

MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2019

1. PURPOSE OF BILL

The Tax Administration Laws Amendment Bill, 2019 (the “Bill”), proposes to amend the Income Tax Act, 1962, the Customs and Excise Act, 1964, the Value-Added Tax Act, 1991, the Skills Development Levies Act, 1999, the Unemployment Insurance Contributions Act, 2002 and the Tax Administration Act, 2011

2. OBJECTS OF BILL

2.1. Income Tax Act, 1962: Amendment of section 3

The proposed amendment corrects cross-referencing. A decision in terms of section 18A(5C) would be given effect to in an assessment. Should the taxpayer not agree with the assessment the taxpayer may exercise the normal remedies of objection and appeal in terms of section 104 of the Tax Administration Act, 2011, which makes a reference to this section in section 3(4) unnecessary. The correct cross-reference should be to sections 18A(1)(a)(cc), 18A(1)(b) and 18A(1)(c) where the Commissioner exercises his or her discretion to approve an organisation for purposes of section 18A.

2.2. Income Tax Act, 1962: Amendment of section 49E

Section 49E(3) requires a foreign person to or for the benefit of whom a royalty payment is made, to submit to the local person making the payment, a declaration to permit a reduced rate of tax to be applied as a result of the application of an agreement for the avoidance of double taxation. An example would be the case of a beneficial owner of a royalty payment who is a resident in the United States of America, where the Double Tax Agreement between the United States and South Africa provides for a lower withholding tax rate than that prescribed in the Act.

It was submitted that this requirement creates an administrative burden for local persons that enter into multiple transactions with a single foreign person during the

year. This would then mean that a declaration would have to be obtained by the local person from the same foreign person with regard to each and every transaction entered into.

The same issue was raised with regards to withholding tax on interest where local persons that have foreign investors need to obtain a declaration in terms of section 50E(3) where a reduced rate of tax has been applied as a result of the application of an agreement for the avoidance of double taxation.

The proposed amendment aims to alleviate this administrative burden by requiring that where more than one payment is made to the same foreign person within a period of two years from the date of the first payment, the written undertaking need only be submitted once, namely before the first payment to that foreign person, provided the conditions affecting the rate at which the royalty tax or withholding tax on interest is paid do not change and the payment of the royalty or interest is still made to or for the benefit of that foreign person. However, a declaration and written undertaking under this section will no longer be valid after a period of 2 years.

The new requirements with regard to the written undertaking have also been extended to royalties or interest payments that are exempt from royalty tax or withholding tax on interest.

2.3. *Income Tax Act, 1962: Amendment of section 50E*

See the note on section 49E above.

2.4. *Income Tax Act, 1962: Amendment of section 60*

Chapter 8 of the Tax Administration Act, 2011, deals with assessments. The proposed deletion is a technical correction to bring the assessment of donations tax under Chapter 8.

2.5. *Income Tax Act, 1962: Amendment of section 64G*

In alignment with the proposed amendments to sections 49E and 50E, a declaration and written undertaking under section 64G will similarly no longer be valid after a period of 2 years.

2.6. Income Tax Act, 1962: Amendment of section 64H

In order to ensure that dividends tax is not withheld from dividends declared on shares held as a tax free investment in terms of section 12T of the Income Tax Act, the regulated intermediary through which the investments are held will need to be provided with the required declaration and written undertaking as contemplated in section 64H. Failing this, dividends tax will have to be withheld and the investor would need to seek a refund of the dividends tax from the regulated intermediary once the required declaration and written undertaking has been provided. The proposed amendment aims to remove this requirement insofar as tax free investments are concerned as there is no need for an investor to make this declaration in so far as the dividend relates to a tax free investment.

Furthermore, in alignment with the proposed amendments to sections 49E, 50E and 64G, a declaration and written undertaking under section 64H will similarly no longer be valid after a period of 2 years.

2.7. Income Tax Act, 1962: Amendment of paragraph 14 of Fourth Schedule

The proposed amendment aims to clarify that the penalty in terms of this paragraph may also be imposed where an employer submits a return that is not in the prescribed form and manner i.e. an incomplete return.

2.8. Income Tax Act, 1962: Amendment of paragraph 19 of Fourth Schedule

The last day of the year of assessment of a natural person in the year of his or her death is the date of death. At present there is no exemption from the payment of provisional tax by a natural person in respect of the period ending on the date of death, which can result in the imposition of underestimation penalties under paragraph 20 of the Fourth Schedule.

