

INDIRECT TAXES

*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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Marketable Securities Tax Act, 1948

Amendment of Section 1 of Act 32 of 1948

. Section 1 of the Marketable Securities Tax Act, 1948, is hereby amended—

(a) by the insertion after the definition of “Commissioner” of the following definition:

“lending arrangement” means a ‘lending arrangement’ as defined in the Uncertificated Securities Tax Act, 1998 (Act No. 31 of 1998).”;

(b) by the insertion after the definition of “member” of the following definition:

“‘person’ includes any public authority, any local authority, any company, any body of persons (corporate or unincorporate), the estate of any deceased or insolvent person and any trust fund.”.

Amendment of Section 3 of Act 32 of 1948

. Section 3 of the Marketable Securities Tax Act, 1948, is hereby amended—

(a) by the substitution in paragraph (f) for item (bb) of subparagraph (vii) of the following item:

"(bb) in subparagraph (i), (ii) or (iii) had the market value of the asset transferred in exchange for those **[market]** marketable securities exceeded the base cost or the amount taken into account in respect thereof, as contemplated in section 42(1)(a), 43(1)(a) or 44(6) of that Act,";

(b) by the addition of the following paragraph:

"(g) if the change in beneficial ownership is from a lender to a borrower, or vice versa, in terms of a lending arrangement and the lender or borrower, as the case may be, who has acquired beneficial ownership has certified to the member that the change is in terms of such a lending arrangement."

Insertion of section 4A of Act 32 of 1948

. The following section is hereby inserted in the Marketable Securities Tax Act, 1948, after section 4:

"Schemes for obtaining undue tax benefits

4A.(1) Notwithstanding anything in this Act, whenever the Commissioner is satisfied that any transaction, operation, scheme or understanding (whether enforceable or not), including all steps by which such event is carried into effect—

(a) has been entered into or carried out which has the effect of any person obtaining a tax benefit by any person;

(b) having regard to the substance of the scheme-

(i) was entered into or carried out in a manner which would not normally be employed for bona fide business purposes other than the obtaining of a tax benefit; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and

(c) was entered into or carried out solely or mainly for the purposes of obtaining a tax benefit,

the Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of such tax benefit.

(2) For the purpose of this section 'tax benefit' means—

(a) any reduction in the liability of any person to pay tax;

(b) any increase in the entitlement of any person to the refund of tax; or

(c) any other avoidance or postponement of liability for the payment of any tax imposed by this Act or any tax, duty or levy imposed by any other Act administered by the Commissioner.

(3) Any decision of the Commissioner under subsection (1) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the relevant scheme results or would result in a tax benefit, it shall be presumed, until the contrary is proved, that such scheme was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.”

Insertion of section 8A of Act 32 of 1948

. The following section is hereby inserted in the Marketable Securities Tax Act, 1948, after section 8:

“Power to appoint agent

8A. The Commissioner may, if he deems it necessary, declare any person to be the agent of any other person, and the person so declared an agent—

(a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of tax, additional tax, penalty or interest payable by such other person under this Act; and

(b) may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be:

Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice within the period specified in the notice.”.

Insertion of section 9E in Act 32 of 1948

. The following section is hereby inserted in the Marketable Securities Tax Act, 1948, after section 9D:

“Records

9E. Any member shall keep, for a period of five years, such records of every purchase of marketable securities from that member or through that member's agency as may enable the member to observe the requirements of this Act and enable the Commissioner to be satisfied that such requirements have been observed.”.

Transfer Duty Act, 1949

Amendment of section 5 of Act 40 of 1949

. Section 5 of the Transfer Duty Act, 1949, is hereby amended—

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

“(a) If a transaction whereby property has been acquired, is, before registration of the acquisition in a deeds registry, cancelled, or dissolved by the operation of a resolutive condition, on that part of the consideration which has been or is paid to and retained by the seller and on any consideration payable by either party to the transaction for or in respect of the cancellation thereof, provided that on cancellation or dissolution of that transaction, such property completely reverts to the seller and the original buyer has relinquished all rights and has not received nor will receive any consideration arising from such cancellation or dissolution.”

