



**NATIONAL
TREASURY**

REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

SECURITIES TRANSFER TAX BILL, 2007



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INTRODUCTION

The Stamp Duties Act (“SDA”) caters for unlisted securities whereas the Uncertificated Securities Tax Act caters for listed securities. The dichotomy in events that give rise to the tax payable, results in anomalies and also complicates the administration of the tax/duties.

In view of the above, it is proposed that the rules both Acts governing listed and unlisted securities be merged into the proposed Bill to provide for the levying of a single tax in respect of any transfer of a listed or unlisted security. This merger will ensure that the rules governing both listed and unlisted securities are consistent. The proposed tax will be called the Securities Transfer Tax (“STT”). The basic premise is that Uncertificated Securities Tax will be the starting point, however the proposal will take into account unlisted securities taxable under the SDA.

CLAUSE 1

Definitions

This clause provides for a number of definitions of words and expressions used in the Bill.

“**close corporation**” means a “close corporation” as defined in section 1 of the Close Corporation Act, 1984 (Act No. 69 of 1984);

The proposed Act does not provide incentives for close corporations, which are to be phased out by the Department of Trade and Industry. However, current relief is provided for in the definition of “transfer” with regard to issues and liquidations. As a practical matter, the issuing of securities and liquidations probably constitutes the majority of transactions in which close corporations will be involved.

“**closing price**” means the closing price, on the date of the transaction or other manner of acquisition of a listed security, at which that security was traded on the exchange on which it is listed, as determined by that exchange on each day on which trade in that security occurs on that exchange: Provided that where the security was not traded on the date of the transaction or other manner of acquisition, the closing price of that security must be regarded as being the closing price on the last business

day, preceding the date of the transaction or other manner of acquisition, on which that security was traded on that exchange;

This definition is used to determine the price of a listed security where no consideration is declared or where a below market value consideration is declared.

“Commissioner” means the Commissioner for the South African Revenue Service;

“company” means any corporation or company incorporated, established or formed by or under any law;

The purpose of this definition is to cover all South African companies, as well as foreign companies listed on an exchange in the Republic. This definition however, excludes co-operatives.

“exchange” means an “exchange” as defined in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004), and licensed under section 10 of that Act;

“Income Tax Act” means the Income Tax Act, 1962 (Act No. 58 of 1962);

This definition is introduced for ease of reference.

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

- (a) a person (hereinafter referred to as the lender) lends a listed security to another person (hereinafter referred to as the borrower) in order to enable that borrower to effect delivery (other than to any lender in relation to that borrower, unless the borrower can demonstrate that the arrangement was not entered into for the purposes of the avoidance of tax and was not entered into for purposes of keeping any position open for more than 12 months) of that security within 10 business days after the date of transfer of that security from the lender to the borrower in terms of that arrangement;
- (b) that borrower in return contractually agrees in writing to deliver a listed security of the same kind and quality to that lender within a period of 12 months from the date of transfer of that security from the lender to the borrower in terms of that arrangement;
- (c) that borrower is contractually required to compensate that lender for any distributions in respect of the listed security which that lender would have been entitled to receive during that period had that arrangement not been entered into; and

(d) that arrangement does not affect the lender's benefits or risks arising from fluctuations in the market value of the listed security, but does not include an arrangement where the borrower has not—

- (i) on-delivered the listed security within the period referred to in paragraph (a); or
- (ii) returned the listed security contemplated in paragraph (b) to the lender within the period referred to in that paragraph;

“listed security” means any security that is listed on an exchange;

This definition is in line with the intended coverage of this Act, so as to distinguish between listed and unlisted securities.

“lowest price” means the lowest price, on the date of the transaction or other manner of acquisition of a listed security, at which that security was traded on the exchange on which it is listed, as determined by that exchange on each day on which trade in that security occurs on that exchange: Provided that where that security was not traded on the date of the transaction or other manner of acquisition, the lowest price of that security must be regarded as being the lowest price on the last business day, preceding the date of the transaction or other manner of acquisition, on which that security was traded on that exchange;

This definition is used to determine whether the consideration declared for a listed security is below market value.

“member” means any person who is an “authorised user” as defined in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004), providing such security services as the rules of the exchange permit including services in respect of the buying and selling of a listed security;

“Minister” means the Minister of Finance;

This definition is introduced for ease of reference.

“participant” means a person that holds in custody and administers a listed security or an interest in a listed security and that has been accepted in terms of section 34 of the Securities Services Act, 2004 (Act No. 36 of 2004), by a central securities depository as a participant in that central securities depository;

“person” includes—

- (a) any sphere of the Government of the Republic;
- (b) any body of persons (incorporated or unincorporated);
- (c) the estate of any deceased or insolvent person;

(d) any trust fund; and

(e) any portfolio comprised in any collective investment scheme in securities contemplated in Part IV of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

This definition is in line with the VAT Act definition. However, collective investment schemes have also been added to the definition (which is in line with the Income Tax Act treatment of portfolios of CISs).