In that regard, paragraph 19(6) of the Fourth Schedule provides that a person that fails to submit an estimate of provisional tax within four months of the end of the second period is deemed to have submitted an estimate of nil. As a result, a deceased person may be subject to the underestimation penalty in paragraph 20 of the Fourth Schedule on assessment if no estimate was submitted by the executor

within the four-month period. In order to have this penalty remitted under paragraph 20(2C) of the Fourth Schedule, the executor would have to lodge an objection.

The purpose of the amendment is to exempt the executor from having to submit an estimate of provisional tax on behalf of the deceased person in respect of the period up to date of death. This amendment has no impact on the deceased person's obligation to make a first period estimate where he or she is still alive on 31 August. This proposal will avoid unnecessary administration for SARS and the executor. Any tax owing will be collected on assessment of the final return of income made under section 66(13)(a) of the Act.

2.9. Customs and Excise Act, 1964: Amendment of section 1

Paragraph (a): The proposed amendment is a correction to reflect the new name of the country previously known as Swaziland.

Paragraph (b): The proposed amendment inserts a definition for Tax Administration Act, 2011, consequential to the proposed amendments to sections 4(3) and 114A of the Act.

2.10. Customs and Excise Act, 1964: Amendment of section 4

Paragraphs (a)-(c): The proposed amendments to sections 4(3) and (3A) provide the authorisation for the sharing of information required to administer carbon offsets and greenhouse gas emissions reporting with the Department of Energy and the Department of Environmental Affairs. Provision is also made for the sharing of information with authorised dealers in foreign exchange to assist such dealers in the verification of applications for advance foreign exchange payments in respect of goods that are to be imported. It is anticipated that the sharing of such information will aid in the verification of legitimate financial flows.

Paragraph (d): The proposed amendment is aimed at alignment with a similar approach followed in section 69(8)(d) of the Tax Administration

Act, 2011.

2.11. Customs and Excise Act, 1964: Amendment of section 41

The proposed amendment aims to clarify that an invoice may, if an amount reflected on the invoice is to be changed, be amended by the issuing of a credit or debit note, without reissuing the invoice.

2.12. Customs and Excise Act, 1964: Amendment of section 47

Paragraph (a): The proposed deletion of subsection (9)(a)(iii) and insertion of the content of the subparagraph in adjusted form as subsection (11A) clarifies that a tariff determination made in terms of subsection (9) applies to identical goods entered by the same person, whether the goods were entered before or after the date when the determination is issued. A tariff determination made in terms of subsection (9) can be applied retrospectively to identical goods imported by the same person before the determination was issued for purposes of refunds for overpayments of duty as well as liability for underpayments of duty, taking into account the applicable prescription period.

Paragraph (b): The proposed amendment has the effect that removals of bulk wine between excise manufacturing warehouses are excluded from compulsory tariff determination. Such removals are aimed at further manufacture and the bulk wine removed is not the final alcoholic beverage.

Paragraph (c): See paragraph (a) above.

2.13. Customs and Excise Act, 1964: Amendment of section 53

The proposed amendment is intended to retrospectively correct an inadvertent overlap between sections 53 and 54G of the Act. Part 7 of Schedule No. 1 has already been set aside for the health promotion levy in terms of section 54G.

2.14. Customs and Excise Act, 1964: Amendment of section 65

The proposed amendment is related to the amendment to section 47(9) and clarifies that a value determination made in terms of subsection (4)(a) or (5) applies to goods mentioned in the determination entered by the same person before or after the date when the determination is issued. A determination made in terms of subsection (4)(a) or (5) can be applied retrospectively to goods mentioned in the determination imported by the same person before the determination was issued for purposes of refunds for overpayments of duty as well as liability for underpayments of duty, taking into account the applicable prescription period.

2.15. Customs and Excise Act, 1964: Amendment of section 76

The proposed amendment is consequential to proposed amendments to items 412.09; 495.00; 497.01; 624.50; 634.03; 670.10; 680.02 and 690.01 of the Customs and Excise Tariff, which aim to exclude duty rebates in circumstances where damage, destruction or loss of goods as contemplated in those items occurs due to robbery or theft. This is in line with an international approach to not allow duty rebates in cases of robbery or theft, the rationale being that the goods have entered into home consumption and that the amount of any duty payable should be covered by an insurance policy.