- (b) by the deletion of subsection (10).

Amendment of section 9 of Act 40 of 1949

. Section 9 of the Transfer Duty Act, 1949, is hereby amended the addition of the following subsections:

“(18) No duty shall be payable where—

(a) any old order right or OP26 right as defined in Schedule II of the Mineral and Petroleum Resources Development Act (Act No. 28 of 2002) continues in force or is converted into a new right pursuant to that Schedule; or

(b) any prospecting right, mining right, exploration right or production right as defined in Schedule I of the Mineral and Petroleum Resources Development Act (Act No. 28 of 2002) is renewed pursuant to that Schedule.

(19) No duty shall be payable by a natural person in respect of the acquisition of property in terms of Item 8 of Schedule 1 to the Share Blocks Control Act, 1980 (Act No. 59 of 1980).”.

Insertion of section 13A of Act 40 of 1949

. The following section is hereby inserted in the Transfer Duty Act, 1949, after section 13:

“Power to appoint agent

13A. The Commissioner may, if he deems it necessary, declare any person to be the agent of any other person, and the person so declared an agent—

(a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, additional duty or penalty payable by such other person under this Act; and

(b) may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be: Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice within the period specified in the notice.”.

Amendment of section 16 of Act 40 of 1949

. Section 16 of the Transfer Duty Act, 1949 is hereby amended by the substitution for subsection (1) for the following subsection:

“(1) Where property is sold to a person who is acting as an agent for some other person, the person so acting as agent shall

disclose to the seller or his agent the name and address of the principal for whom he acts, ~~[-]~~ and furnish the seller or his agent with a copy of the documents appointing him as agent—

- (i) if the sale is by auction, on the day of acceptance by the auctioneer of his offer; or
- (ii) if the sale is otherwise than by auction, on the day of conclusion of the agreement of sale.”.

Amendment of section 17 of Act 40 of 1949

. The following section is hereby inserted in the Transfer Duty Act, 1949, after section 17:

“Additional duty in case of evasion

17A. (1) Where any person or any person under the control or acting on behalf of such person fails to perform any duty imposed upon him by this Act or does or omits to do anything, with intent—

- (a) to evade the payment of any amount of duty payable by him; or
- (b) to cause a refund to him by the Commissioner of any amount of duty (such amount being referred to hereunder as the excess) which is in excess of the amount properly refundable to him.

such person shall be chargeable with additional duty not exceeding an amount equal to double the amount of duty referred to in paragraph (a) or the excess referred to in paragraph (b), as the case may be.

(2) The amount of the said additional duty shall be assessed by the Commissioner and shall be paid by the person within such period as the Commissioner may allow.

(3) The power conferred upon the Commissioner by this section shall be in addition to any right conferred upon him by this Act to institute or take other proceedings under this Act.”.

Amendment of section 18 of Act 40 of 1949

. (1) Section 18 of the Transfer Duty Act, 1949 is hereby amended by the addition of the following subsections:

“(4) The obligation to pay and the right to receive and recover any duty or penalty chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision or a decision by the Commissioner to concede the appeal to the tax board or the tax court or such court of law, a due adjustment shall be made, amounts paid in excess being refunded with interest at the prescribed rate and calculated from the date proved to the satisfaction of the Commissioner to be the date on which such excess was received and amounts short-paid being recoverable with penalty calculated as provided in section 4.

“(5) The payment by the Commissioner of any interest under the provisions of this section shall be deemed to be a drawback from revenue charged to the National Revenue Fund.”.