“prescribed rate”, in relation to any interest payable in terms of the Securities Transfer Tax Administration Act, 2007, means such rate as the Minister may fix from time to time by notice in the *Gazette* in terms of section 80(1)(b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999): Provided that where the Minister fixes a new rate in terms of that Act, that new rate applies for the purposes of the Securities Transfer Tax Administration Act, 2007, from the first day of the second month following the date on which that new rate came into operation;

This definition is in line with the other Acts administered by the Commissioner for SARS.

“Republic” means the “Republic” as defined in section 1 of the Income Tax Act;

This definition is collateral to the clarification of the source rules for establishing whether a security is subject to the tax, i.e. listed on an exchange in the Republic (the JSE).

“security” means—

- (a) any share or depository receipt in a company;
- (b) any member’s interest in a close corporation; or
- (c) any right or entitlement to receive any distribution from a company or close corporation,

excluding the debt portion in respect of a share linked to a debenture;

This definition of “security” essentially acts as the base for the STT. It covers all share in a company, depository receipts and all members’ interests in a close corporation. These items form the majority of securities subject to the STT. As a general rule debts are outside the net. Interests in collective investment schemes in the form of unit trusts also fall outside the scope of the STT because a unit trust interest in a trust is not a share.

A right or entitlement to receive any distribution from a company or close corporation constitutes a security in its own right, e.g. the right to receive a dividend declared by a company. This means that the cession of dividend rights

would fall under the STT because the holder has the right to dividends. On the other hand, a right to manufactured dividends would fall outside the regime because no actual right to dividends exists (i.e. the person has a right only to an amount equal to a dividend).

Lastly, in the case of a linked unit, only the share portion (i.e. the non-debt portion) is subject to the STT.

“tax” means the tax payable in terms of this Act;

“transfer” includes the transfer, sale, assignment or cession, or disposal in any other manner, of a security or the cancellation or redemption of that security, but does not include—

- (a) any event that does not result in a change in beneficial ownership;
- (b) any issue of a security; or
- (c) a cancellation or redemption of a security if the company which issued the security is being wound up, liquidated or deregistered or its corporate existence is being finally terminated;

The transfer of a security is the trigger for STT. The definition of “transfer” makes it clear that a transfer means a transfer in the normal sense and is expanded by including events such as assignments, cessions, the cancellation and redemption of a security. The concept of transfer relates to economic ownership, as opposed to the mere registration of a security as in the case of a share registered in the name of a nominee. For that reason transfer excludes any event that does not result in a change in beneficial ownership.

There is a specific exclusion for the issue of securities. This exclusion encourages company formations and equity financing. The cancellation or redemption of a security on liquidation, deregistration or final termination of a company is also excluded from the concept of transfer.

“unlisted security” means any security other than a listed security.

This definition is in line with the intended coverage of this Act, which covers both listed and unlisted securities.

CLAUSE 2

Imposition of tax

Subclause 1

This subclause provides that a tax, to be known as the securities transfer tax, must be levied and paid for the benefit of the National Revenue Fund, in respect of every transfer of any security issued by—

(a) a company or close corporation incorporated, established or formed inside the Republic; or

(b) a company incorporated, established or formed outside the Republic and listed on an exchange,

at the rate of 0,25 per cent of the taxable amount of the security.

This subclause determines the scope of the tax on the transfer of listed and unlisted securities. It covers all South African companies as well as foreign companies listed on an exchange in the Republic (i.e. JSE).

Subclause 2

This subclause provides that the Minister may announce the reduction of the rate mentioned in subclause (1) as well as a change in the provisions of the STTA that will have the effect of exempting the transfer of any security from securities transfer tax.

Subclause 3

This subclause provides that if the Minister makes the announcement referred to in subclause (2), that reduction or change comes into effect on the date announced and continues to apply for a period of six months from that date, unless Parliament passes legislation giving effect to that announcement within the six months.

CLAUSE 3

Purchase of listed securities through or from member

Subclause 1

This subclause provides that the taxable amount in respect of any transfer as a result of every purchase of a listed security through the agency of or from a member is the consideration for which that security is so purchased.

Subclause 2

This subclause provides that the member is liable for the tax payable in respect of a transfer of a listed security referred to in this clause.

