2020 DRAFT RATES AND MONETARY AMOUNTS AND REVENUE LAWS AMENDMENT BILL, 2020 TAXATION LAWS AMENDMENT BILL , 2020 DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL

Presentation to the Standing Committee on Finance (SCoF)

Presenters: National Treasury and SARS | 13 October 2020

national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Consultation process

- The 2020 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Draft Rates Bill), the 2020 Draft Taxation Laws Amendment Bill (Draft TLAB) and the 2020 Draft Tax Administration Laws Amendment Bill (Draft TALAB) were published for public comment on 31 July 2020.
- National Treasury and SARS received written comments from 112 contributors on the 2020 Draft Tax Bills by deadline of 31 August 2020.
- National Treasury and SARS briefed the SCoF on the 2020 Draft Tax Bills on 19 August 2020.
- Oral presentations by taxpayers and tax advisors on the 2020 Draft Tax Bills were made at hearings by the SCoF on 7 October 2020.
- Workshops with stakeholders to discuss their comments on the 2020 Draft Tax Bills were held on 9, 10 & 11 September 2020.
- On 13 October 2020, National Treasury and SARS present to the SCoF a draft response document containing a summary of draft responses to public comments received on the 2020 draft bills.

Additional comment outside the scope of the 2020 Draft TLAB

- As indicated in the Media Statement issued by National Treasury on 31 July 2020 as well as in the Response Document on the COVID-19 Tax Bills to SCoF on 28 July 2020, National Treasury will consider some of the COVID-19 tax proposals that may have less impact on the fiscal framework, such as the tax residency test for inclusion in the legislation later this year.
- A special exception is made with regard to one comment dealing with tax residency test in terms of foreign remuneration exemption contemplated in section 10(1)(*o*)(ii) of the Income Tax Act in order to accommodate the impact of COVID-19 pandemic, which is outside the scope of the 2020 Draft Tax Bills.
- This is addressed in this Draft Response Document under heading 4.3 dealing with "Amending the 183-day rule to the foreign remuneration exemption, in light of 2020 travel restrictions".

Key issues raised during consultation process

The key issues raised during public consultation process and during SCoF public hearings are the following:

2020 Draft Rates Bill

- Increase on excise duty on tobacco

2020 Draft TLAB

- ➢ **Introduction of export taxes on scrap metals**
- ➢ **Employment, Individuals and Savings**
- Addressing an anomaly in the tax exemption of employer provided bursaries
- Withdrawing from retirement funds upon emigration
- Amending the 183-day rule to the foreign remuneration exemption, in light of 2020 travel restrictions
- ➢ **Business Tax (General)**
- Clarifying the rollover relief for unbundling transactions
- ➢ **Business Tax (Incentives)**
- Addressing the tax treatments of allowable mining capital expenditure
- Changing the Minister of Finance discretion in lifting ring-fencing of capital expenditure per mine

Key issues raised during consultation process

2020 Draft TALAB

- **Tax Administration Act, 2011**
  - Raising of assessments based on an estimate
  - Grace period to determine if a payment in excess of an assessment was erroneous
  - Provision that a refund need not be authorized where a matter is under criminal investigation

- **Income Tax Act, 1962; Value-Added Tax Act, 1991 & Tax Administration Act, 2011**
  - Removal of requirement to prove intent from certain statutory tax offences

2020 Draft Rates Bill

Increase in the excise duty on tobacco

Increase on excise duty of tobacco (Clause 8 & Schedule II, Part 1 of the Draft TLAB: Part 2A of Schedule No 1 to the Customs and Excise Act)

In the 2020 Draft Rates Bill, a proposal was made to increase the excise duty on tobacco from R16.66/20 cigarettes to R17.40/20 cigarettes, with effect from 26 February 2020. As a result the excise burden for tobacco is slightly above the targeted 40 per cent of the retail selling price of the most popular brand.

Comment: National Treasury has already gone beyond the 40% excise incidence (currently excise incidence sit at 41.4%). Government should not increase excise on cigarettes until the targeted incidence is maintained (or next year and inflation adjusted increases for the 2022/3 and 2023/4 financial years respectively)

- ***Response****:* **Noted.** It is correct that the tax incidence is currently above the 40% policy guidelines, however part of the policy is to increase the excise rates by at least inflation or an amount to move towards the targeted incidence, whichever is higher, on an annual basis. Sometimes industry absorbs a portion of the excise increases and therefore the incidence is surpassed. The year-on-year increases on cigarettes prices by manufacturers has been lower than excise rate increases.

Increase on excise duty of tobacco (Clause 8 & Schedule II, Part 1 of the Draft TLAB: Part 2A of Schedule No 1 to the Customs and Excise Act)

Comments: It is recommended that tobacco and tobacco products should be exempted from any tax increase. We believe the freezing of any increase will help the local legal industry to recover from instability and uncertainty that has been caused by the rampant illicit trade and the effects of COVID-19 pandemic. Any increases will stimulate illicit trade and lead to a significant decline in state revenue.

- ***Response:*** **Not accepted**. The reason there is an excise tax regime for tobacco products is that consumption of these products causes health harm, and the excise must be adjusted on an annual basis by at least inflation. The fear of loss of revenue is not a sufficient motivation for government to abandon its excise policy on tobacco products. The problem of illicit trade must be addressed through law enforcement mechanisms. Addressing the concerns regarding illicit trade in tobacco products should happen concurrently with the implementation of the excise tax policy on tobacco products.

Increase on excise duty of tobacco (Clause 8 & Schedule II, Part 1 of the Draft TLAB: Part 2A of Schedule No 1 to the Customs and Excise Act)

Comment: It is requested that government should not increase excise duty on tobacco because it has failed over time to decrease smoking in the country. It is not successful as an anti-smoking strategy, as all it does is fuel illicit trade.

- ***Response:*** **Not accepted.** An excise tax policy regime is part of a broader strategy to reduce consumption of tobacco products, which includes non-tax measures in the purview of the National Department of Health through the Tobacco Products Control Act. Excise tax increases are a proven and effective tool, both in terms of cost and population-level effects, to make cigarettes and other tobacco products less affordable and reduce consumption. Research shows that since the implementation of these strategies from 1993 smoking prevalence has declined in SA.

Increase on excise duty of tobacco (Clause 8 & Schedule II, Part 1 of the Draft TLAB: Part 2A of Schedule No 1 to the Customs and Excise Act)

Comments: The cigarette excise is charged per stick and not based on the weight of the stick. Calculations based on weight creates a distortion vis-à-vis other categories especially cigarettes. Recommend that the excise on HTPs be adjusted to 75% of the excise per factory manufactured cigarettes which translates to ZAR 652.50 per 1000 heated tobacco sticks. Further recommend that a separate subcategory specific for tobacco heat sticks should be introduced under sub heading HS code 2403.91 to give effect to the foregoing.

- ***Response:* Noted**. The newly created category of tobacco products is, at this stage, very broad, and includes different products in the form of the tobacco roll (different length and weight), tobacco capsule or tobacco plug. The reference of HTPs rate to that of cigarettes was intended for HTPs to be taxed like cigarettes albeit with a concessionary rate.

  The intention is to further refine the HTPs category in the following budget to ensure that there is equity in the treatment of similar tobacco products rather than a broad category we have currently. We will also be following the developments in this category to keep up with newer products that will be introduced in the market.

2020 Draft TLAB

Introduction of export taxes on scrap metals

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

On 10 May 2013, the then Minister of Economic Development issued a Trade Policy Directive for the International Trade Administration Commission of South Africa ("ITAC") to regulate the exportation of scrap metal through the introduction of the Price Preference System (PPS). The objective was to improve the availability of better-quality scrap metal at affordable prices for foundries and mills in the domestic market to assist them in becoming more cost competitive as against imports, enhancing investment, jobs and industrialization.

The PPS seems not to have provided sufficient support such that the sector can flourish in competition with global counterparts, many of which benefit from an export tax on scrap and lower domestic prices for scrap. ITAC conducted its investigation and based on the findings, recommended that the current PPS be replaced with export duties since it has not effectively provided support to the foundries and mills with availability of affordable, quality scrap The DTIC consider an export tax to be superior to the PPS in terms of its easy administration and believe it should be more effective in reducing the domestic price as it will have the effect of reducing the export price achieved by local scrap dealers, unlike the PPS. Based on the above, it is proposed that changes be made in the Customs and Excise Act and schedules to the Customs and Excise Act to insert provisions dealing with the introduction of export duties on scrap metals. metal.

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Comment: The Price Preference System (PPS) has so far proved to be ineffective in achieving its objectives. We strongly support this initiative of export tax on scrap metal replacing the PPS, as this will assist local manufacturers in their foundries to supply material locally which will stimulate and grow the economy and will also assist manufacturers to be competitive in the export market.