Insertion of section 20A in Act 40 of 1949

. The following section is hereby inserted in the Transfer Duty Act, 1949, after section 20:

“Schemes for obtaining undue tax benefits

20A.(1) Notwithstanding anything in this Act, whenever the Commissioner is satisfied that any transaction, operation, scheme or understanding (whether enforceable or not), including all steps and transactions by which it is carried into effect—

(a) has been entered into or carried out which has the effect of granting a tax benefit to any person; and

- (b) having regard to the substance of the scheme—
- (i) was entered into or carried out in a manner which would not normally be employed for bona fide business purposes, other than the obtaining of a tax benefit; or
 - (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length; and
- (c) was entered into or carried out solely or mainly for the purposes of obtaining a tax benefit,

the Commissioner shall determine the liability for any tax imposed by this Act, and the amount thereof, as if the scheme had not been entered into or carried out, or in such manner as in the circumstances of the case the Commissioner deems appropriate for the prevention or diminution of such tax benefit.

(2) For the purpose of this section—

'tax benefit' means—

- (a) any reduction in the liability of any person to pay duty;
- (b) any increase in the entitlement of any person to the refund of duty; or
- (c) any other avoidance or postponement of liability for the payment of any duty imposed by this Act or any tax, duty or levy imposed by any other Act administered by the Commissioner.

(3) Any decision of the Commissioner under subsection (1) shall be subject to objection and appeal, and whenever in proceedings relating thereto it is proved that the relevant scheme results or would result in a tax benefit, it shall be presumed, until the contrary is proved, that such scheme was entered into or carried out solely or mainly for the purpose of obtaining a tax benefit.”

Estate Duty Act, 1955

Income Tax Act, 1962

Amendment of section 1 of Act 58 of 1962

. (1) Section 1 of the Income Tax Act, 1962, is hereby amended by the insertion after the definition of “insolvent estate” of the following definition:

“lending arrangement’ means any arrangement in terms of which—

(a) a person (hereinafter referred to as the lender) lends marketable securities, contemplated in Item 15 of Schedule 1 to the Stamp Duties Act No 77 of 1968, to another person (hereinafter referred to as the borrower) in order to enable that borrower to effect delivery (for any purpose other than for delivery to that lender) of the marketable security within 10 business days after the date that borrower and lender enter into that arrangement;

(b) that borrower in return contractually agrees in writing to deliver securities of the same kind and quality to the lender within a period of 12 months from the date that borrower and that lender entered into that arrangement;

(c) that borrower is contractually required to compensate that lender for any distributions in respect of the securities which that lender would have been entitled to receive during that period had that arrangement not been entered into; and

(d) that arrangement does not affect the lender’s benefits or risks arising from fluctuations in the market value of the securities.

Provided that where—

(i) that borrower has not on delivered the securities within the period contemplated in paragraph (a); or

(ii) that borrower has not returned marketable securities as contemplated in paragraph (b) to the lender within the period contemplated in paragraph (b).

that arrangement shall be deemed not to be a lending arrangement.”

Amendment of section 9B of act 58 of 1962

. Section 9B of the Income Tax Act, 1962, is hereby amended by the substitution in subsection (1) for subparagraph (i) of paragraph (e) of the proviso of the following subparagraph:

“(i) any share has been lent by a lender to a borrower as contemplated in the definition of ‘lending arrangement’ in section 1, such share shall for purposes of the lender be deemed not to have been disposed of by the lender; and”.

Amendment of section 22 of Act 58 of 1962

. Section 22 of the Income Tax Act, 1962, is hereby amended—

(a) by the substitution in subsection (4A) for paragraph (a) of following paragraph:

“(a) any marketable security has been lent by a lender to a borrower in terms of a ‘lending arrangement as defined in section (1), such marketable security shall be deemed not have been acquired by such borrower; or”;

(b) the substitution in subsection (9) for subparagraph (ii) of paragraph (a) of the following subparagraph:

“(ii) such person has, during such year of assessment, lent such marketable security to a borrower in terms of a ‘lending arrangement’ as defined in section 1; and.”;

(c) the substitution in subsection (9) for subparagraph (ii) of paragraph (b) of the following subparagraph:

“(ii) such person has, during such year of assessment, borrowed such marketable security from a lender in terms of a ‘lending arrangement’ as defined in section 1; and.”.

