MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2023

1. PURPOSE OF BILL

The Tax Administration Laws Amendment Bill, 2023 (the ''Bill''), proposes to amend the following Acts:

- The Income Tax Act, 1962 (Act No. 58 of 1962) (the ''Income Tax Act'');
- the Customs and Excise Act, 1964 (Act No. 91 of 1964) (the ''Customs and Excise Act'');
- the Value-Added Tax Act, 1991 (Act No. 89 of 1991) (the ''Value-Added Tax Act'');
- the Mineral and Petroleum Resources Royalty (Administration) Act, 2008 (Act No. 29 of 2008) (the ''Mineral and Petroleum Resources Royalty (Administration) Act''); and
- the Tax Administration Act, 2011 (Act No. 28 of 2011) (the ''Tax Administration Act'').

2. OBJECTS OF BILL

2.1 Income Tax Act: Amendment of section 3

Section 6*quat*(5) of the Income Tax Act provides that notwithstanding the prescription provisions contained in the Tax Administration Act for the issuing of a reduced or additional assessment, an additional or reduced assessment may be made in respect of a year of assessment to take account of a rebate or deduction in respect of foreign taxes paid by the taxpayer (in terms of subsections (1) or (1A)) within a period that does not exceed six years from the date of the original assessment in respect of that year. If the Commissioner for example, decides not to issue the reduced assessment, the taxpayer may object against the original assessment within the time-periods allowed in section 104 of the Tax Administration Act, read with the dispute resolution rules issued in terms of section 103 of the Act.

Section 104(4) of the Tax Administration Act provides that a senior official of the South African Revenue Service (''SARS'') may extend the period prescribed in the rules within which an objection must be made if satisfied that reasonable grounds exist for the delay in lodging the objection. However, section 104(5) of the Act provides, *inter alia*, that the period for objection must not be so extended if more than three years have lapsed from the date of assessment or the decision under section 104(2) of the Act. In order to address the situation where SARS decides not to issue a reduced assessment under section 6*quat* of the Income Tax Act and the taxpayer is out of time to object against the original assessment, it is proposed that the decision not to issue a reduced assessment as aforesaid be included as a decision that may be objected to or appealed against under section 3 of the Act, read with section 104(2)*(c)* of the Tax Administration Act.

The same scenario will apply with regards to a decision by SARS not to issue a reduced assessment in terms of section 11D(20) of the Income Tax Act, hence this provision is also included in the proposed amendment to section 3 of the Act.

2.2 Income Tax Act: Amendment of section 6*quat*

Section 6*quat*(5) of the Income Tax Act provides that notwithstanding the prescription provisions contained in the Tax Administration Act, for the issuing of a reduced or additional assessment, an additional or reduced assessment may be made in respect of a year of assessment to take account of a rebate or deduction in respect of foreign taxes paid (in terms of subsection (1) or (1A)) within a period that does not exceed six years from the date of the original assessment in respect of that year. This section provides an additional basis for a reduced assessment other than that envisaged in section 93 of the

Tax Administration Act. The proposed amendment aims to clarify this position.

2.3 Income Tax Act: Amendment of section 10

The Mutual Evaluation Report of South Africa adopted by the Financial Action Task Force (''FATF MER'') in October 2021, identified a wide range of technical deficiencies in South Africa's Anti-Money Laundering, Countering Terrorism Financing and Countering the Financing of Proliferation (''AML/CTF/CFP'') regime and adopted an action plan for South Africa to address deficiencies.

In order to give effect to the National Strategy on AML/CTF/CFP, developed as a response to the FATF MER, and give effect to the action plan, Parliament adopted the legislative changes in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, 2022 (the ''GLA Act''). The GLA Act amended the Companies Act, 2008 (Act No. 71 of 2008), Nonprofit Organisations Act, 1997 (Act No. 71 of 1997) (''NPO Act''), and Trust Property Control Act, 1988 (Act No. 57 of 1988), by, *inter alia*, requiring certain non-profit organisations (''NPOs'') to require disclosure of beneficial ownership (''BO'') and provide for additional grounds for a person to be appointed or continue to act as a director, office-bearer of a registered NPO or trustee or to be disqualified from being so appointed or continuing to act in such capacity.

In order to align with the National Strategy on AML/CTF/CFP and achieve consistency with the GLA Act, amendments are inserted in the Income Tax Act to provide for similar grounds for disqualification for tax exempt associations, including persons to be appointed or continuing to act as an office-bearer of an organisation approved as a tax-exempt entity and for the removal of disqualified office-bearers.