- ***Response:*** **Accepted**. Scrap metal is a key input for downstream manufacturing supporting local beneficiation. The system however, has been circumvented by both illegal means and using loopholes in the PPS, resulting in illegal and excessive exports of scrap with the consequence of a shortage of affordable scrap for local consumers. The export duty was recommended as an alternative for regulating the export of scrap from South Africa. Due to the shortcomings in the PPS, National Treasury, ITAC and the DTIC have been working on replacing the PPS with a proposed export tax.
- It should be noted that South Africa is a signatory to a number of key trade agreements, which limit the use of export taxes – both in number and timing, but also through the implications of the most favoured nation concept and the web of overlapping trade agreements, and there remains a very real threat of retaliation from those outside of such agreements. For example, the EPA only allows up to 8 export taxes at one time and their use comes with time restrictions. Export taxes are a blunt tool to use to achieve the intended objectives and need to be carefully considered as they directly harm one industry for the direct benefit of another, which hopefully creates wider benefits for the broader economy.

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Comment: In light of the shortage and insecurity of supply in our own country, government should ban the exportation of scrap in the interest of championing manufacturing and industrialisation. Otherwise, any avenue left to export ferrous scrap will be used even by false declarations, since inspecting every container by authorities seems impossible.

- ***Response:*** **Not accepted.** The application of a ban on export of scrap metals on a permanent basis is not currently considered prudent. Theoretically, a ban, a quota and an export tax all have similar effects on the domestic price – they increase the domestic supply and thus lower the domestic price. These three only differ in the severity of their impacts. An export ban and a quota sever the price link between the domestic and the international markets. For this reason, a quota and/or a ban can provide poor incentives to consumers and may encourage inefficient consumption of the commodities. In contrast, an export tax does not sever the link between the domestic and the global markets for commodities but creates a wedge between the domestic and "world" prices. This accords the domestic consumers of commodities some cost advantage, but the two prices will continue to move in tandem. This provides better efficiency incentives to the domestic consumers. Consequently, an export tax is generally preferable to either a quota or a ban.

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Comment: Any duty or restriction on the movement of metallic scrap for recycling in the long term is detrimental to not only the consuming industry but to the general economy. The only way that you will encourage both modernization and foreign investment is to fully open the industry

- ***Response:*** **Not accepted.** Scrap metal is a critical feedstock into manufacturing. The metals value chain is central to South Africa's industrialisation and has significant linkages to infrastructure, construction, mining and a range of manufacturing industries. The three largest consumers of metal products in South Africa are the construction industry, the mining industry and the transport equipment manufacturing industry which together account for approximately R750 billion or 15% of SA's GDP and employ nearly 2 million people (both formal and informal). Measures to support the availability of affordable scrap metal will therefore support the economy and add value to our raw material input base.

Comment: A decrease in local scrap price would dampen the incentive for collection and this would negatively impact the informal sector in particular and not be beneficial to the downstream scrap suppliers who should be the beneficiaries of such intervention

- ***Response:*** **Not accepted.** The proposed export tax rates are intended to balance the interests of both the scrap consuming and supply industry, and not to create a disincentive to any party.

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Comment: Stainless steel scrap must have its own category of export taxation. Its inclusion in the Ferrous metals would render the taxation to be at a low value.

- ***Response:*** **Accepted.** The tariff Schedule 6A in the draft 2020 TLAB already provides for stainless steel scrap under tariff subheading item 7204.21 and the applicable rate will be adjusted and is different from ferrous metals.

Comment: There is absolutely no justification for an export duty on metals not processed or currently required in South Africa or SACU countries or exported in such small volumes that the imposition of an export duty will serve no purpose.

- ***Response:*** **Noted.** The exclusion of specific grades of scrap metal within categories will add a layer of complexity to administration. However, as noted earlier, National Treasury and other role players will review the export tax regularly to establish if the export tax is meeting its intended objectives and review the types or grades of scrap metal should be included or excluded in the list of scrap metal that is subject to export tax. The 2020 draft TLAB also includes an amendment in section 48 of the Customs and Excise Act to make provision for the Minister of Finance, by notice to withdraw or reduce any export duty imposed in terms of this section, with or without retrospective effect, or increase such export duty, from a date and to such extent as the Minister may determine.

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Comment: The Rand value per tonne that can be realised for scrap metals constantly varies and a fixed duty rate per tonne is simply not dynamic enough to be effective without being disruptive. We propose an ad valorem duty as it better serves both objectives of supporting domestic consumers of scrap metals and also protecting the collectors and recyclers.

A fixed duty will serve to further instil the distortion already evident in the application of existing Price Preferential System for scrap metals.

The values given to each grade is firstly not consistent and secondly, the gross values are based on international metal prices and exchange rates, which are continually moving and will eventually distort this whole system. There should be a mechanism for increasing these duty as needed.

- ***Response:*** **Accepted.** The rates in the 2020 draft TLAB will be changed from a specific Rand rate per tonne to an ad valorem equivalent rate to provide for the dynamic movements in the prices of metals. Government recognises there are concerns about the challenges of under-invoicing or under-declaration with ad-valorem duties. The DTIC experience with imports is that as the customs duties increase, the declared value decreases, which may undermine the applicable duty rates. The implementation of an ad-valorem duty will be monitored and where there is evidence of under-invoicing and/or under-declaration, government will review the manner the export tax is designed as provided for in the amendment to section 48 of the Customs and Excise Act.

Introduction of export taxes on scrap metals (Clauses 57, 58 & 59 of the Draft TLAB: Section 48 , Schedules 1 & 5 of the Customs and Excise Act)

Comment: South Africa could consider a refund mechanism (where exporter is required to make payment upfront) rather than an exemption, with refund requiring proof of final destination. The refund mechanism will not breach the SADC Treaty (Art 5 & 9) since is to promote custom enforcement and prevent deceptive practices.

A quota system especially for the SADC countries should be imposed limiting scrap metals through EFTA or SADC, with the quota based on normal export levels before the announcement of the export levy. This will go a long way to prevent aggressive tax avoidance and circumvention schemes that undermine the tax base and economic development.

- ***Response:*** **Not accepted.** As the export tax is a new system, careful consideration is required before implementation of any further mechanisms such as refund mechanism or a quota mechanisms.

Comment: Request that the current PPS remain in place for export to countries where free duty is applicable.

- ***Response:*** **Not accepted.** PPS system has proven to be complex to implement and oversee. Export control through the ITAC's permit system should be sufficient in supplanting all other enforcement mechanisms to ensure compliance.

Income Tax: Individuals, Savings and Employment

Addressing an anomaly in the tax exemption of employer provided bursaries (Clauses 10 and 25 of the Draft TLAB: Sections 10(1)(q), 10(1)(qA) and 23(s) of the Income Tax Act)

- The Act contains provisions that provide exemption in respect of *bona fide* scholarship or bursary granted by an employer to an employee or relative of qualifying employees, subject to certain monetary limits and requirements.
- When this exemption was initially introduced in 1992, the applicability for tax exemption was dependent on the fact that the employee's remuneration was **not** subject to an element of salary sacrifice.
- In 2006, changes were made in the Income Tax Act to remove the requirement that the employees remuneration should not be subject to an element of salary sacrifice.
- Government has noticed that a number of tax schemes have emerged in respect of employer bursaries granted to the relatives of employees, for example:
  - These schemes are developed by an institution other than the employer and marketed to the employer and seek to reclassify ordinary taxable remuneration received by the employee as a tax exempt bursary granted to the relatives of employees.
  - The portion of the salary sacrificed by the employee is paid directly by the employer to the respective school and is treated as a tax-exempt bursary granted to the relatives of the employees.

Addressing an anomaly in the tax exemption of employer provided bursaries (Clauses 10 and 25 of the Draft TLAB: Sections 10(1)(q), 10(1)(qA) and 23(s) of the Income Tax Act)

- In order to address these concerns, the following changes were proposed in the 2020 Draft TLAB:
  - The exemption in respect of a *bona fide* bursary or scholarship granted by the employer to the relatives of the employee should only apply if that *bona fide* bursary or scholarship granted by the employer is not restricted only to the relatives of the employees, but is an open bursary or scholarship available and provided to members of the general public;
  - The requirement that the applicability of the exemption is dependent on the fact that the employee's remuneration package is not subject to an element of salary sacrifice, be reinstated; and
  - As a means of further encouraging employers to grant bursaries to relatives of employees without subjecting such bursary to an element of salary sacrifice, that the employer deduction in relation to said bursaries is only afforded if the bursary to the employee's relative is not subject to an element of salary sacrifice.