Amendment of paragraph 11 of the Eighth Schedule of Act 58 of 1962

. Paragraph 11 of the Eighth Schedule of the Income Tax Act, 1962, is hereby amended by the substitution in subparagraph (2) for item (h) of following item:

“(h) by a lender to a borrower or by a borrower to a lender where any marketable security has been lent by a lender to a borrower in terms of a ‘lending arrangement’ as defined in section 1 of this Act; or“.

Stamp Duty Act, 1968

Amendment of section 7 of Act 77 of 1968

. Section 7 of the Stamp Duties Act, 1968, is hereby amended—

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

“(g) in the case of the original issue of a marketable security or of a negotiable certificate of deposit, the company or corporate body issuing the marketable security or negotiable certificate of deposit.”; and

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

“(h) in the case of the registration of transfer of a marketable security or of a negotiable certificate of deposit, the transferee;”.

Amendment of section 23 of Act 77 of 1968

. Section 23 of the Stamp Duties Act 1968 is hereby amended—

(a) by the deletion in subsection (1) of the definition of “lending arrangement”;

(b) by the deletion in subsection (4) of subparagraph (viiB) of paragraph (b);

(c) by the substitution for subsection (6) of the following subsection:

“(6) Any instrument of transfer referred to in subsection (4) shall at all reasonable times during a period of ~~[three]~~ five years after the date of registration of the relevant transfer be open for inspection by any person acting under the authority of the Commissioner.”.

Insertion of section 30A in Act 77 of 1968

. The following section is hereby inserted in the Stamp Duties Act, 1968, after section 30:

“Power to appoint agent

30A. The Commissioner may, if he deems it necessary, declare any person to be the agent of any other person, and the person so declared an agent—

(a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty or penalty payable by such other person under this Act; and

(b) may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be:

Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice within the period specified in the notice.”.

Amendment of Item 7 of Schedule 1 to Act 77 of 1968

. Item 7 of Schedule 1 to the Stamp Duties Act, 1968 is hereby amended by the deletion of subitem (5).

Amendment of item 13 of Schedule 1 to Act 77 of 1968

. Item 13 of Schedule 1 to the Stamp Duties Act, 1968, is hereby amended—

- (a) by the substitution in the introductory paragraph of Item 13 for the expression “*Fixed deposit receipt*” of the following paragraph:

“*Fixed deposit receipt*, means any negotiable certificate of deposit:”;

- (b) by the substitution after the introductory paragraph “*Fixed deposit receipt*” of the following paragraph:

“In respect of the original issue or transfer of any fixed deposit made with any bank, company or association, whether corporate or unincorporated: for every R200 (or part thereof) of the amount of the fixed deposit and for every period of twelve months (or part thereof) for which the deposit is made;”;

- (c) by the deletion of the paragraph before the paragraph “*Exemption:*” but following the second paragraph of Item 13.

- (d) by the deletion of paragraph (a) of the *Exemptions from the duty under Item 13*.

Amendment of item 15 of Schedule 1 to Act 77 of 1968

. Item 15 of Schedule 1 to the Stamp Duties Act, 1968, is hereby amended—

- (a) by the addition of the following subitems:

“(xviii) where the securities are interest-bearing debentures, including debenture stock, debenture bonds and similar securities of a juristic person, whether constituting a charge on the assets of the juristic person or not, unless convertible into shares or similar equity interest or eligible to participate in dividends; and
(xix) a share block company as defined in section 1 of the Share Blocks Control Act, 1980 (Act No. 59 of 1980).”.