The proposed amendment to section 76(d) intends to ensure parity in the treatment of refunds of duty already paid, and rebates in respect of duty payable, on goods damaged, destroyed or lost due to robbery or theft.

2.16. Customs and Excise Act, 1964: Amendment of section 114A

The proposed amendment makes provision for options, in addition to those dealt with in section 114 of the Customs and Excise Act, for the collection of debt owed to SARS in terms of that Act, by making Part D of Chapter 11 of the Tax Administration Act, 2011, with the necessary changes as the context may require, applicable for purposes of the Customs and Excise Act.

2.17. Customs and Excise Act, 1964: Amendment of section 120

The proposed amendment authorises the Commissioner to prescribe rules relating to

the making of advance foreign currency payments in relation to the importation of goods. The purpose of these rules is to aid in the verification of legitimate financial flows by requiring persons intending to apply to authorised dealers in foreign exchange for making advance foreign exchange payments, to first notify the Commissioner of such intention, and by requiring authorised dealers to report certain information in relation to advance foreign exchange payments to the Commissioner.

2.18. Value-Added Tax Act, 1991: Amendment of section 20

Section 20(5B) requires the Minister to prescribe the particulars to be contained on a tax invoice issued by a foreign supplier of electronic services, by regulation. This regulation has not been issued but the Commissioner has issued Binding General Ruling No. 28 in this regard. The proposed amendment removes the requirement for the Minister to prescribe these particulars per regulations and now enables the Commissioner to prescribe them by public notice in the *Gazette*.

2.19. Value-Added Tax Act, 1991: Amendment of section 41B

The proposed amendment aims to clarify that rulings in terms of section 41B of the Value-Added Tax Act, are not subject to the prescribed fee (i.e. the application fee and the cost recovery fee) as set out in section 81 of the Tax Administration Act, 2011.

2.20. Skills Development Levies Act, 1999: Amendment of section 5

Paragraph (a): The Director-General of the Department of Higher Education and Training is regarded as the person most capable of evaluating whether or not an employer has been classified under the jurisdiction of the correct SETA, and not SARS. The proposed amendment aims to ensure that the Director-General is able to classify the employer under the jurisdiction of the correct SETA.

Paragraph (b): In view of the above, an amendment is also proposed to allow the Director-General to direct that a SETA selection by an employer is not binding in certain circumstances.

2.21. Skills Development Levies Act, 1999: Amendment of section 7

In terms of section 190(4) of the Tax Administration Act, 2011, a refund must be claimed within certain specified time-periods. The proposed amendment aims to align the refund provisions in the Skills Development Levies Act with section 190 of the Tax Administration Act, 2011, to provide that a refund by the Director-General in terms of the Skills Development Levies Act, must be claimed by the employer within 5 years from the date the levy was paid in terms of the Act.

2.22. Skills Development Levies Act, 1999: Amendment of section 11

The proposed amendment is a technical correction to cross referencing.

2.23. Skills Development Levies Act, 1999: Amendment of section 12

The proposed amendment is a technical correction to cross referencing.

2.24. Unemployment Insurance Contributions Act, 2002: Amendment of section 9

In terms of section 190(4) of the Tax Administration Act, 2011, a refund must be made within certain specified time-periods. The proposed amendment aims to align the refund provisions in the Unemployment Insurance Contributions Act with section 190 of the Tax Administration Act, 2011, to provide that a refund by the Commissioner in terms of the Unemployment Insurance Contributions Act, must be claimed by the employer within 5 years from the date the levy was paid in terms of the Act.

2.25. Tax Administration Act, 2011: Amendment of section 11

A one week notice period has proven to be impractical in practice to give effect to the rationale for the notice, i.e. to enable SARS an opportunity to investigate the matter further and to decide how to resolve the dispute, for example by exploring a dispute resolution process, thereby avoiding litigation at the public's expense. The proposed amendment increases the current one week period to 21 business days in order to afford SARS sufficient time to investigate the matter to see if it can be resolved without resorting to litigation, unless a competent court directs otherwise, for example in the case of urgency. In comparison, for example, the Institution of Legal

Proceedings Against Certain Organs of State Act, 2002, provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state six months written notice, from the date the debt became due, of his or her or its intention to institute the legal proceedings in question.