Addressing an anomaly in the tax exemption of employer provided bursaries (Clauses 10 and 25 of the Draft TLAB: Sections 10(1)(q), 10(1)(qA) and 23(s) of the Income Tax Act)

- ***Comment:*** The requirement that bursaries to relatives of employees also be bursaries available to the general public is restrictive. It would also be extremely costly for employers (especially considering the impacts of the current COVID-19 pandemic). The loss to the fiscus is minimal considering the benefit arising from the current legislation.
  - ***Response:* Accepted.** Changes will be made in the 2020 draft TLAB to remove the requirement that bursaries to relatives of employees shall only be exempt if said bursary is an open bursary available to members of the general public. As a result, the tax-exempt status will not be dependent on whether or not the bursary is open to members of the general public.

- ***Comment:*** The 2020 Budget announcement only catered for an amendment as relates to bursaries granted to relatives of an employee. The proposed legislative amendment, as relates to salary sacrifice, however caters for both bursaries to employees and relatives of employees.
  - ***Response:* Accepted.** Changes will be made in the 2020 Draft TLAB to limit the proposal to bursaries granted to relatives of employees. As such, subject to meeting the monetary thresholds, a bursary granted to a relative of an employee shall be tax exempt if the provision of such bursary is not subject to an element of salary sacrifice.

Addressing an anomaly in the tax exemption of employer provided bursaries (Clauses 10 and 25 of the Draft TLAB: Sections 10(1)(q), 10(1)(qA) and 23(s) of the Income Tax Act)

***Comment**:* Reinstating the salary sacrifice requirement undermines Government's objective for skills development.

- ***Response:* Not accepted.** While Government remains committed to the skills development objectives, Government also needs to acknowledge when policy decisions previously taken are making tax abuse easier for taxpayers. Further to the above, and in the strictest interpretation of the law, a bursary that is subject to an element of salary sacrifice is not a *bona fide* bursary as defined. In fact, a bursary that is subject to an element of salary sacrifice enables employees to pay for their children or relative's school fees with "pre-tax income", whereas employees who do not receive the benefit of an employer provided bursary pay for their children or relative's school fees with "after tax income". Allowing a tax exemption in cases where a bursary is subject to an element of salary sacrifice results in the employee effectively paying for educational costs and receiving a tax deduction for those educational costs.

Addressing an anomaly in the tax exemption of employer provided bursaries (Clauses 10 and 25 of the Draft TLAB: Sections 10(1)(q), 10(1)(qA) and 23(s) of the Income Tax Act)

- ***Comment***: It seems unfair to disallow the employer deduction in respect of a bursary subject to a salary sacrifice if the benefit is going to be taxed in the employee's hands.
  - ***Response: Accepted***. Changes will be made in the 2020 Draft TLAB, and the requirement that the employer deduction in relation to bursaries is only available if the bursary is not subject to an element of salary sacrifice will be removed. The employer deduction will be allowed even if the bursary is subject to an element of salary sacrifice.

- ***Comment:*** Due to current COVID-19 crisis, effecting the proposed change will impede a company's ability to assist middle- and lower-income earners to provide education for their relatives. If the proposal is not amended, can a postponement for 2 or 3 tax years be considered so as to afford the economy a chance to recover from the impacts of COVID-19.
  - ***Response: Not accepted***. When initially announced on Budget Day, the amendment was meant to be a retrospective amendment with effect from 1 March 2020. However, due to comments received following the announcement, a decision was taken to postpone the effective date to 1 March 2021. It is also important to note that the proposed amendment falls outside the scope of any COVID-19 related tax measures. Moreover, the amendment seeks to limit the abuse of this provision.

Withdrawing from retirement funds upon emigration (Clause 2 of the Draft TLAB: Section 1 of the Income Tax Act

The definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” in section 1 of the Income Tax Act currently make provision for a payment of lump sum benefits when a member of a pension preservation, provident preservation or retirement annuity fund withdraws from the retirement fund due to that member emigrating from South Africa, and such emigration is recognised by the South African Reserve Bank (SARB) for exchange control purposes.

As outlined in Annexure E of the 2020 Budget Review, Government will be modernising the foreign exchange system. As a result, a new capital flow management system will be put in place. In relation to individuals, one of the changes to be implemented during modernisation of the foreign exchange system is the phasing out of the concept of “emigration” for exchange control purposes.

The phasing out of this concept will have a direct impact on the application of the tax rules as the tax legislation makes provision for a payment of lump sum benefits when a member emigrates from South Africa and such emigration is recognised by the SARB for exchange control purposes.

In order to ensure efficient application of the tax legislation, it is proposed that the definitions of “pension preservation fund”, “provident preservation fund” and “retirement annuity fund” in section 1 of the Income Tax Act be amended to include a new which will make provision for the payment of lump sum benefits when a member ceases to be a South African tax resident (as defined in the Income Tax Act), and such member has remained non-tax resident for three consecutive years or longer.

Withdrawing from retirement funds upon emigration (Clause 2 of the Draft TLAB: Section 1 of the Income Tax Act

Comment: The 3-year waiting period places a financial burden on the individual as the amounts received from the retirement funds are often used to cover settling in costs in the new country. It also adds additional requirements (which includes administrative requirements) for fund members, SARS and fund administrators to meet. SARS will also be subject to a cash-flow delay while waiting for the 3-year period to lapse. Many commentators suggest that the withdrawal should be allowed immediately.

- ***Response:*** **Not accepted**. The 3-year rule is a mechanism to ensure that there is a sufficient lapse of time for all emigration processes to have been completed with certainty, without affecting such workers whose residence status changes for reasons other than emigration. The envisaged system as a whole will have much lower compliance burdens overall for those looking to move abroad, and therefore it is not useful to focus on the 3-year requirement in isolation of the overall policy change.
- When individuals contribute to pensions (tax-free), the understanding is that tax is deferred until benefits are received upon retirement. Government did not intend to provide a tax incentive for funds to be used for emigration. This also illustrates a horizontal equity point: tax residents who remain in South Africa and decide not to emigrate have to wait until retirement for withdrawals from retirement annuity funds. It is already inequitable that those who leave the country are able to access those funds within 3 years.

Withdrawing from retirement funds upon emigration (Clause 2 of the Draft TLAB: Section 1 of the Income Tax Act

Comment: There is uncertainty as to whether the requirement to be a non-resident for 3 years refers to the physical presence test or ordinarily resident test. The 3-year test conflicts with other existing residency tests (e.g. section 9H). There is also uncertainty whether the 3 years refers to tax or calendar years. Clarity is also sought with regard to the interaction between Double Tax Agreements (DTA) and the new proposal. Many commentators recommended ceasing residence in terms of the ordinary residence test as a more appropriate measure.

- ***Response:*** **<u>Not accepted.</u>** The 3-year rule applies if an individual has ceased to be tax resident in South Africa, irrespective of the particular test under which that tax residency is determined. Therefore, the 3-year rule does not focus on the ordinarily resident test alone.

Comment: Clarity is required with regards to how cases where the emigration process commenced before 1 March 2021, but have not yet been finalised when the effective date kicks in, will be dealt with.

- ***Response:*** **<u>Accepted</u>*.*** All complete applications received by the SARB before 1 March 2021 will be finalised through the existing process, provided that they are approved by the SARB (even if the approval should occur after 1 March 2021). The amended provision will apply to all cases that meet the requirements on or after 1 March 2021 including individuals that did not receive formal approval to emigrate from SARB. In most cases, a change in tax residence, triggers capital gains tax on the deemed disposal of assets. National Treasury and SARS encourage taxpayers to weigh their options carefully and not be swayed by superficial advice, often at exorbitant fees.

Amending the 183 day rule to the foreign remuneration exemption , in light of the 2020 travel ban
(New Clause in the Draft TLAB: Section 10(1)(o)(ii) of the Income Tax Act)

- As stated in the Response Document to COVID-19 Tax Bills to the SCoF on 28 July 2020 as well as media statement issued by National Treasury on 31 July 2020, National Treasury would consider additional tax proposals which may have less of an impact on the fiscal framework, such as the tax-residency test.
- In terms of the current provisions of section 10(1)(*o*)(ii) of the Income Tax Act, individuals who spent more than 183 days working outside South Africa would have qualified for exemption in respect of their remuneration.
- However, due to travel bans during the COVID-19 pandemic, these individuals could not travel in order to work outside South Africa, and therefore could not qualify for the above-mentioned section 10(1)(*o*)(ii) exemption.