CLAUSE 4

Transfer of listed securities effected by participant

Subclause 1

This subclause provides that the taxable amount in respect of any transfer of a listed security effected by a participant, other than pursuant to a purchase from or through a member of the JSE is—

- (a) where that security is a security referred to in paragraph (a) of the definition of “security”—
 - (i) the amount declared as consideration in respect of that security, by the person who acquires that security; or
 - (ii) if no amount is declared or the amount so declared is less than the fair market value of the listed security, the ruling price of the security one day prior to the date on which the transfer of the security is effected by the participant.
- (b) where that security is a security referred to in paragraph (c) of the definition of “security”, the greater of—
 - (i) the amount of the consideration declared by the person who acquires that security; or
 - (ii) the market value of that security on the date of acquisition.

Subclause 2

The participant who effects the transfer on behalf of the beneficial owner is liable for the tax payable in respect of the transfer of the listed security.

CLAUSE 5

Other transfers of listed securities

Subclause 1

This subclause provides that the taxable amount in respect of transfers, other than pursuant to a purchase from or through a member of the JSE or a transfer effected by a participant, is—

- (a) where that security is a security referred to in paragraph (a) of the definition of “security”—
 - (i) the amount declared as consideration in respect of that security by the person who acquires that security; or
 - (ii) if no amount is declared or the amount so declared is less than the lowest price of the listed security, the ruling price of

- the security on the date on which the transfer of the security is effected by the participant.
- (b) where that security is a security referred to in paragraph (c) of the definition of “security”, the greater of—
- (i) the amount of the consideration declared by the person who acquires that security; or
 - (ii) the market value of that security on the date of acquisition.

This subclause protects the STT base against transfers of listed securities that take place outside the ambit of brokers and participants.

Subclause 2

The person to whom the listed security is transferred is liable for the tax payable. (Note that this includes transfers in whatever form, and as such includes changes in sub-accounts of foreign nominee companies.)

Subclause 3

The tax payable must be paid through a member or participant holding the listed security in custody.

CLAUSE 6

Transfer of unlisted securities

Subclause 1

This subclause provides that the taxable amount in respect of every transfer of an unlisted security is—

- (a) the amount or market value of the consideration given or, where no consideration is given or the consideration is less than the market value of that security, the market value of that security; and
- (b) in the case of the cancellation or redemption of an unlisted security, the market value of that security immediately prior to the cancellation or redemption: Provided that the market value must be determined as if that security was never cancelled or redeemed.

Subclause 2

The company which issued the unlisted security is liable for the tax payable in respect of any transfer of that unlisted security.

This clause provides for the taxation of any transfer that relates to unlisted securities. Reliance on market value is consistent with the rules for listed shares.

CLAUSE 7

Tax recoverable from person to whom security is transferred

Subclause 1

This subclause provides that in respect of a listed security, a member or participant may recover the amount of the tax payable by that member or participant from the person—

- (a) to whom the listed security is transferred; or
- (b) that cancels or redeems the listed security.

Subclause 2

This subclause provides that in respect of an unlisted security, the company which issued that security may recover the amount of tax payable by the company in respect of the transfer from the person to whom that security is transferred.

This clause provides for the recovery of tax from the person who acquires the security in respect of both listed and unlisted securities.

CLAUSE 8

Exemptions

Subclause 1

With the merger of the securities aspect of the Stamp Duties Act and Uncertificated Securities Act, the exemptions applicable to the transfer of a security (listed and unlisted) are as follows:

Corporate reorganisation exemptions

- (a) if the security is transferred to a person in terms of the following sections of the Income Tax Act:
 - (i) in terms of an asset-for-share transaction referred to in section 42 of that Act;
 - (ii) in terms of an amalgamation transaction referred to in section 44 of that Act;
 - (iii) in terms of an intra-group transaction referred to in section 45 of that Act;

- (iv) in terms of an unbundling transaction referred to in section 46 of that Act;
- (v) in terms of a liquidation distribution referred to in section 47 of that Act; or
- (vi) in terms of any transaction which would have constituted a transaction or distribution referred to—
 - (A) in subparagraphs (i) to (v) regardless of whether or not an election has been made for the provisions of the relevant section to apply;
 - (B) in subparagraph (i) or (iii) regardless of the market value of the asset disposed of in exchange for that security; or
 - (C) in subparagraphs (i) to (v) regardless of whether or not that person acquired that security as a capital asset or as trading stock,

where the public officer of the relevant company has made a sworn affidavit or solemn declaration that the acquisition of that security complies with the provisions of this paragraph;

Securities lending transactions

- (b) if the transfer is from a lender to a borrower, or *vice versa*, in terms of a lending arrangement and the person to whom that security has been transferred, has certified to the participant that the transfer is in terms of that lending arrangement;

Transfer between pension funds

- (c) if the transfer is from a pension fund to another pension fund both of which are registered under the Pension Funds Act, 1956 (Act No. 24 of 1956), and that change is made in pursuance of a scheme referred to in section 14(1) of that Act;