2.4 Income Tax Act: Amendment of section 11D

The proposed amendment aims to align the wording used in section 11D of the Income Tax Act with that used in other sections of the Act, for example section 6*quat*(5), dealing with instances where the Commissioner may issue a reduced or additional assessment after the prescribed periods as stipulated in the Tax Administration Act, have lapsed.

2.5 Income Tax Act: Amendment of section 12I

The proposed amendment aims to align the wording in section 12I(14) of the Income Tax Act with that proposed for section 6*quat*(5) of the Act, dealing with instances where the Commissioner may issue a reduced or additional assessment after the periods for prescription, as stipulated in the Tax Administration Act have lapsed.

2.6 Income Tax Act: Amendment of section 30

Paragraph *(a)*: Public benefit organisations, recreational clubs and certain dedicated associations are all generally engaged in activities of either a benevolent or supportive nature with a sole or principal object of prioritising the needs, interests and well-being of the general public, group of persons or contributing members.

As such, these entities all enjoy a special tax benefit in an effort by Government to support these shared responsibilities for the social and developmental needs of the country. The tax benefit is structured as a partial or complete exemption from income tax on the receipts and accruals of these entities and in certain instances as a tax deduction for the originators of the funding to these entities.

In order to ensure that the above-mentioned tax benefit obtained in respect of these entities are utilised for its intended purpose, Government requires stringent accountability and stricter governance, including requirements that the establishment must have at least three unconnected persons who accept fiduciary responsibility and that no single person may directly or indirectly control the decision-making powers of the entity.

At issue is the application of interpretation on the word ''person'' and whether the fiduciary requirements of these entities refer to a natural person or a juristic person.

Section 30C of the Income Tax Act already makes the distinction between natural or juristic persons as it relates to fiduciary responsibility for small business funding entities. Hence, it is proposed that the legislation be amended to clarify that only natural persons can accept the fiduciary responsibility for public benefit organisations, recreational clubs and certain dedicated associations.

Paragraphs *(b)* to *(e)*: Refer to the proposed amendment to section 10 of the Income Tax Act above. It should also be noted that, should a public benefit organisation appoint a disqualified person and fail to remedy such non-compliance upon notification by the Commissioner, the Commissioner may withdraw the approval of the public benefit organisation as provided under section 30 of the Act.

2.7 Income Tax Act: Amendment of section 30A

Paragraph *(a)*: Refer to paragraph *(a)* of the proposed amendment to section 30 of the Income Tax Act, above.

Paragraphs *(b)* to *(e)*: Refer to the proposed amendment to section 10 of the Income Tax Act, above. It should also be noted that, should a recreational club appoint a disqualified person and fail to remedy such non-compliance upon notification by the Commissioner, the Commissioner may withdraw the approval of the club as provided under section 30A of the Act.

2.8 Income Tax Act: Amendment of section 30B

Paragraph *(a)*: Refer to paragraph *(a)* of the proposed amendment to section 30 of the Income Tax Act, above.

Paragraphs *(b)* to *(e)*: Refer to the proposed amendment to section 10 of the Income Tax Act, above. It should also be noted that, should an association appoint a disqualified person and fail to remedy such non-compliance upon notification by the Commissioner, the Commissioner may withdraw the approval of the association as provided under section 30B of the Act.

2.9 Income Tax Act: Amendment of section 30C

Refer to the proposed amendment to section 10 of the Income Tax Act, above. It should also be noted that, should a small business funding entity appoint a disqualified person and fail to remedy such non-compliance upon notification by the Commissioner, the Commissioner may withdraw the approval of the small business funding entity as provided under section 30C of the Act.

2.10 Income Tax Act: Insertion of Part IA in Chapter III

The implementation of an advance pricing agreement (''APA'') programme is in keeping with international trends, e.g. Action 14 of the OECD/G20's Base Erosion and Profit Shifting Action Plan, and the recommendations of the Davis Tax Committee. An APA programme will provide taxpayers with a greater level of certainty when embarking on large-scale international transactions that have transfer pricing implications. This is in line with SARS'

first strategic objective of providing clarity and certainty to taxpayers to promote voluntary compliance and complements SARS' advance tax rulings system, which provides rulings on the tax implications of proposed domestic transactions.

SARS released a discussion paper on an APA programme for public comment in November 2020, followed by the release of a high-level model and draft legislation in December 2021. The proposed legislation seeks to introduce the enabling framework for the APA programme. The framework is inserted in the Income Tax Act, in the light of its close relationship with section 31 and other provisions of the Act. It deals with persons eligible to apply for APAs, fees, pre-application consultation, content of applications, amendment and withdrawal of applications, criteria for rejecting applications, processing of applications, finalisation of APAs, annual compliance reports, extension of APAs, termination of APAs, record keeping and the Commissioner's power to prescribe procedures and guidelines for the implementation of the programme. It also provides for consultation with affected treaty partners at key points of the process.

