

MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2024

1. PURPOSE OF BILL

The Tax Administration Laws Amendment Bill, 2024 (the “Bill”), proposes to amend the following Acts:

- The Income Tax Act, 1962 (Act No. 58 of 1962);
- the Customs and Excise Act, 1964 (Act No. 91 of 1964);
- the Value-Added Tax Act, 1991 (Act No. 89 of 1991);
- the Tax Administration Act, 2011 (Act No. 28 of 2011); and
- the Tax Administration Laws Amendment Act, 2022 (Act No. 16 of 2022).

2. OBJECTS OF BILL

2.1 Clause 1: Amendment of section 30A of Income Tax Act, 1962

The proposed amendment aims to correct an incorrect cross-reference in this section.

2.2 Clause 2: Amendment of paragraph 1 of Fourth Schedule to Income Tax Act, 1962

Paragraph 2(5)(a)(i) of the Fourth Schedule refers to a person being registered as a provisional taxpayer under the provisions of paragraph 17(8). Paragraph 17(8) of the Fourth Schedule was deleted by the Tax Administration Laws Amendment Act, 2015. As such, no obligation to register as a provisional taxpayer exists. A taxpayer automatically becomes a provisional taxpayer if the taxpayer meets the requirements of the definition of provisional taxpayer. It is proposed that the obsolete reference to paragraph 17(8) be deleted, and that a labour broker in respect of which a certificate of exemption has been issued in terms of paragraph 2(5)(a), be specifically included in the definition of provisional taxpayer.

2.3 Clause 3: Amendment of paragraph 2 of Fourth Schedule to Income Tax Act, 1962

Paragraphs (a) and (b): The proposed amendment is consequential to the amendment of section 11(nA) by the Taxation Laws Amendment Bill, 2024.

Paragraph (c): See the note on the proposed amendment to the definition of “provisional taxpayer” in paragraph 1 of the Fourth Schedule.

2.4 Clause 4: Amendment of paragraph 19 of Fourth Schedule to Income Tax Act, 1962

The proposed amendment aims to correct an incorrect cross-reference.

2.5 Clause 5: Amendment of section 4 of Customs and Excise Act, 1964

The proposed amendment seeks to give effect to the Order of court made by the Constitutional Court in *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Services and others* [2023] ZACC 13, regarding measures to address the constitutional invalidity of certain provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), as well as provisions relating to secrecy of taxpayers’ information in the Tax Administration Act, 2011 (Act No. 28 of 2011). Although the Court’s findings did not directly pertain to the Customs and Excise Act, 1964, the Act also contains secrecy provisions relating to taxpayer information which are now adjusted accordingly.

2.6 Clause 6: Amendment of section 38 of Customs and Excise Act, 1964

The proposed amendment relates to the announcement in the 2024 Budget Review concerning the timeframes for the submission of certain export bills of entry. Section 38(3) provides that the Commissioner may allow a reasonable timeframe for the submission of bills of entry in respect of certain goods. The proposed amendment to this subsection aims firstly to ensure that prohibited and restricted goods in respect of which compliance with requirements has already taken place are not excluded from the Commissioner's discretion, and secondly to enable the Commissioner to determine the process for exercising the discretion provided for in subsection (3) by rule. An application process is foreseen which will ensure proper governance as well as facilitation of the export procedure for exporters that face legitimate challenges in relation to complying with the timeframe for submission of the export bill of entry.

2.7 Clause 7: Amendment of section 40 of Customs and Excise Act, 1964

The proposed amendment relates to the announcement in the 2024 Budget Review concerning the simplification of the process for the substitution of a bill of entry in certain circumstances dealt with in section 40(3)(a)(ii). No separate cancellation by way of a voucher of correction will be required in the circumstances set out in the provision and the substituting bill of entry will replace the previous bill of entry.

2.8 Clause 8: Amendment of section 69 of Customs and Excise Act, 1964

The proposed amendments are technical corrections aimed at removing references in section 69 to certain items in Section B of Part 2 of Schedule No. 1 to the Act, which were deleted from Schedule No. 1 to the Act some years ago when the *ad valorem* duties on recorded media and road tractors were abolished. The consequential amendments required to be made to this section were inadvertently not effected at the time of deletion of the items from the Schedule.