Amending the 183 day rule to the foreign remuneration exemption , in light of the 2020 travel ban
(New Clause in the Draft TLAB: Section 10(1)(o)(ii) of the Income Tax Act)

- ***Comment:*** Consider reducing the number of days that employees have to be outside South Africa to qualify for the exemption of foreign remuneration.
  - **Response**: In order to take into account the lockdown period during the COVID-19 pandemic, it is proposed that changes be made in the 2020 draft TLAB so that the 66 days that commence on 27 March 2020 and end on 31 May 2020, when the country operated under COVID-19 alert level 5 and 4, should be subtracted from the 183-day threshold rule used to determine the eligibility for exemption of foreign remuneration.
  - In order to qualify for exemption, the number of days that a person spent working outside South Africa will be reduced to more than 117 days in any 12 month period, for years of assessment ending from 29 February 2020 to 28 February 2021.
  - The current requirement in section 10(1)(*o*)(ii) that 60 of the days abroad should be a continuous period remains as is. In view of the fact that these individuals would have qualified for section 10(1)(*o*)(ii) exemption if there was no lockdown due to COVID-19 pandemic, the proposed relief to reduce the number of days from 183 to 117 in order to take into account the lockdown period during the COVID-19 pandemic is likely to be revenue neutral and will have minimal impact on the fiscal framework.

Income Tax: Business Tax (General)

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

- The Income Tax Act contains corporate reorganisation rules (sections 45-47 of the Act) that allow for the tax neutral transfer of assets between companies that are part of the same group of companies.
- The corporate reorganisation rules contain provision in section 46 that provides for roll-over relief where shares of a resident company (unbundled company) that are held by another resident company (unbundling company) are distributed to the shareholders of that unbundling company in accordance with the effective interest of those shareholders.
- These unbundling transactions are also subject to an anti-avoidance measure aimed at limiting or discouraging tax avoidance by taxpayers from distributing shares on a tax neutral basis.
- This anti-avoidance measure makes provision for roll-over relief not to be granted if immediately after the distribution of shares in terms of an unbundling transaction, 20 per cent or more of the shares in the unbundled company are held by disqualified persons (such as non-residents and tax exempt entities) either alone or together with any connected persons (who is also a disqualified person) in relation to that disqualified person.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Initial proposal included in the 2020 Draft TLAB published for public comment on 31 July 2020

- To close this loophole, changes were made in the 2020 draft TLAB published for public comment on 31 July 2020 to remove the reference to "connected persons".
- The intent was to disallow deferral in terms of an unbundling transaction if, immediately after any distribution of shares in terms of an unbundling transaction, an aggregate of 20 per cent or more of the shares in the unbundled company are held by disqualified persons. It was intended that these changes should apply in respect of unbundling transactions entered into on or after the date on which the draft TLAB was published for public comment (i.e. 31 July 2020).

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Public consultation on the proposed amendments

The following public consultations were held on these proposed amendments:

- 10 September 2020-Public workshops on the Draft TLAB
- 23 September 2020-Consultative meeting on the specific proposed amendment
- 7 October 2020-SCoF Hearings
- The following comments were raised to National Treasury in writing as well as in oral presentations during the public consultation workshops and meeting:

Comment: It is submitted by taxpayers that, as part of any proposed change to the anti-avoidance measure, reconsideration be given to the classes of person currently falling within the definition of "disqualified person". For example, it is particularly anomalous that this definition includes government or a pension fund as a shareholder.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Response: Not accepted. The corporate reorganisation rules were first introduced in the South African tax legislation in 2001 after Government considered the impact that the introduction of capital gains tax may have on asset transfers between entities forming part of the same economic unit . These rules were introduced with the aim of facilitating transactions between group companies or between shareholders and their companies on a tax neutral basis at the time of an asset transfer or distribution. However, the corporate reorganisation rules were introduced, not as a tax exemption but as a tax deferral that would allow for the deferral of the normal tax consequences arising from the transfer of an asset or distributions. The rationale for this temporary tax deferral was to allow for the entities with an economic unit to restructure their operations without an immediate tax consequence in anticipation of optimised South African business operations, reduced costs and ultimately higher profitability that would give rise to higher tax collection.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Continued…

Response: Not accepted. In addition, it was always anticipated that, in the event that a previously tax-free transferred asset were to leave the economic unit or be transferred to an entity or shareholders that are not within the South African tax net (i.e. be it by virtue of residence or exempt status), that subsequent transfer would fall outside of the deferral benefits of the reorganisation rules. It is this principle of disallowing a permanent reduction in the tax base through granting a deferral benefit to persons from which tax cannot be collected in the future, that advised the current list of "disqualified persons" under the deferral provisions dealing with unbundling transactions. To exclude pension funds or any other category of persons from the definition of "disqualified persons" would not be desirable as there is no policy change in ensuring that the corporate reorganisation rules continue to operate as tax deferral provisions and not exemptions (as would be the case if tax deferral is allowed for transfers to persons outside of the South African tax net).

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Revised proposal discussed during public consultations

- During the consultative workshops and meetings, various commentators had submitted that a 5% *de-minimis* rule, which prevailed prior to the 2007 legislative changes that brought into effect the current 20% rule should be considered instead of the current proposal available in the 2020 Draft TLAB.
- This 5% *de-minimis* rule and a pro-rata rule was discussed by National Treasury with the stakeholders during the public consultations as the equitable mechanism to ensure that the principle of deferral is upheld and that tax deferral is disallowed to the extent that a distribution of the unbundled shares is made to “disqualified persons” – without wholly and unfairly denying tax deferral for distributions in respect of the qualifying persons.
- Under this proposed rule, tax deferral under the unbundling transaction provisions contained in section 46 will not apply in respect of any equity share that is distributed by an unbundling company to any shareholder that –
  - is a disqualified person; and
  - holds at least 5 per cent of the equity shares in the unbundling company immediately before that unbundling transaction.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Comment: The current and revised proposed anti-avoidance measure is again flawed as it tests the shareholding in the unbundled company immediately after the unbundling transaction by reference to all the shares in that company, i.e. including those that may not have been held by the unbundling company and in respect of which no relief is sought. As an example, it cannot be that where an unbundling company unbundles its entire shareholding (of say 60 per cent) in a listed company that other existing shareholders (holding the remaining 40 per cent) in the unbundled company that have nothing to do with the unbundling transaction can prejudice the relief to the unbundling company.

Response: Accepted. The test for which part of the distribution is denied tax deferral under the unbundling transaction provisions will be limited to the unbundled shares that are distributed to "disqualified persons". No regard will be had of any shareholder holding shares that are not held by the unbundling company and thus not distributed under an unbundling transaction.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Comment: A pro-rata rule is not a solution. Keeping in mind that some 37 per cent of the market capitalisation of South African companies listed on the JSE was held by foreign shareholders in 2016 and a further 24.4 per cent of the market capitalisation of the JSE in 2016 was held by retirement funds, only about 40 per cent of the unbundling transaction will qualify for rollover relief, while 61 per cent will not under a pro-rata rule. Further, even if the unbundling was still viable, the tax burden associated with the unbundling would create an inequitable situation for shareholders that are in the tax net. This is because the tax burden, in the form of CGT and dividends tax, associated with the unbundling to disqualified persons would indirectly be borne by all shareholders pro-rata to their shareholding in the unbundling company (on the basis that these taxes are levied on the company and not on the shareholders in question).

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

- **Response: Not accepted.** Company distributions, by their nature, allow companies to put value directly in the hands of their shareholders. However, with consideration for the normal tax consequences applicable to company distributions outside of the corporate reorganisation rules, such as dividends tax (applicable to dividends) and capital gains tax (applicable to returns of capital), the value placed in the hands of shareholders is always net of tax. That being said, a tax deferred unbundling transaction would result in a better position for shareholders given that no immediate tax would be payable under a tax deferred unbundling transaction. However, from a policy point of view, the opposite to the concern raised would be true if the high instance of "disqualified persons" holding shares in the listed space is not acknowledged.
- Under such a circumstance, the Government would, using the same example provided by taxpayers, permanently forego its right to taxing 61 per cent of a distribution made to persons outside of the South African tax net and that benefit will be shared by all the shareholders of the unbundled company. This result is not aligned with the policy intention of tax deferred unbundling transactions which defer tax consequences in instances were future collection is likely. Instead, a more equitable and policy compliant result is where rollover is provided in respect of 39 per cent of the shares (held by persons who are not disqualified persons) under a pro-rata rule so that the benefit of the rollover is passed on to all the shareholders as is expected from a company distribution.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Comment: While under normal circumstances the in-specie distribution of the shares, in the absence of tax deferred unbundling transactions attracts capital gains tax and/or dividends tax, this assumes that the transaction would have happened in the absence of the unbundling relief applying and is therefore hypothetical rather than real. However, when one considers the tax base from the perspective of the individual companies and shareholders, there is no erosion of the tax base at all. From the perspective of the non-resident shareholder in a listed company with an investment worth R1 billion before the unbundling transaction – if, after the unbundling, it holds a shareholding in the listed company that is worth R800 million and a shareholding in the unbundled subsidiary of the listed company that is worth R200 million, in aggregate, its combined investment is still worth R1 billion. It has simply swapped its indirect investment in the subsidiary for a direct investment. From the perspective of the listed company and its subsidiary there is also no erosion of the tax base. Their assets remain wholly within the tax net to the extent of the combined net asset value of R1 billion.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Response: Not accepted. As indicated above, the policy rationale for the introduction of the corporate reorganisation rules was to defer tax consequences on the transfer or distribution of assets between entities within the same economic unit, or their shareholders, in anticipation of more profitability from the effective use of such assets and finally collection of any embedded gains in the event that those assets were transferred out of those economic units. In this regard, tax deferred is subject to prescribed circumstances within these rules, including the exclusion of parties to whom these assets are transferred, no future taxes may be collected. As such, to expect that all corporate distribution in the listed space should benefit from deferral is misplaced. It is also necessary to note that tax deferral is granted for the unbundling company (i.e. the listed company in the example made by the taxpayers) in respect of its shares in the unbundled company (its subsidiary in the example made by the taxpayers) and that it is only the after-tax benefit that is transferred to all the shareholders in this regard.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Continued…