As the APA programme will require scarce resources, it is envisaged that the programme will commence with a pilot shortly after the legislative framework has been put in place. It is currently envisaged that the pilot will initially only accept bilateral APA applications, which will allow for learning from other jurisdictions and the managed expansion of capacity before SARS extends the programme. The proposed framework provides a degree of flexibility in eligibility criteria and implementation in that most of the detail will be dealt with in subordinate legislation. This also enables the expansion of the programme to other types of APAs over time.

2.11 Income Tax Act: Amendment of section 89*bis*

Paragraph 22 of the Fourth Schedule to the Income Tax Act was repealed by section 60(1) of the Revenue Laws Amendment Act, 2002 (Act No. 74 of 2002). The reference in section 89*bis* of the Act to paragraph 22 of the Fourth Schedule must therefore be deleted.

2.12 Income Tax Act: Amendment of paragraph 13 of First Schedule

Paragraph 13 of the First Schedule provides that the cost of livestock purchased by farmers in certain instances shall be allowed, at the option of such farmer, as a deduction in the determination of the farmers taxable income for the year of assessment during which the livestock was so sold, provided the claim for such deduction is made within five years or 10 years after the close of that year of assessment as the case may be. Paragraph 13(6) provides that the Commissioner may, notwithstanding the prescription provisions contained in the Tax Administration Act, for the issuing of a reduced or additional assessment, raise an assessment for any year of assessment with respect to which a deduction in terms of this paragraph is allowed. This section provides an additional basis for a reduced assessment other than that envisaged in section 93 of the Tax Administration Act. The proposed amendment aims to clarify this position.

2.13 Income Tax Act: Amendment of paragraph 2 of Fourth Schedule

Paragraph *(a)*: The proposed amendment widens the employees' tax (''PAYE'') deduction obligation to include a non-resident employer that conduct business through a permanent establishment in the Republic, and then also widens the deduction obligation to include all representative employers.

Paragraph *(b)*: The proposed amendment is a textual correction.

2.14 Income Tax Act: Amendment of paragraph 9 of Fourth Schedule

As a result of the amendments to section 10(1)*(o)*(ii) of the Income Tax Act (which amendments became effective on 1 March 2020) employers may, in terms of paragraph 10 of the Fourth Schedule to the Act, request the Commissioner (by applying for an IRP3q tax directive) to vary the basis (as provided in paragraph 9 of the Fourth Schedule) for determining the amount of PAYE to be deducted or withheld from the employees' remuneration to take into account foreign taxes paid. The PAYE to be deducted or withheld by that employer in terms of paragraph 2 of the Fourth Schedule shall, subject to the provisions of paragraph 11 of the Fourth Schedule and section 95 of the Tax Administration Act, be determined accordingly.

Paragraph 9, in turn, states that the Commissioner may from time to time prescribe deduction tables applicable, and the manner in which such tables must be applied and indicates that the PAYE to be deducted from any remuneration must, subject to the provisions of paragraph 10 and 11 and section 95 of the Tax Administration Act, be determined in accordance with such tables.

In terms of paragraph 11A(4), where the remuneration includes section 8C share gains, the employer must, before deducting the PAYE payable on the gain, ascertain from the Commissioner the amount to be so withheld (by applying for an IRP3s tax directive). Given the amendments to section 10(1)*(o)*(ii), as stated above, employers may, in terms of paragraph 10, request a variation in the employees' tax withholding (by applying for an IRP3q tax directive) to take into account foreign taxes paid.

However, under the current wording of paragraphs 9 and 10, such a variation does not apply to withholding required under paragraph 11A (namely, share gains under section 8C of the Income Tax Act) and the foreign taxes paid in respect of section 8C gains cannot be taken into account for purposes of determining the tax due on the gain. This could result in cash flow implications for the affected employees (as they will only be entitled to claim a foreign tax credit at the time of completing their ITR12s). The proposed amendment aims to rectify this situation.

2.15 Income Tax Act: Amendment of paragraph 10 of Fourth Schedule

See the note on the amendment of paragraph 9 of the Fourth Schedule to the Income Tax Act.

2.16 Income Tax Act: Amendment of paragraph 20 of Fourth Schedule

The proposed amendment is a technical correction.