2.9 Clause 9: Amendment of section 14 of Value-Added Tax Act, 1991

In terms of the Value-Added Tax Act, 1991, VAT should be accounted for and is payable by the recipient of imported services within 30 days of the earlier of receipt of the invoice issued by the supplier or the recipient or the time any payment is made by the recipient in respect of that supply. In many instances it is impractical to comply with the 30-day time period. Failure to pay VAT within this timeframe will result in the imposition of penalties and interest. To address this concern, it is proposed that the 30-day time period be extended to 60 days.

2.10 Clause 10: Amendment of section 16 of Value-Added Tax Act, 1991

Prior to the introduction of the Tax Administration Act, 2011, the Value-Added Tax Act made specific provision for a refund of tax paid in excess of what was properly chargeable under the Value-Added Tax Act, 1991. While the Value-Added Tax Act, 1991, read with the Tax Administration Act, 2011, provides for a refund of an amount under an assessment of an amount erroneously paid, it does not adequately cater for a reduction in the amount of tax chargeable as result of a subsequent event in respect of the importation of goods by persons who are not registered as vendors or in respect of imported services where there is no assessment. The proposed amendment aims to correct this.

2.11 Clause 11: Amendment of section 23 of Value-Added Tax Act, 1991

Due to the wide definition of "enterprise", non-resident vendors may be required to register as vendors, despite not having any physical presence in

South Africa or having a very limited presence for a short period of time. These non-residents have difficulties in appointing a representative vendor who resides in South Africa and in opening a South African bank account, which is one of the requirements to register as a vendor. As a result, non-resident suppliers of electronic services were exempted from these requirements.

To facilitate engagement and compliance, the proposed amendment provides that electronic services suppliers shall be required to appoint a representative vendor, however the requirement that such vendor must reside in South Africa be waived, while maintaining the exemption from opening a South African bank account. Furthermore, it is recommended that this concession be afforded to non-resident vendors with no, or a limited, presence in South Africa in specified circumstances.

2.12 Clause 12: Amendment of section 44 of Value-Added Tax Act, 1991

Paragraph (a): See the note on the proposed amendment of section 23 above. The proposed amendment is consequential to the amendment of section 23.

Paragraph (b): See the note on the proposed amendment of section 16 above. The proposed amendment is consequential to the amendment of section 16.

2.13 Clause 13: Amendment of section 46 of Value-Added Tax Act, 1991

See the note on the proposed amendment of section 23 above. The proposed amendment is consequential to the amendment of section 23.

2.14 Clause 14: Amendment of section 1 of Tax Administration Act, 2011

The concept of a legal practitioner is frequently used throughout the Tax Administration Act, 2011, and it is proposed that a general definition aligned with the definition of the term in the Legal Practice Act, 2014, be inserted, to prevent the unnecessary duplication of wording in the Tax Administration Act, 2011.

2.15 Clause 15: Amendment of section 12 of Tax Administration Act, 2011

Paragraph (a): The proposed amendment will enable senior SARS officials who appear on behalf of SARS or the Commissioner in legal proceedings under a tax Act, to also appear in proceedings before the Supreme Court of Appeal and Constitutional Court, in addition to the High Court and tax court, as is currently the case.

Paragraph (b): The proposed amendment is a consequential amendment to the amendment of section 12(1).

Paragraph (c): *Addition of subsection (3)*: The proposed amendment provides that where a senior SARS official that is a duly admitted and enrolled legal practitioner appeared on behalf of SARS or the Commissioner in any proceedings in a High Court, Supreme Court of Constitutional Court, fees and costs may be taxed and recovered in the same manner as if such functions had been performed by a legal practitioner in private practice, as is the case for the State Attorney. Recovery of costs in the tax court for both SARS and the taxpayer is regulated by section 130 of the Act. In this regard also see the proposed amendment to section 130.

Addition of subsection (4): The proposed amendment provides that any costs awarded by a court under this section must be determined in accordance with the fees prescribed by the rules of the relevant court.