Response: Not accepted. Those shares in the unbundled company are themselves assets in respect of which their transfer by way of a distribution attracts either dividends tax or capital gains tax. Given that a tax-deferred distribution in respect of shares distributed to a shareholder that is a person outside of the tax net, in essence, means that no future collection can be anticipated from any future transfer of those shares by such a taxpayer, therein lies the erosion of the tax base. Given the extent to which "disqualified persons" may hold shares in South African listed entities, by the taxpayers' own assertions (i.e. 61 per cent capitalisation of JSE listed companies), it is necessary to curb this erosion of the tax base to limit tax deferred unbundling transaction to distribution to shareholders that are not "disqualified persons".

Clarifying rollover relief for unbundling transactions (Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Comment: The less than 5 per cent *de-minimis* level in respect of which it was proposed should not trigger any anti-avoidance rule in this regard finds precedence in section 9D of the Income Tax Act where shareholders of less than 5 per cent in foreign companies that are listed companies do not need to calculate and impute in terms of section 9D. This level is arguably the more appropriate level for the reasons behind its inclusion in section 9D (i.e. the inability of companies and SARS to determine who their smaller shareholders are or what the nature and even residency status of such shareholders are). That being so, consideration should be given to the potential of pension funds holding 5 per cent or more of the shares in listed companies.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Response: Not accepted. The de-*minimis* level of less than 5 per cent will adequately and similarly exclude small shareholdings (that may be hard to track and ascertain their nature) from triggering the proposed pro-rata anti-avoidance rule for tax deferred transactions. As indicated during the public workshops and the consultative meeting, a limitation or further concession of any exempt entities is not in line with the policy of tax deferral under the corporate reorganisation rules and will lead to a scenario where legislation is made to accommodate or give preferential treatment to entities when it is not aligned with the currently prevailing policy.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Comment: The 2020 draft TLAB proposed that the amendments pertaining to the anti-avoidance rules on unbundling transactions involving "disqualified persons" comes into effect on the date of the publication of the draft TLAB for public comment, i.e. 31 July 2020. There are unbundling transactions that are currently underway and it is proposed that the effective date of any amendment to the anti-avoidance rule should be delayed. Furthermore, an effective date of no earlier than 1 January 2021 is proposed.

Clarifying rollover relief for unbundling transactions
(Clause 35 of the Draft TLAB: Section 46 of the Income Tax Act)

Response: Partially accepted. The proposed pro-rata anti-avoidance rule gives effect to a more equitable outcome in respect of unbundling transactions as only shares distributed to persons that are not disqualified persons will benefit from roll-over relief. This new mechanism of the anti-avoidance rule is in line with the policy rationale of the reorganisation rules that are intended to be tax deferral rules. As the proposed change has been softened and will no longer be an "all-or-nothing" rule, it is not necessary to delay this anti-avoidance rule beyond the date of the tabling of the 2020 draft TLAB given that this alternative mechanism has been communicated during the public workshops and the subsequent consultative meeting. Furthermore, it should be noted that in the case of anti-avoidance rules, the intention is to curb the use of structures that have the potential of negatively affecting the fiscus and it is not a new practice that anti-avoidance rules should have earlier effective dates.

As such, the 2020 draft TLAB will be changed to provide that the pro-rata anti-avoidance rule will come into effect on the date on which the 2020 draft TLAB is introduced by the Minister of Finance in Parliament.

Income Tax: Business Tax (Incentives)

Addressing the tax treatment of allowable mining capital expenditure

(Clauses 22 & 32 of the Draft TLAB : Sections 15 and 36 of the Income Tax Act)

- The Income Tax Act contains rules in sections 15 and 36 that entitle taxpayers that are engaged in mining operations to a full upfront deduction of any capital expenditure in respect of mining operations.
- The change in mining business models has led to the increase of “contract mining”, which comprises the services of an independent contractor (contract miners) to excavate minerals from the soil on behalf of the mining rights holder for a fee.
- The current provisions of the tax legislation do not adequately address the tax treatment of capital expenditure incurred by taxpayers carrying on activities of “contract mining”.
- At issue is whether both a contract miner that excavates minerals on behalf of a mineral rights holder for a fee for and a mineral rights holder should qualify for a full upfront deduction of any capital expenditure in respect of mining operations.
- It is proposed that clarification be made in the tax legislation and that only the taxpayer that holds a mineral right as defined in section 1 of the MPRDA can claim for a full upfront deduction of any capital expenditure in respect of mining operations in this regard.

Addressing the tax treatment of allowable mining capital expenditure

(Clauses 22 & 32 of the Draft TLAB : Sections 15 and 36 of the Income Tax Act)

Comment: The industry requests that the proposed amendments be withdrawn based on the following reasons:

- In principle, it is accepted that contract mining should be distinguished from wholescale mining, in that contract mining should not qualify for the same tax treatment of allowable mining capital expenditure, specifically the timing of the claim for capital expenditure contemplated in section 36 of the Income Tax Act (i.e. immediate expensing or 100% deduction in the year of purchase). The proposed amendment in the 2020 draft TLAB should be postponed and National Treasury should liaise with the Mining Resource Council and the Department of Mineral Resources to find a way to distinguish and define contract mining.
- The proposed amendment should not be implemented in its current form as it presents adverse unintended consequences for mining companies that conduct legitimate mining operations for their own benefit but whom, in terms of the MPRDA, are not required to hold mining rights to conduct those mining operations. The proposed amendment requires more consultation with all relevant stakeholders to ensure that mining taxpayers who rightfully claim accelerated capital expenditure allowances are not inadvertently excluded.

Addressing the tax treatment of allowable mining capital expenditure

(Clauses 22 & 32 of the Draft TLAB : Sections 15 and 36 of the Income Tax Act)

Comment:

- The proposed amendment, if enacted, will have dire consequences for the mining industry as it will not only impact contract miners, but also joint ventures. If the purpose of the proposed amendment is to curb abuse by non-qualifying taxpayers, then it is proposed that National Treasury obtains assistance from industry with the proposed drafting. It may be more appropriate to consider an amendment to the definition of "mining" and "mining operations" rather than limiting capital deductions to only the holder of mining right as is currently proposed.
- Given the far-reaching impact of the proposed amendment, this matter should be reconsidered as part of a future comprehensive overhaul of the entire mining tax regime. National Treasury should first consider the recommendations of the Davis Tax Committee (DTC) and also find policy alignment with the Department of Mineral Resources and Energy. It is worth noting that many of the problems (formerly associated with the taxation of contract mining) would fall away should the recommendations made by the DTC be accepted. This is because the incentive to classify expenditure as mining, rather than manufacturing, would in any event disappear with the move towards equalising the write-offs regimes for mining and manufacturing. Proper consultation with the mining industry on the impact and solutions is also advised to limit further impact on an already strained industry.

Addressing the tax treatment of allowable mining capital expenditure

(Clauses 22 & 32 of the Draft TLAB : Sections 15 and 36 of the Income Tax Act)

Response: Partially accepted.

- As discussed by National Treasury during public workshops on the 2020 Draft TLAB and as indicated by some stakeholders in their comments, the intent behind the full expensing of capital expenditure in the year of investment was to recognise the long lead times and risk taken on by mining companies when deciding to invest. This is the case across all the phases – exploration, development and production. Since companies engaged in mining activities for a fee (i.e. "contract mining") are not exposed to equivalent risks, the accelerated capital allowance for mining expenditure (specifically the timing of the claim for capital expenditure contemplated in section 36 of the Income Tax Act) should not be made available to them. Their revenue base is certain and so they should not be given the same benefit afforded to companies with an uncertain revenue base. To avoid both unintended and negative consequences resulting from the proposed amendments in the 2020 Draft TLAB, the following is proposed:
  - Government and industry be given more time to investigate and find solutions that may have less negative impact on the mining industry before amendments are made to the tax legislation;
  - Legislative amendments should only be considered after investigations and reviews have been conducted in this regard.