2.17 Customs and Excise Act: Amendment of section 7A

The proposed amendment relates to the announcement in the 2023 Budget Review that provision will be made for a single window concept in relation to the collection of advance passenger and passenger name record information. Because the Department of Home Affairs collects this type of information and an agreement between SARS and the Department of Home Affairs relating to the sharing of such information is anticipated, the amendment aims to exempt an operator from the obligation to transmit the relevant information to the Commissioner if the operator has submitted it to the Department of Home Affairs who, in terms of an agreement contemplated in section 2(1A) of the Customs and Excise Act, shared such information with SARS. Provision is also made for the Commissioner to prescribe rules to facilitate the exemption, which rules will inter alia provide for notification by SARS to the operator if for some reason the information was not received from the Department of Home Affairs.

Furthermore, the concept of ‘‘passenger data’’ is introduced. Passenger data, in terms of the amendment, comprises advance passenger information, as well as passenger name record information collected by operators. The proposed amendment also expands the requirement of transmission of passenger data to operators of conveyances as may be prescribed.

Currently, section 7A of the Act focuses on advance passenger information that only becomes available during the check-in process, provision is now also made to include passenger name record information that relates to the passenger booking made on the reservation system of the operator.

2.18 Customs and Excise Act: Amendment of section 15

The proposed amendment relates to the announcement in the 2023 Budget Review concerning SARS' new online traveller management system. The amendments are aimed at making provision for travellers to submit a traveller declaration in accordance with requirements determined by the Commissioner by rule, either prior to or upon entering or leaving the Republic. Provision is also made for the exclusion of certain persons by rule. The proposed amendment further clarifies that foreign or local currency or bearer negotiable instruments in excess of a threshold prescribed in terms of section 30 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), must be declared.

This amendment is related to the proposed amendment of section 120 of the Customs and Excise Act, that deals with the Commissioner's authority to make rules concerning various aspects relating to the traveller declaration.

2.19 Customs and Excise Act: Amendment of section 39

The proposed amendment relates to the announcement in the 2023 Budget Review that provision will be made in the Customs and Excise Act, to enable the Commissioner to prescribe rules providing for conditions under which deferment of duties will be allowed. This proposed amendment ties in with an amendment to section 120 of the Act that sets out the various matters in relation to deferment that the Commissioner may prescribe by rule.

2.20 Customs and Excise Act: Amendment of section 76

The proposed amendment relates to the announcement in the 2023 Budget Review concerning the liquidation of provisional payments that serve as security. Currently, there are no provisions in the Customs and Excise Act for the liquidation of provisional payments that serve as security, and the proposed amendment now includes in the refund process provided for in section 76, provisional payments lodged in terms of section 107(2)*(a)* where goods under customs control are allowed to pass from such control, as well as provisional payments in respect of anti-dumping, countervailing or safeguard duties in terms of section 57A, in circumstances set out in section 57A(4) or (5).

This proposed amendment ties in with the proposed amendment to section 120 of the Act that provides for the Commissioner to make rules to further enhance the current processes and procedures relating to liquidation of provisional payments.

2.21 Customs and Excise Act: Amendment of section 101B

The proposed amendment relates to the announcement in the 2023 Budget Review concerning the establishment of a single window for advance passenger information and passenger name record data. It aims to align the meaning of ‘‘personal information’’ with the definition of the term in the Protection of Personal Information Act, 2013.

2.22 Customs and Excise Act: Amendment of section 120

The proposed amendments are consequential to the proposed amendments to sections 15, 39 and 76 of the Customs and Excise Act and are intended to empower the Commissioner to make rules relating to various matters dealt with in those sections.

Paragraph *(a)*: The proposed insertion of subsection (1)*(c*A*)* aims to empower the Commissioner to make rules relating to various aspects of the implementation of SARS' new traveller management system, including the information to be reflected on the declaration, requirements for submission (which may vary depending on the mode of travel), the process of informing a traveller of how to proceed upon arrival at a place of entry or exit and assistance to travellers by means of traveller kiosks or officers with hand held devices. Other aspects to be dealt with relate to the information to be declared in relation to goods contemplated in section 15(1)*(a)* and *(b)*, the entry of commercial goods and goods exceeding the duty-free allowance, the payment of duties and the sharing by SARS of relevant information with the Financial Intelligence Centre as a measure to combat illicit financial activity.

Paragraph *(b)*: The proposed insertion of subsection (1)*(e*A*)* aims to empower the Commissioner to make rules relating to the requirements for applications for deferment, including the conditions for approval, payment of deferment accounts and deferment limits, the amendment of deferment limits, payment dates, amount of security required and suspension and cancellation of accounts.