2.26. Tax Administration Act, 2011: Amendment of section 12

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.27. Tax Administration Act, 2011: Amendment of section 42A

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.28. Tax Administration Act, 2011: Amendment of section 46

The proposed amendment is a textual correction in order to align the wording of section 46(3) with the wording of section 46(2)(b).

2.29. Tax Administration Act, 2011: Amendment of section 64

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.30. Tax Administration Act, 2011: Amendment of section 100

The proposed amendment aims to clarify that an assessment or decision is final if an appeal has been filed and is withdrawn.

2.31. Tax Administration Act, 2011: Amendment of section 110

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.32. Tax Administration Act, 2011: Amendment of section 111

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.33. Tax Administration Act, 2011: Amendment of section 134

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.34. Tax Administration Act, 2011: Amendment of section 139

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.35. Tax Administration Act, 2011: Amendment of section 141

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.36. Tax Administration Act, 2011: Amendment of section 191

Paragraph (a): The proposed amendment aims to clarify that SARS may set-off refunds against the outstanding tax debt of the taxpayer as well as amounts outstanding in terms of customs and excise legislation, even if there is no outstanding tax debt. In such instances the full amount is then utilised towards customs and excise debt.

Paragraph (b): The proposed amendment aims to clarify when SARS may make an assessment based on an estimate if no return is submitted or required, i.e. only when a return is required and not submitted or a return is not required but payment is and has not been made.

2.37. Tax Administration Act, 2011: Amendment of section 210

It has emerged internationally that offshore structures and arrangements are being designed in an attempt to circumvent financial account reporting under the OECD's

Common Reporting Standard (“CRS”). The standard is used for the exchange of financial account information between countries. Subject to the approval of the Minister, the OECD’s model *Mandatory Disclosure Rules* are to be implemented in South Africa in proposed new CRS regulations. These will be issued in respect of the OECD *Standard for Exchange of Financial Account Information in Tax Matters* under section 257 read with paragraph (a) of the definition of “international tax standard” in section 1 of the Act. The *Mandatory Disclosure Rules* will require certain persons to report such structures and arrangements, and the proposed amendment of section 210 aims to enforce this reporting obligation by means of similar penalties to those currently in force for non-compliance with the reportable arrangement scheme under the Act.

2.38. Tax Administration Act, 2011: Amendment of section 212

See note on section 210 above.

2.39. Tax Administration Act, 2011: Amendment of section 223

The proposed amendment is a technical correction to effect clarity.

2.40. Tax Administration Act, 2011: Amendment of section 234

The proposed amendment clarifies that any document required to be submitted under a tax Act to SARS that is erroneous, incomplete or false, is subject to criminal sanction under section 235.

2.41. Tax Administration Act, 2011: Amendment of section 240A

The proposed amendment is a consequential to the coming into effect of the Legal Practice Act, 2014.

2.42. Tax Administration Act, 2011: Amendment of section 246

The proposed amendment is a consequential to the coming into effect of the Legal Practice Act, 2014.

2.43. Tax Administration Act, 2011: Amendment of section 256

The proposed amendments update the provisions relating to a taxpayer's tax compliance status to take account of recent system developments that speed up the process. It furthermore enables the Commissioner to, by public notice, insert a *de minimis* for the amount of outstanding tax debt that will contribute to a taxpayer's tax compliance status as being indicated as non-compliant.

2.44. Tax Administration Act, 2011: Amendment of section 262

The proposed amendment is a consequential to the coming into effect of the Legal Practice Act, 2014.

2.45. Short title and commencement

The clause makes provision for the short title of the proposed Act and provides that different provisions of the Act may come into effect on different dates.

3. CONSULTATION

The amendments proposed by this Bill were published on SARS' and National Treasury's websites for public comment. Comments by interested parties were considered. Accordingly, the general public and institutions at large have been consulted in preparing the Bill.

4. FINANCIAL IMPLICATIONS FOR STATE

An account of the financial implications for the State was given in the 2019 Budget Review, tabled in Parliament on 20 February 2019.

5. PARLIAMENTARY PROCEDURE

5.1. The State Law Advisers and the National Treasury and South African Revenue Service are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2. The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.