Changing the Minister of Finance's discretion in lifting ring-fencing of capital expenditure per mine

(Clause 32 of the Draft TLAB : Section 36(7F) of the Income Tax Act)

- Section 36(7F) makes provision for the tax deductible capital expenditure incurred in relation to a mine not to be used to reduce taxable income of another mine, unless the Minister of Finance, in consultation with the Minister of Minerals Resources and Energy and having regard to the relevant fiscal, financial and technical implications, otherwise directs.
- This limitation of tax deductible capital expenditure is referred to as "capex per mine ring-fence".
- This capex per mine ring-fence was introduced to prevent the reduction of taxable income from matured and profitable mines, given that those mines enjoyed an accelerated capital expenditure deduction during the earlier years.
- It is proposed that legislation be amended to move the discretion in respect of capex per mine ring-fence from the Minister of Finance to the Commissioner for SARS and a specific criteria for lifting the capex per mine ring-fence be introduced.

Changing the Minister of Finance's discretion in lifting ring-fencing of capital expenditure per mine
(Clause 32 of the Draft TLAB : Section 36(7F) of the Income Tax Act)

- *Comment:* The industry requests that the proposed amendments be withdrawn based on the following reasons:
  - Applications to the Minister of Finance in consultation with the Minister of Resources, is the preferable route, as policy should be set by National Treasury and Department of Mineral Resources, whilst the mandate of SARS lies with administration of the Tax Acts. There may be cases where investors will be approaching the Finance and DMRE Departments to invest in SA, which may involve contiguous mines, which will require the lifting of the per mine ring-fence. Without the Ministerial discretion, such investments may be lost.
  - The current Ministerial discretion available in section 36(7F) of the Income Tax Act is not only based on a concept of tax base protection, but in an equal manner the interests of the country's broader economic and investment needs and goals.

Changing the Minister of Finance's discretion in lifting ring-fencing of capital expenditure per mine

(Clause 32 of the Draft TLAB : Section 36(7F) of the Income Tax Act)

Comment:

- SARS as an administrative organ designed for the collection and administration of taxes does not have the necessary fiscal, financial and technical insight to perform the necessary balance of the country's broader economic interest. Moreover, SARS does not have the necessary mining technical insight or expertise to give the appropriate consideration to the specific needs and circumstances of miners.
- The proposed listed criteria in the 2020 Draft TLAB excludes the criteria that were relevant for purposes of the Minister's discretion, i.e. relevant fiscal, financial and technical implications. The deletion of the criteria that the Minister may presently consider in exercising the discretion limits the circumstances in which the discretion may be exercised.
- To the extent that the request to withdraw this proposed amendment is not accepted, we propose that the criteria be more objective so that they can be measured against, in keeping with SARS commitment to fairness, openness and transparency.

Changing the Minister of Finance's discretion in lifting ring-fencing of capital expenditure per mine

(Clause 32 of the Draft TLAB : Section 36(7F) of the Income Tax Act)

Response: Partially accepted.

- In the 2020 Budget Review, it was proposed that the Minister's discretion be reviewed with the aim of its removal or restructuring. The proposed amendments in the 2020 Draft TLAB removed the Minister's discretion and replaced it with the SARS Commissioner's discretion and set out specified criteria to be applied by the SARS Commissioner in this regard. In order to avoid negative impact and unintended consequences as a result of the proposed amendments in the 2020 Draft TLAB, the following is proposed
  - When Government is conducting the above-mentioned investigations and reviews on tax treatment of allowable capital expenditure, Government should also conduct reviews on the provisions of section 36(7F) dealing with the Minister of Finance's discretion in ring-fencing capital expenditure per mine;
  - Legislative amendments only be considered ~~in the subsequent legislative cycle~~ after investigations and reviews have been conducted in this regard.
-

Carbon Tax Cost Pass Through:
(Main reference: Section 6 of the Carbon Tax Act: Clause 77 of the Draft TLAB)

Comment: It is noted that this section of the Act would only be applicable from 1 January 2021 when it should be made retroactive to afford the same treatment to electricity generators and due to the commitments made by National Treasury during hearings in Parliament. It was understood to be effective 1 June 2019. Further, as per National Treasury's National Budget Review 2020, it is stated that government will publish the applicable rates for specific regulated fuels with no indication that commencement will be effective 2021.

- ***Response:*** **Partially accepted.** Changes will be made in the 2020 draft TLAB to make the effective date retrospective to 1 January 2020 but not to 1 June 2019 as the seven-month filing period has already closed. Taxpayers have already filed their tax returns for the 2019 period and this pass through will only be finalised by the end of 2020 and a retroactive application might be problematic.

Comment: There is also no provision for the adjustment for inflation of the quantum on an annual basis unlike that for the headline rate of carbon tax. To accommodate such an adjustment, the final quantum should be expressed to two decimal places and provision should be made for inflationary adjustments.

- ***Response:*** **Accepted.** The inflationary adjustment for the cost pass-through will be included in the draft legislation and the inflation rate will be adjusted as per the Carbon Tax Act (CPI plus 2 percentage points).

Carbon Tax Cost Pass Through:
(Main reference: Section 6 of the Carbon Tax Act: Clause 77 of the Draft TLAB)

Comment: Stakeholders indicated that price regulated fuels also include Liquefied Petroleum Gas (LPG), Illuminating Paraffin (IP) and Diesel which are also part of refinery output. However, the carbon tax costs recovery, as provided, is only applicable to petrol production which is not consistent with the aforementioned statement nor with the accepted principal of pass-through on administered prices. The pass-through should also be applied to diesel.

- ***Response:*** **<u>Not accepted.</u>** There are no taxes imposed on IP therefore it does not need to be included in the carbon tax net and it has one price throughout the country i.e. the Single Maximum National Retail Price (SMNRP) which is regulated and promulgated in the Government Gazette on a monthly basis. For LPG, the regulated Maximum Retail Price (MRP) are set for Retailers selling to the household consumer only and up the 9kg cylinders and retail prices may therefore be set below this maximum price. Diesel prices are quasi-regulated as the gazetted wholesale price is only a reference price but the wholesaler can sell at any price (have a lever to maneuver prices in the value chain) which could include cost recovery for the carbon tax costs. Only petrol prices are regulated to the retail level which is very tight and does not allow room for any cost pass-through. In consultation with the DMRE, it was agreed that the concession for refineries should only be applied to price controlled products. Given that refinery output is mostly petrol and only petrol amongst the carbon tax liable fuels is regulated to the retail level, a carbon tax cost offset will only be considered for petrol.

Carbon Tax Cost Pass Through:
(Main reference: Section 6 of the Carbon Tax Act: Clause 77 of the Draft TLAB)

***Comment*:** The 0.1 cents per litre is an approximate 1% of the carbon fuel levy currently imposed on petrol (7 c/l) which is very low. The proposal to allow a pass- through is appreciated. The actual relief provided in the formula is however extremely and almost negligibly low. It is not clear whether it is intended to be so low or whether it is an unintended oversight in the formula inserted in section 6. The current structure of the Carbon Tax Act allows electricity generators to offset their carbon tax liability with the environmental levy until the end of 2022. This effectively allows these operators a pass-through of their carbon tax liability to consumers unlike the liquid fuels sector during this period.

- ***Response:*** **Partially accepted.** The rationale for the pass-through (0.1 c / litre) should not be referenced to the carbon fuel levy as this relates to the emissions in the process of producing petrol and is not directly related to the 7c/litre as those are for the emissions from the burning of petrol. Also, the 7c/litre is in effect paid by the consumer as the regulated price has increased by that amount so it is not a cost for the producer (even though the payment is made by the producer, but that is not where the incidence lies). There was never a commitment to carbon price neutrality for fuels like was done for the electricity generation sector. However, Government proposes to increase the pass through to around 50 per cent of the total expected pass-through costs (as described in the following methodology) and will increase the pass-through amount to 0.56 c/litre.

2020 Draft TALAB

Raising of assessments based on an estimate (Clauses 26, 27 and 29 of the Draft TALAB: Sections 91, 93 and 95 of the Tax Administration Act)

- SARS may currently issue an estimated assessment if:
  - a taxpayer does not file a return;
  - no return is required but a taxpayer fails to pay the tax required; or
  - a return or information supplied is inadequate.
- In the first case the assessment may not be disputed until the required return is filed and SARS has failed to revise the assessment in the light thereof.
- This approach ensures that all the facts are available when the assessment is revisited and that the dispute resolution timelines that would otherwise apply may be relaxed.
- **Proposed:**
  - Estimated assessments also be permitted where no tax is due or a refund is due, to assist taxpayers and personal income tax administration reform.
  - Cases where specific relevant material was requested from a taxpayer on more than one occasion, without an adequate response also be subject to the limitation on disputes for the reasons set out above.
  - Time-period within which taxpayer may request SARS to revise the assessment by providing outstanding return or relevant material be extended from 30 to 40 business days.
  - Maximum extension of time-period by senior SARS official be aligned with the prescription period for the assessment, i.e. three/five years from date of original assessment.

