, the Minister, the Commissioner or an officer.*

*Problems are experienced in practice as a result of notices not being in a standardised format or not being delivered correctly to the Commissioner.*

*The proposed amendment to subsection (1)(a) introduces empowering provisions to enable the Commissioner to prescribe by rule the form of the notice and the manner in which it must be delivered. The amendment further provides that any notice not complying with the requirements stated in the rules shall be deemed to be invalid.*

*Subsection (1)(b) deals with the period of extinctive prescription relating to the institution of legal proceedings against the State, the Minister, the Commissioner or an officer. No specific provisions currently exists in section 96 to stipulate how the extinctive prescription period relating to judicial proceedings referred to in that section will be interrupted in respect of matters first dealt with under the internal administrative appeal, alternative dispute resolution or settlement procedures.*

*The proposed amendment to subsection (1)(b) stipulates the date on which extinctive prescription begins to run relating to matters decided under the internal administrative appeal, the alternative dispute resolution or settlement procedures.*

#### **Amendment of section 105 of Act 91 of 1964**

31. Section 105 of the Customs and Excise Act, 1964, is hereby amended by the substitution for paragraph (d) of the following paragraph:

“(d) any such instalment paid shall be utilized by the Commissioner to discharge any penalty, fine, **[forfeiture,]** interest, forfeiture and duty

and **[other amounts due,]** expenses incurred by or charges due to the Commissioner, in that order;".

*Section 105 provides for the levying of interest on any amount outstanding in terms of the Act (excluding penalty and forfeiture amounts) and also for the payment of such outstanding amounts by instalments.*

*Section 105 further requires the Commissioner to apply instalment payments received in a prescribed order by first discharging any penalty that may be due followed by forfeiture, interest, duty and any other amounts.*

*The provisions of section 105 relating to the order within which payments received must be discharged are not in uniformity with similar provisions in the Income Tax Act, 1962 or in this Act.*

*The proposed amendment aims to achieve uniformity in respect of the order of discharge of payments received with similar provisions contained in the Income Tax Act, 1962 and also amounts recovered i.t.o. section 114(1)(b)(iv) of this Act.*

#### **Amendment of section 114 of Act 91 of 1964**

**32.** Section 114 of the Customs and Excise Act, 1964, is hereby amended—

(a) by the substitution in subsection (1) for subparagraph (iv) of paragraph (a) of the following subparagraph:

“(iv)(aa) (A) Any imported or excisable goods, vehicles, machinery, plant or equipment, any goods in any customs and excise warehouse, any goods in a rebate store room, any goods in the custody or under the control of the Commissioner and any goods in respect of which an excise duty or fuel levy is prescribed, and any materials for the manufacture of such goods, of which such person is the owner, whether imported, exported or manufactured before or after the debt became so due and whether or not such goods are found in or on any premises in the possession or under the control of the person by whom the debt is due, may be detained in accordance with the provisions of subsection (2) and shall be subject to a lien until such debt is paid.”

(B) Whenever a person alleges that he or she is not the owner of goods as contemplated in subitem (A), he or she must furnish proof thereof to the Commissioner within 14 days from the date of the detention of the goods.

(C) Where the person concerned proves that he or she is not the owner of the goods as contemplated in subitem (B) the Commissioner must without delay release such goods from the operation of the lien.

(D) Any person who, without reasonable cause, fails to comply with subitem (B), shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000,00 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

(E) In the absence of evidence to the contrary which raises a reasonable doubt, proof by the Commissioner of the failure by the person concerned to comply with subitem (B) shall be sufficient evidence of the absence of reasonable cause.

(bb) Any imported or excisable goods, vehicles, machinery, plant or equipment, in the possession or under the control of such person or in or on any premises in the possession or under the control of such person and in respect of which such person has entered into any credit agreement as contemplated in the Credit Agreements Act, 1980 (Act No. 75 of 1980) and of which the right, title or interest of such person may be readily established and excused, may be detained in accordance with the provisions of subsection (2) and shall, subject to subparagraph (vi) (cc), be subject to a lien until such debt is paid.”; and

(b) by the substitution in subsection (1) for subsection (iv) of paragraph (b) of the following subsection:

“(iv) Where, in addition to any amount of duty which is due or is payable by any person in terms of this Act, any fine, penalty, forfeiture or interest is incurred under this Act and is payable by such person, any payment made by that person or any amount

recovered pursuant to any sale of such goods as contemplated in this section shall be utilised by the Commissioner to discharge such payment or amount in the order of—

- (aa) any [**duty, interest, fine,]** penalty, fine, interest, forfeiture, duty, expenses incurred by or charges due to the Commissioner; and
- (bb) payment of the overplus, on application, if any, to the person by whom the debt was due.”.

*Section 114 deals with the recovery of any duty, interest, fine, penalty or forfeiture incurred under the Act and which becomes a debt due to the State.*

*Section 114(1)(a)(iv)(aa) empowers the Commissioner to detain certain categories of goods that belongs to a person by whom a debt is due in respect of any amount of duty, fine, penalty, forfeiture or interest incurred under this Act.*

*The enforcement of liens in terms of the provisions of section 114(1)(a)(iv)(aa) are in practice problematic due to the fact that debtors aver that goods do not belong to them in an attempt to escape the operation of a lien.*

*The proposed amendment substitutes the reference to “belonging to” with “ownership” and places an onus on the debtor who denies ownership of goods that are subject to a lien to prove that he or she is not the owner of such goods.*

*Subsection (1)(b)(iv) requires the Commissioner to utilise any payment received or any amount recovered in terms of this section to discharge any such payment or amount recovered in a particular order.*

*The proposed amendment is consequential to the amendment of section 105 and aims to achieve uniformity in respect of the order of discharge of payments contained in that section, as well as with similar provisions contained in the Income Tax Act, 1962.*

### **Amendment of section 116 of the Customs and Excise Act, 1964**

**33.** Section 116 of the Customs and Excise Act, 1964, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Notwithstanding anything to the contrary in this Act contained, the Commissioner may, in respect of any excisable goods **[(except ethyl alcohol)]** manufactured by natural persons **[(except under item 604.00 of Schedule No. 6)]** for their own use and not for sale or disposal in any manner—“.