Paragraph *(c)*: The proposed amendment to subsection (1)*(m*A*)* aims to empower the Commissioner to regulate the process for liquidation of security lodged in the form of a provisional payment, including the circumstances in which the Commissioner may initiate the liquidation process and the circumstances in which a provisional payment may accrue to the National Revenue Fund.

2.23 Value-Added Tax Act: Amendment of section 45

The proposed amendment is a consequential amendment as section 44(1) of the Value-Added Tax Act was repealed by section 271, read with paragraph 133 of Schedule 1, of the Tax Administration Act.

2.24 Mineral and Petroleum Resources Royalty (Administration) Act: Amendment of section 19

The proposed amendment is a consequential amendment to the proposed amendments to sections 3 and 4 of the Mineral and Petroleum Resources Royalty Act, 2008, contained in the Taxation Laws Amendment Bill, 2023, once enacted.

2.25 Tax Administration Act: Amendment of section 1

A definition of ''beneficial owner'' of a company, trust and partnership is inserted in order to align with the National Strategy on AML/CTF/CFP in developing a national integrated, interoperable and harmonised BO framework, comprising of BO registries and other sources to provide timely access to law enforcement and other competent authorities, including SARS, to reliable legal ownership and BO information in line with the FATF BO standards and Immediate Outcome 5 of the FATF MER action plan. This definition also seeks to achieve consistency with the GLA Act and to take account of other developments related to the FATF MER on South Africa, including commitments by SARS, and the consequent increased monitoring (''grey listing'') of South Africa by FATF in view of the country's deficiencies in its AML/CTF/CFP controls and the consequent higher risk of money laundering and terrorism financing being facilitated in South Africa through

legal entities such as companies, legal arrangements such as trusts and partnerships and associations such as NPOs.

BO is also crucial for tax administration because it helps to ensure transparency and accountability in financial transactions. By identifying the individuals who ultimately benefit from an asset or income, tax authorities can accurately determine tax liabilities and prevent tax evasion, which information may also assist other competent authorities in the investigation of money laundering, and other illicit activities. Furthermore, BO information facilitates international cooperation and exchange of tax-related information among jurisdictions. This cooperation is crucial in detecting and addressing cross-border tax evasion and ensuring that taxpayers fulfil their obligations in the appropriate jurisdictions.

2.26 Tax Administration Act: Amendment of section 69

In terms of the Tax Administration Act SARS may disclose a list of public benefit organisations approved in terms of sections 18A and 30 of the Income Tax Act. Approval to issue receipts for tax deductible donations in terms of section 18A of the Act may be granted to a broader range of entities than public benefit organisations. The proposed amendments explicitly empower SARS to disclose all entities with a section 18A approval.

2.27 Tax Administration Act: Amendment of section 70

The proposed amendment allows the disclosure of taxpayer information to the Companies and Intellectual Property Commission, the Master of the High Court and the NPO Directorate for purposes of duties and functions under the Companies Act, 2008, Trust Property Control Act, 1988, and Nonprofit Organisations Act, 1997, respectively, similar to such disclosures to the SARB, FIC and FSCA, to allow for the cross verification of beneficial ownership information under the beneficial ownership framework of the National AML/CTF/CFP Strategy.

2.28 Tax Administration Act: Amendment of section 80

The proposed amendment is a consequential amendment. Section 31 of the Income Tax Act was amended to include a reference to ‘‘associated enterprises’’ in addition to the reference to ‘‘connected persons’’ in the definition of an affected transaction. Hence, to ensure alignment with the amendment to section 31 of the Act, the cross-reference to ‘‘associated enterprise’’ needs to be added to the reference to connected person in section 80(1)*(a)*(iii) of the Tax Administration Act.

2.29 Tax Administration Act: Amendment of section 95

SARS may make an assessment based on an estimate where a taxpayer does not submit a return. The taxpayer may, within 40 days from the date of the assessment, request SARS to make a reduced or additional assessment by submitting a true and full return. The proposed amendment empowers the Commissioner to extend the period within which the taxpayer is required to make their request to SARS by public notice. This will allow the deadline for the request to be aligned with the close of the filing season for non-provisional taxpayers when it would otherwise have fallen earlier.

An amendment is also proposed to section 95(8) of the Act to clarify the intent of the amendment to this section by the Tax Administration Laws Amendment Act, 2021 (Act No. 21 of 2021).

2.30 Tax Administration Act: Amendment of section 246

Refer to the proposed amendment to section 10 of the Income Tax Act, above.

2.31 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 2023 Budget Review, tabled in Parliament on 22 February 2023.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers, the National Treasury and SARS 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 and Khoi-San Leaders in terms of section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities, nor any matter referred to in section 154(2) of the Constitution.

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