Raising of assessments based on an estimate (Clauses 26, 27 and 29 of the Draft TALAB: Sections 91, 93 and 95 of the Tax Administration Act)

Comment:

The proposed amendment denying the taxpayer the right to object to an estimated assessment, particularly where the taxpayer may be pursuing a dispute with SARS as to the legitimacy of the underlying issue (extent of request for relevant material) denies the taxpayer both critical constitutional rights and the right to administrative justice.

Response:

Partially accepted. Section 95(1) read with section 95(4) will be redrafted to provide that a taxpayer will only be barred from lodging an objection against the assessment based on an estimate if the taxpayer does not submit a return or does not submit a response to a request for relevant material in respect of the taxpayer under section 46, after delivery of more than one request for such material. The response may thus set out valid grounds as to why the relevant material is not available or need not be supplied to SARS. It is implicit that the response must be something more than a frivolous response.

Raising of assessments based on an estimate (Clauses 26, 27 and 29 of the Draft TALAB: Sections 91, 93 and 95 of the Tax Administration Act)

Comment:

A concern is that taxpayers are not always aware of requests for information, since a valid method of communication is the uploading of a letter on the taxpayer's or tax practitioner's eFiling profile without notification that the correspondence has been uploaded. Requests for information must be sent via multiple communication platforms and where a tax practitioner is the preferred contact, the correspondence should be sent both to the taxpayer and tax practitioner using the contact details on the taxpayer's RAV01 form.

Response:

Noted. A taxpayer making use of eFiling should ensure that the option on the eFiling platform, which if selected sends eFilers an SMS about communications that have been issued on the eFiling platform, is activated. Taxpayers should also ensure that their cell phone number and email addresses listed on the eFiling platform are current.

Raising of assessments based on an estimate (Clauses 26, 27 and 29 of the Draft TALAB: Sections 91, 93 and 95 of the Tax Administration Act)

Comment:

It should also be borne in mind that SARS can request relevant material from a taxpayer in respect of third parties. The failure to comply with such a request (again in the instance where a taxpayer challenges SARS legal competence as to the extent of such request) has no impact on the taxpayer's own tax affairs so it is difficult to understand why in such instances SARS should even be empowered to make an estimated assessment in respect of the taxpayer to whom the request is addressed, even less so that such assessment may not be objected to.

Response:

Accepted. Though it is difficult to see on what basis an estimated assessment would be raised on a taxpayer in respect of a failure to provide a response in respect of third party data requested, section 95(1) will be redrafted to make it clear that the request for relevant material is in respect of the affairs of the taxpayer to whom the request was directed.

Grace period to determine if a payment in excess of an assessment was erroneous (Clause 30 of draft TALAB; Section 187 of the Tax Administration)

- Payments that are not properly allocated to a specific tax type by a taxpayer are administratively difficult to allocate correctly.
- If the payment had to be allocated to a specific tax type but is refunded as an erroneous payment, the taxpayer will be charged interest on an unpaid debt.
- SARS requires a period to determine if the payment was erroneous.
- **Propose** amendment to insert a specific effective date for erroneous payments referred to in the Act, which will provide SARS a period of up to 60 business days to determine the erroneous nature of the payment prior such payment being refunded to the taxpayer.

Comment: While it is administratively efficient for SARS to be given a period of time to confirm whether an amount is a genuine overpayment or an amount which must be set off against existing tax debts before interest is calculated, the suggested period of 60 business days is excessive. In our view, a period of 21 business days would be more than sufficient and would align with other similar legislative provisions.

Response:

Accepted. The period will be shortened to 30 calendar days.

Provision that a refund need not be authorised where a matter is under criminal investigation (Clause 33 of Draft TALAB; Section 190 of the Tax Administration Act)

- SARS may withhold a refund until such time that a verification, inspection or audit of the refund is finalised, unless security is provided by the taxpayer.
- **Propose** that this provision be extended to include criminal investigations, since the risks with regard to inappropriate refunds are even higher in such cases.

Comment: The proposed amendment may be in breach of taxpayer's constitutional rights and the presumption of 'innocent until proven guilty'. It is submitted that the proposed amendment be deleted.

Response:

Partially accepted. The same rule already applies with regard to verifications, inspections or audits. It expresses no view on the final outcome of a verification, inspection, audit or investigation but provides SARS with the discretion not to make a refund while the risk that led to the verification, inspection, audit or investigation remains unresolved. Section 190(3) will, therefore, be extended to require SARS to make the refund if the taxpayer subject to investigation provides security in a form acceptable to a senior SARS official.

Removal of requirement to prove intent from certain statutory offences (Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

- For a person to be guilty of an offence, the person needs to have committed an unlawful act and the person's conduct must be culpable.
- In South African law such culpability is normally referred to as *mens rea* and may be present in one of two forms i.e. intent (*dolus*) or negligence (*culpa*)
- Intent and negligence are mutually exclusive – any reference to wilful conduct must necessarily exclude negligent conduct.
- The current "wilfully and without just cause" requirement included in the opening words to certain lesser tax offences listed in the Income Tax Act, VAT Act and Tax Administration Act, means:
  - The NPA must prove intent as the only basis of *mens rea* in respect of the relevant tax offences, e.g. failure to withhold or pay over employees' tax.
  - Negligent, even grossly negligent, conduct is excluded, e.g. a vendor who negligently overcharges VAT cannot be prosecuted.
- The test for intention is subjective, while the test for negligence is objective (i.e. the person's conduct is measured against the reasonable person standard).
- The "wilfully" requirement is purely subjective and there can be no reference to what a reasonable person would have done in the circumstances.

Removal of requirement to prove intent from certain statutory offences (Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

- The requirement of intent is generally applicable to common law offences and serious statutory offences in South Africa, while the requirement of negligence, whether explicitly stated or not, is more typical of lesser statutory offences.
- The requirement of "wilfully and without just cause" was not a general requirement for lesser tax offences before the promulgation of the Tax Administration Act, it does not appear in any other South African legislation and, as the NPA has pointed out to SARS, its proposal and adoption through the Tax Administration Act appears to have been an error.
- **Propose** that "willfully and" be deleted from the opening words.

Comment: The standard required before a person can be found guilty of a criminal offence has been considered by the Constitutional Court, where it was found that the basic tenant of blameworthiness and criminal liability is intent (*dolus*).

Response:

Noted. The commentator relies on the judgment by O'Regan J in **S v Coetzee and Others** (CCT50/95) [1997] ZACC 2 at paragraph 162. "The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the *actus reus* and *mens rea*)… At common law, the fault requirement is generally met by proof of intent (*dolus*) in one of its recognised forms, and, in rare circumstances, by the objective requirement of negligence *(culpa)*."

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Two points may be made in this regard.

- The first is that a good deal of the analysis in this part of the judgment revolves around comparative statutory law dealing with absolute or strict liability, where the prosecution need prove neither intent nor negligence, although certain defences may be available to the accused. This led to the statement in paragraph 176 of the judgment that "The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the state. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the state may punish them."
- The second is that the paragraph 177 of the judgment specifically recognizes that the discretion afforded the legislature in respect of statutory offences. "In addition, it should be borne in mind that significant leeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge." (Emphasis added in quotations above.)

Removal of requirement to prove intent from certain statutory offences

(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: To change the *mens rea* criteria to negligence, will open the floodgates of prosecutions against taxpayers, and furthermore to hold them liable for their advisors (tax consultants, auditors, representative taxpayers, etc.) actions. This may result in potential prosecutions, against tax advisors, tax representatives or consultants, who will all be drawn into possible prosecutions where the taxpayers will inevitably rely on a defence that they have been “advised” to adopt certain positions.

Response:

Comment misplaced. Prior to the introduction of the Tax Administration Act, 2011, the provisions in respect of so-called lesser tax offences did not explicitly state whether wilfulness or negligence was required for *mens rea* for such tax offences. It is thus incorrect to say that the proposed deletion of wilfully is dramatic change from a legal approach that has been applied for numerous decades in tax law.

Intent was (and still is) specifically required for the more serious offence of tax evasion. In other instances, where the courts were satisfied that the legislature intended that negligence was the level of *mens rea* required, prosecutions were conducted and offenders convicted on this basis.

None of the adverse consequences feared by commentators arose, since it remained for the prosecution to prove negligence beyond reasonable doubt.

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: The removal of an element of a crime in order to make it easier to prosecute is almost certainly unconstitutional. A standard of objective reasonableness could be introduced which would go some way to assisting policing of non-compliance, but without going as far as the strict liability proposed in the draft TALAB.

Response:
Accepted. It is not the intention to introduce strict liability, so an explicit references to negligence will be inserted to remove any doubt in this regard.