- (b) by the substitution for the introductory words of paragraph (1) of the following words:

“in respect of the original issue within the Republic of any such shares or debentures qualifying as marketable securities.”;

- (c) by the insertion of the words “qualifying as marketable securities” after the word “debentures” wherever it may appear in paragraph (2);
- (d) by the deletion of sub-items (b), (c), (e) and (h) *Exemptions from the duty under paragraph* (1) and (2);
- (e) by the deletion of sub-items (a) to (g) inclusive of *Paragraph* (3);
- (f) by the substitution of sub-item (h) of *Paragraph* (3) of the following paragraph:

“if the marketable security was sold or disposed of (whether conditionally or not) after 31 March 1997 and the date of sale or disposal is noted on the relevant instrument of transfer referred to in section 23 of this Act by the transferee or his agent and such note is signed by the transferee or his agent –“;

- (g) the deletion of sub items (c), (d), (dA), (nB), (p) and (v) of the *Exemptions from the duty under paragraph* (3);
- (h) by the deletion of sub items (i) to (vi) inclusive of *Paragraph* (5).

(2) Subsection (1)(g) shall in so far as it deletes sub-item (c) come into operation on 1 December 2004.

Uncertificated Securities Tax Act, 1998

Amendment of section 1 of Act 31 of 1998

. Section 1 of the Uncertificated Securities Tax Act, 1998, is hereby amended—

- (a) by the substitution for the definition of “lending arrangement” of the following definition:

“lending arrangement’ means any arrangement in terms of which—

- (a) a person (hereinafter referred to as the lender) lends securities to another person (hereinafter referred to as the borrower) in order to enable that borrower to effect delivery (for any purpose other than for delivery to that lender) of the marketable security

within 10 business days after the date that borrower and lender enter into that arrangement;

- (b) that borrower in return contractually agrees in writing to deliver securities of the same kind and quality to that lender within a period of 12 months from the date that borrower and that lender entered into that arrangement;
- (c) that borrower is contractually required to compensate that lender for any distributions in respect of the securities which that lender would have been entitled to receive during that period had that arrangement not been entered into; and
- (d) that arrangement does not affect the lender's benefits or risks arising from fluctuations in the market value of the securities.

Provided that where—

- (i) that borrower has not on delivered the securities within the period contemplated in paragraph (a); or
- (ii) that borrower has not returned marketable securities as contemplated in paragraph (b) to the lender within the period contemplated in that paragraph,

that arrangement shall be deemed not to be a lending arrangement.”;

- (b) by the insertion after the definition of “participant” of the following definition:

“person’ includes any public authority, any local authority, any company, any body of persons (corporate or unincorporate), the estate of any deceased or insolvent person and any trust fund.”.

Insertion of section 11A in Act 31 of 1998

. The following section is hereby inserted in the Uncertificated Securities Tax Act, 1998, after section 11:

“Power to appoint agent

11A. The Commissioner may, if he deems it necessary, declare any person to be the agent of any other person, and the person so declared an agent—

(a) shall for the purposes of this Act be the agent of such other person in respect of the payment of any amount of duty, additional duty or penalty payable by such other person under this Act; and

(b) may be required to make payment of such amount from any moneys which may be held by him for or be due by him to the person whose agent he has been declared to be: Provided that a person so declared an agent who, is unable to comply with a requirement of the notice of appointment as agent, must advise the Commissioner in writing of the reasons for not complying with that notice within the period specified in the notice.”.

Insertion of section 14A in Act 31 of 1998

. The following section is hereby inserted in the Uncertificated Securities Tax Act, 1998, after section 14:

"Records

14A. Any issuer, member or participant shall keep, for a period of five years, such records of every issue of, or change in beneficial ownership in, any securities issued by the issuer or in respect of which a change in beneficial ownership has been effected by that member, or any transfer of securities by such participant as may enable the issuer, member or participant, as the case may be, to observe the requirements of this Act and enable the Commissioner to be satisfied that such requirements have been observed.”.