*Section 116 (1) provides, subject to a few exceptions, for the manufacture of any excisable goods solely for the use by manufacturer thereof for own use. Ethyl alcohol is currently excluded from this provision.*

*The recent review of Schedule No. 6 also had as its aim the levelling of the playing fields, thereby resulting in the need to delete the exceptions referred to in subsection (1).*

*The proposed amendment to section 116(1) is as a result of the review of Schedule No. 6 and deletes the references to ethyl alcohol, as well as the references to item 604.00 in Schedule No. 6.*

### **Substitution of the long title of the Customs and Excise Act, 1964**

**34.** (1) The long title for the Customs and Excise Act, 1964 is hereby substituted with the following title:

**“To provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax and an environmental levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto.”.**

(2) Subsection (1) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*The long title to the Customs and Excise Act, as substituted by section 72 of Act No.32 of 2004, is amended to include a reference to the levying of the Road Accident Fund levy as a result of the announcement by the Minister of Finance in the 2005 Budget that SARS will become the agency responsible for collecting the Road Accident Fund levy.*

### **Amendment of section 1 of Act 56 of 1996**

**35.** (1) Section 1 of the Road Accident Fund Act, 1996 is hereby amended by the deletion of the definition of “fuel”.

(2) Subsection (1) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*Section 1 contains the definitions used in the Road Accident Fund Act, 1966.*



*The current definition of "fuel" contained in the Road Accident Fund Act, 1966 is only used in the current section 5(a) and will be replaced in that section by a reference to the Road Accident Fund levy, making the definition of "fuel" obsolete.*

*The proposed amendment is consequential to the announcement by the Minister of Finance in the 2005 Budget that SARS will become the agency responsible for collecting the Road Accident Fund levy and the introduction of the Road Accident Fund levy under the Customs and Excise Act, 1964.*

### **Amendment of section 5 of Act 56 of 1996**

**36.** (1) Section 5 of the Road Accident Fund Act, 1996 is hereby amended—

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

“(a) by way of a **[fuel levy] Road Accident Fund levy [of all fuel sold within the Republic]** as contemplated in the Customs and Excise Act, 1964; and”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) The Road Accident Fund levy paid into the National Revenue Fund in terms of the provisions of section 47(1) of the Customs and Excise Act, 1964, is a direct charge against the National Revenue Fund for the credit of the Fund.”; and

(c) by the deletion of subsection (3).

(2) Subsection (1)(c) shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

*Section 5(1)(a) of the Road Accident Fund Act, 1966 provides that the Road Accident Fund shall procure the funds it requires by way of a fuel levy in respect of all fuel sold within the Republic.*

*Alternative provisions are required to finance the Road Accident Fund with the Road Accident Fund levy to be collected under the Customs and Excise Act, 1964.*

*The proposed amendment is consequential to the announcement by the Minister of Finance in the 2005 Budget that SARS will become the agency responsible for collecting the Road Accident Fund levy and the introduction of the Road Accident Fund levy under Customs and Excise Act, 1964.*

*Subsection (3) of the Road Accident Fund Act, 1966 authorises the Chief Executive Officer of the Road Accident Fund to withdraw money from the Fund in order to repay*

*the Commissioner the amounts of Road Accident Fuel levy refunded by the Commissioner under the Customs and Excise Act, 1964.*

*This provision will no longer be required after SARS commences with the collection of the Road Accident Fund levy as SARS will deduct refunds of the Road Accident Fund levy and only pay over the net amount into the National Revenue Fund. Therefore, subsection (3) shall only be deleted on a date fixed by the President by proclamation in the Gazette.*

### **Amendment of section 30 of Act 34 of 2004**

**37.** Section 30 of the Second Revenue Laws Amendment Act, 2004 is hereby amended—

- (a) by the deletion of paragraph (b) of subsection (1); and
- (b) by the substitution for subsection (2) of the following subsection:

**“(2) Subsection (1) shall come into operation on the date of promulgation of this Act.”.**

*Section 30(1)(b) of Act No. 34 of 2004 amended section 96 of the Act by making the period of prescriptive extinction relating to the institution of judicial proceedings also subject to the provisions of section 77F(2).*

*Section 77F(2) provides that the period within which a person may institute judicial proceedings following the consideration of his or her appeal shall commence on the day the Commissioner or chairperson of the committee advises the person concerned of the final decision of the appeal.*

*Section 77F(2) has now been deleted consequential to an amendment to section 96, which provides for the date of extinctive prescription for instituting judicial proceedings relating to matters decided under the internal administrative appeal, the alternative dispute resolution or settlement procedures.*

*The proposed amendment deletes subsection (1)(b) consequential to the amendment to section 96 and also substitutes subsection (2) which provided for the date which subsection (1)(b) would have come into operation.*