Transfer to a public benefit organisation

- (d) if that security is transferred to a public benefit organisation which is exempt from income tax in terms of section 10(1)(cN) of the Income Tax Act, if the tax thereon would be legally payable and borne by that public benefit organisation;

Transfer to an institution, board or body

- (e) if that security is transferred to an institution, board or body, which is exempt from income tax in terms of the provisions of section 10(1)(cA)(i) of the Income Tax Act, which has as its sole or principal object the carrying on of any public benefit activity referred to in section 30 of that Act, if the tax thereon would be legally payable and borne by that institution, board or body;

Interest in a collective investment scheme

- (f) to the extent that the security is a participatory interest in a collective investment scheme regulated in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

Generally collective investment schemes are outside the net because they operate in the form of unit trusts, i.e. they are not shares. This exemption ensures that STT does not apply even if collective investment schemes operate in a company form.

Transfer, in accordance with a will, to a trust beneficiary

- (g) if that security is transferred to a beneficiary entitled thereto under a trust created in accordance with a will;

Testamentary succession or redistribution of assets

- (h) if the person who acquires that security is an heir or a legatee who has acquired that security *ab intestatio* or by way of testamentary succession or as a result of a redistribution of the assets of a deceased estate in the process of liquidation;

Acquisition by a spouse on commencement of a marriage in community of property

- (i) if the person to whom that security is transferred is a spouse in a marriage in community of property who acquires an undivided half-share in that security by operation of law by virtue of the contraction of such marriage, if that security was acquired by the other spouse prior to the date of that marriage;

Transfer to surviving or divorced spouse

- (j) if the person to whom that security is transferred is a surviving or divorced spouse who acquires a security from his or her deceased or divorced spouse where that security is transferred to that surviving or divorced spouse as a result of the death of his or her spouse or dissolution of their marriage or union;

Transfer to any sphere of Government

- (k) if that security is transferred to any sphere of the Government of the Republic or to any sphere of the government of any other country;

Water services provider

- (l) if that security is transferred to any “water services provider” as defined in section 1 of the Income Tax Act;

Regional electricity distributor

(m) if that security is transferred to any “regional electricity distributor” as defined in section 1 of the Income Tax Act, until 1 January 2014 or a later date that may be determined by the Minister by Notice in the *Gazette*;

Transactions subject to transfer duty

(n) if that security is an unlisted security which in terms of the Transfer Duty Act, 1949 (Act No. 40 of 1949), constitutes a transaction for the acquisition of property that is subject to transfer duty;

This exemption prevents any double taxation of securities, i.e. the imposition of both STT and Transfer Duty.

Share in a share block company

(o) if that security is a share in a “share block company” as defined in section 1 of the Share Block Control Act, 1980 (Act No. 59 of 1980), which confers a right to or an interest in the use of immovable property;

This exemption prevents any double taxation of securities, i.e. the imposition of both STT and Transfer Duty/Value-Added Tax.

Transfer to traditional councils

(p) if that security is transferred to any traditional council as referred to in the Communal Land Rights Act, 2004 (Act No. 11 of 2004), until a date that may be determined by the Minister by Notice in the *Gazette*; or

Transfer to a member for own benefit

(q) if the person to whom that security is transferred is a member who has purchased the security for that person’s own account and benefit.

Subclause 2

This subclause provides that the Commissioner may prescribe any declaration to be submitted by any person to the participant in respect of any security referred to in subclause (1)

Subclause 3

This subclause provides that no exemption applies in respect of any transfer of any security referred to in subclause (1) unless a declaration in respect of that security is lodged with a participant.

CLAUSE 9

Schemes for obtaining undue tax benefits

This clause provides that whenever the Commissioner is satisfied that any transaction, operation or scheme has the effect that any person obtained a tax benefit (as defined), and was entered into or carried out in a specified manner or has created certain rights or obligations, for the purpose of obtaining a tax benefit, the Commissioner must determine the liability for tax, penalties and interest imposed by this Act and the Securities Transfer Tax Administration Act, 2007, as if it has not been carried out or as he deems appropriate.

Any decision of the Commissioner under this clause is subject to objection and appeal.

CLAUSE 10

Effect of certain exemptions from taxes

This clause provides that no exemption provided for by any other law will apply to the tax payable under this Act.

There are many Acts that provide for miscellaneous exemptions. This clause clarifies that this Act is the sole Act that governs STT.
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CLAUSE 11

Repeal of Act

This clause provides for the repeal of the Uncertificated Securities Tax Act, 1998. It further provides that the provisions of the Uncertificated Securities Tax Act, 1998, continue to apply in respect of any change in beneficial ownership in any security before the date of the repeal as if that Act had not been repealed.

CLAUSE 12

Short title and commencement

This clause provides that the Bill is to be called the Securities Transfer Tax Act, 2007, and that it will come into operation on 1 July 2008.