Removal of requirement to prove intent from certain statutory offences (Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: Negligence (*culpa*) as *mens rea* for criminal liability in South Africa is reserved for matters where death occurs such as, for example, culpable homicide in cases of doctors, engineers or directors for corporate criminal liability (e.g. negligence for death by faulty products).

Response:

Comment misplaced. As the Law of South Africa, Volume 11, paragraph 98 notes; "Although *culpa* plays a limited role as far as common-law crimes are concerned… it plays an important role in respect of statutory offences." There are many provisions in other Act where it has been held that *culpa* is a sufficient form of *mens rea.*

In the light of the importance of the duties of a taxpayer vis-à-vis the fiscus enunciated by the Constitutional Court per Kriegler J in *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* (CCT3/00) [2000] ZACC 21, it is submitted that taxpayers should be held to a standard of reasonable care in carrying out those duties. This is especially so when so much of our fiscal management relies on the *bona fides* of taxpayers and truthful self-assessment.

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: *Dolus eventualis* does not require the accused to have purposefully committed an offence, or even to have understood the commission of an offence to be an inevitable consequence of his or her conduct. The accused must merely have foreseen a possibility (even if only a remote or slight possibility) that a prohibited consequence may occur as an indirect result of his or her conduct.

Most (if not all) of the offences in the relevant sections under amendment involve conduct which the average taxpayer would know is unlawful, and therefore, the requirement of intent can be established without broadening the scope of the provisions to include negligent conduct.

Response:

Not accepted. It is for the prosecution to prove the form of *mens rea.* Where negligence is the fault requirement, the prosecution must prove that the taxpayer did not perform his or her duty in the manner as would be expected of the reasonable taxpayer in the circumstances (objective standard evaluated in a court of law). When intention is the fault requirement, as for the offences relating to tax evasion, the State must prove *dolus* (in whichever of its forms). The court may draw an inference as to the subjective state of mind of the accused at the time of the commission of the offence. The inference will be premised on all the evidence presented during the course of the trial.

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: Many other jurisdictions have noted that a "reasonable mistake" should be a defence and not result in criminal culpability. The Constitutional Court has also held that the length of punishment must be proportionate to the offence.

Response:
Noted. Other jurisdictions that apply absolute liability or strict liability may permit defences such as the accused having performed due diligence or, in other words, having taken reasonable steps to avoid committing the offence. This ameliorates the fact that neither intent nor negligence have to be proved by the prosecution.

In a South African context, it is for the prosecution to prove intent or negligence. In the case of negligence, the prosecution must prove, beyond reasonable doubt that the person did not measure up to the objective standard, that the taxpayer did not conduct themself in the manner that would have been expected of a reasonable person in those circumstances. Where there is a positive duty on the taxpayer, the court will consider whether the taxpayer did what was expected of the reasonable person in the circumstances in performing that duty. The NPA would have to be satisfied that the investigating agency had provided sufficient evidence for there to be reasonable prospects of success before it would institute a prosecution.

With respect to proportionality, the existing legislation and the proposed legislation do not set a minimum punishment only a maximum. If the NPA is able to prove the case, it is thus open for the presiding officer to consider the degree of culpability involved in arriving at an appropriate sentence. This would range from a modest fine for minor degrees of culpability, to more a significant fine, to suspended imprisonment and to imprisonment for the highest degree of culpability.

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: It is acknowledged that, in the context of tax law, it would (in certain circumstances) be appropriate to treat negligent non-compliance as a criminal offence. It is unconscionable that less serious offences (such as failure to notify SARS of a change of address or to appoint a public officer) should be criminal offences purely on the basis of negligence.

Response:

Not accepted. So-called less serious offences nevertheless have substantial consequences on further analysis. Significantly, the purpose of criminalizing the failure to appoint a representative, the non-submission of returns, the failure to update registered particulars and so forth, is to ensure that the collection of revenue can be monitored and enhanced.

The system of tax collection is premised on the submission of returns, accurate information, etc. by taxpayers as and when required by law to do so. This compliance is essential to the success of South Africa and government's ability to meet *inter alia* the socio-economic needs of the public. It is submitted that to hold taxpayers to account to an objective standard of reasonableness in these areas, is not out of proportion with the purpose of the legislation.

Removal of requirement to prove intent from certain statutory offences (Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: There has been a consistent move away to criminalise conduct for minor administrative failures. This is the exact reason why penal provisions such as administrative non-compliance penalties and understatement penalties are contained in the tax laws so as to avoid expensive and resource demanding prosecutions where administrative penalties satisfy as a deterrent to offenders.

Response: **Noted.** Although there is no doubt that administrative non-compliance penalties assist in addressing certain forms of non-compliance, experience has shown that they are not a panacea. Some taxpayers either ignore the penalties or simply consider them a cost of doing business. Despite outstanding tax personal and corporate income tax returns being subject to administrative non-compliance penalties, several million such returns remain outstanding.

Comment: A criminal conviction for a relatively minor offence may have a disproportionately negative effect or serious limitation on a taxpayer's right to freedom of movement (e.g. to emigrate) and right of association (e.g. to be eligible for certain positions / forms of employment). Hence, a deviation from this standard position would have to be justified and generally applied under section 36 of the Constitution.

Response: **Not accepted.** The limitations imposed by other countries, legislation and employers are matters for those countries, custodians of legislation and employers. It may be that they feel that it is in the interest of good governance to ensure that people who occupy positions of responsibility have a good track record of compliance.

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: SARS refers to international precedent without considering our local law notwithstanding that even the Australian judges have criticised their Parliament's lowering of the culpability standard.

Response: **Not accepted.** It is striking that countries with well-established cultures of compliance, such as Australia, Canada and New Zealand impose absolute or strict liability to address so-called lesser tax non-compliance. As a perusal of SARS' Annual Report 2018/19 will demonstrate, South Africa has not yet reached anywhere near these levels of tax compliance. The response document provides further details of the Australian judgment referred to.

Comment: Whilst SARS may choose not to prosecute for administrative 'mistakes', amending the legislation as proposed would give SARS the power to do so, should it so wish. This in itself leads to another Constitutional concern of arbitrary prosecution. In effect, the Tax Administration Act, does not, like the Criminal Procedure Act for the NPA, set a standard of proof that compels prosecution, namely a prima facie case.

Response: **Comment misplaced.** SARS does not prosecute offences in terms of the Tax Administration Act, 2011, the NPA does. The NPA decides the institution of prosecution on the basis of whether there is a *prima facie* case and reasonable prospects of a successful prosecution and it is constitutionally compelled to do so without fear, favour or prejudice.

Removal of requirement to prove intent from certain statutory offences

(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: The effectiveness of this proposal as a deterrent to unlawful conduct must be evaluated particularly considering the perception of this proposal by taxpayers as an overly heavy-handed measure which is likely to further diminish the trust which law-abiding taxpayers have in SARS and the Government. In fact, the proposed amendment may have the opposite effect on voluntary compliance.

Response:

Noted. As set out in SARS' Strategic Plan 2020/21 – 2024/25, SARS's first three strategic objectives, which are considered equally important, are:

- Provide Clarity and Certainty for taxpayers and traders of their obligations.
- Make it easy for taxpayers and traders to comply with their obligations.
- Detect taxpayers and traders who do not comply, and make non-compliance hard and costly.

A balanced approach will thus be followed with a mix of proactive and reactive measures. The proposed amendments do not seek to increase the severity of non-compliance offences for example by proposing a higher fine or imprisonment – they simply seek to make tax non-compliance offences more effective sanctions to deter non-compliance.

Removal of requirement to prove intent from certain statutory offences
(Clauses 8, 21 & 34 of Draft TALAB: Paragraph 30 of Fourth Schedule to Income Tax Act, section 58 of Value-Added Tax Act & section 234 of the Tax Administration Act)

Comment: It is recommended that the proposed amendments should be withdrawn. Alternatively, a differentiated approach should be applied to the various offences depending on their severity.

Response:

Accepted. A differentiated approach will be adopted in the redraft of paragraph 30 of the Fourth Schedule to the Income Tax Act, 1962, section 58 of the Value-Added Tax Act, 1991, and section 234 of the Tax Administration Act, 2011.

Rather than do away with intent entirely, offences will be categorised into those for which intent or negligence is required and those for which intent is required.

- The first category will include aspects of non-compliance that strike at key duties that the tax system's broad application depends on, such as failing to register, submit returns, pay over tax that has been collected from a third party and so on.
- The second category will include aspects of non-compliance where the nature of the non-compliance is such that the requirement of intent is implied, such as issuing a false document , obstructing or hindering a SARS official, assisting another person to dissipate their assets to impede tax collection and so on.

The maximum penalty of a fine or two years imprisonment will remain and it will be left to the presiding officer to decide what sentence is appropriate on conviction, considering all the aspects of a case.

Thank You

QUESTIONS?