2.16 Clause 16: Amendment of section 42A of Tax Administration Act, 2011

The proposed amendment is consequential to the proposed amendment to section 111 of the Tax Administration Act, 2011.

2.17 Clause 17: Amendment of section 47 of Tax Administration Act, 2011

SARS may require a person to attend the offices of SARS to be interviewed by a SARS official concerning the tax affairs of a person. This would be the case where the interview is intended to clarify issues of concern to SARS that would render further verification or audit unnecessary or to expedite a current verification or audit. Hence, section 47 aims to shorten a verification or audit by providing a process to dispose of the matter through a face-to-face discussion. This avoids unnecessary correspondence and is beneficial to both taxpayers and SARS. The proposed amendment aims to expand the provision to also include instances where a taxpayer has applied for debt relief, so as to also resolve or expedite these proceedings. The legislation does not preclude the interviewee from being accompanied by a legal advisor. This is an existing common law right.

2.18 Clause 18: Amendment of section 51 of Tax Administration Act, 2011

The proposed amendment is consequential to the proposed amendment to section 111 of the Tax Administration Act, 2011.

2.19 Clause 19: Amendment of section 67 of Tax Administration Act, 2011

In *Arena Holdings (Pty) Limited t/a Financial Mail and Others v South African Revenue Service and Others* [2023] ZACC 13, the Constitutional Court made findings regarding the constitutional invalidity of certain provisions of the Promotion of Access to Information Act, 2000, as well as the Tax Administration Act, 2011. The court ordered that Parliament considers measures to address their constitutional validity and, in the meantime, the court ordered a “read in” to the relevant provisions of the Promotion of Access to Information Act, 2000, and those of the Tax Administration Act, 2011. The proposed amendment aims to address these measures and effect the necessary amendments to the affected legislation.

2.20 Clause 20: Amendment of section 69 of Tax Administration Act, 2011

See the notes on the proposed amendment of section 67 above.

2.21 Clause 21: Amendment of section 91 of Tax Administration Act, 2011

Concerns have been raised that the current legislative framework only covers certain types of original assessments by implication. The proposed amendments aim to further clarify the legislative framework in order to address this concern, in particular in the context of SARS’ “auto-assessments” of tax.

2.22 Clause 22: Amendment of section 104 of Tax Administration Act, 2011

Paragraph (a): Section 104(4) read with rule 7(3) and rule 52(2)(c) of the dispute resolution rules promulgated under section 103 of the Tax Administration Act, 2011, may create the impression that an extension can only be requested for cases that fall under section 104(4) and not those falling under section 104(5) of the Act. The proposed amendment aims to clarify this matter by aligning the wording of section 104 with that of section 107(2) of the Act. It is further proposed that the time period of the extension be aligned with the structure used in section 107 of the Act, which also makes provision for a maximum period of extension, and other limitations in the Act (see, for example, sections 9 and 99(1)).

Paragraph (b): Alternative dispute resolution proceedings can currently only be accessed at the appeal stage of a dispute, where they generally result in the resolution of the majority of appeals. In order to improve the efficiency of the dispute resolution process, the proposed amendment aims to also introduce alternative dispute resolution proceedings at the objection phase of the dispute. This proposal will allow for the earlier resolution of a tax dispute through improved engagements and the exchange of documents at the

objection stage of a dispute. The effective date for these provisions will be determined by the Minister by notice in the *Government Gazette*, in order to ensure operational and system readiness from SARS' side, before these provisions come into effect.

2.23 Clause 23: Amendment of section 107 of Tax Administration Act, 2011

Where a taxpayer has not lodged an appeal within the time period provided under the rules, or an extended period as provided under this section, the taxpayer's appeal will be invalid. The proposed amendment aims to create an additional remedy for the taxpayer to approach the tax court for an extension of up to 120 business days, should such extension be in the interest of justice. Hence the taxpayer can make an application to the tax court under the dispute resolution rules for extension in these instances (i.e. where the senior SARS official refuses to grant an extension or is no longer empowered to do so), should the criteria be met.

2.24 Clause 24: Amendment of section 109 of Tax Administration Act, 2011

Paragraph (a): Some taxpayers prefer that their tax disputes be heard by the tax court, even where the tax board is competent to decide on the matter. This may result in an unnecessary overflow of matters to the tax court and overly full court rolls, bearing in mind that only a limited number of days are available for the sittings of the tax court. The proposed amendment aims to remove the requirement that SARS and the taxpayer must agree on a matter to be referred to the tax board, and that a matter will automatically in the first instance be heard by the tax board if the tax in dispute does not exceed the amount determined by the Minister of Finance by public notice. It will only be referred to the tax court if SARS and the taxpayer so agree should both parties regard it necessary, due to for example, the complexity of the matter.

Paragraph (b): See paragraph (a). The proposed amendment is a consequential amendment.

2.25 Clause 25: Amendment of section 110 of Tax Administration Act, 2011

The proposed amendment is consequential to the proposed amendment to section 111 of the Tax Administration Act, 2011.

2.26 Clause 26: Amendment of section 111 of Tax Administration Act, 2011

The chairperson of the tax board is nominated from a panel compiled by the Minister of Finance in terms of section 111 of the Tax Administration Act, 2011. Currently, the panel consists of legal practitioners appointed by the Minister in consultation with the Judge-President of the Division of the High Court with jurisdiction in the area where the tax board is to sit. It is proposed that registered tax practitioners who belong to a recognised controlling body under section 240A of the Tax Administration Act, 2011, may also be included in the panel due to their specific expertise in the area of tax, after consultation with the Chief Executive Officer of the recognised controlling body to which the registered tax practitioner belongs.

2.27 Clause 27: Amendment of section 125 of Tax Administration Act, 2011

The proposed amendment seeks to enable a person, other than a legal practitioner duly admitted and enrolled in terms of the Legal Practice Act, 2014, to appear on behalf of the taxpayer in the tax court, if the president of the tax court is satisfied that such person is a fit and proper person to appear on the taxpayer's behalf in tax court proceedings.

2.28 Clause 28: Amendment of section 130 of Tax Administration Act, 2011

Section 130 of the Tax Administration Act, 2011, provides for the granting of an order for costs in favour of an aggrieved party under certain circumstances. Subsection (2) provides that the costs awarded by the tax court under this section must be determined in accordance with the fees prescribed by the Rules of the High Court.

It is proposed that section 125 of the Tax Administration Act, 2011, be amended to enable a person, other than a legal practitioner duly admitted and enrolled in terms of the Legal Practice Act, 2014, to appear on behalf of a taxpayer in certain circumstances. In this regard see the note on the proposed amendment to section 125 of the Tax Administration Act, 2011. The rules of the High Court only apply to legal practitioners and hence cannot be used to determine the costs to be awarded to a taxpayer, where the person representing the taxpayer is not a legal practitioner.

It is proposed that section 130 be amended to provide that costs awards by the tax court in these instances be determined in accordance with the fees prescribed by the dispute resolution rules. Amendments will be introduced to the dispute resolution rules to make provision for specific fees in these instances.

2.29 Clause 29: Amendment of section 195 of Tax Administration Act, 2011

A tax debt can be written off temporarily if it is “uneconomical to pursue”. “Uneconomical to pursue” means that the total costs of recovery of that tax debt is likely to exceed the anticipated amount to be recovered. In order to determine whether the costs of recovery is likely to exceed the anticipated amount to be recovered, a senior SARS official must have regard to factors such as the steps that have been taken to date to recover the tax debt and the costs involved in those steps, the likely cost of continuing action to recover the tax debt and the anticipated return from that action, the financial position of the debtor, including the debtor’s assets and liabilities, cash flow and possible future income streams.

Where a taxpayer is engaged in business rescue proceedings SARS’ recovery efforts are suspended *ex lege* until the business rescue proceedings are over. Consequently, a tax debt tied up in this procedure cannot easily meet the test of “uneconomical to pursue” as laid out above, and this section was amended by the Tax Administration Laws Amendment Act, 2014, to allow SARS to temporarily write off the tax debt during business rescue proceedings to recognise this suspension. Such a temporary write-off does not affect the collectability of the tax debt from the taxpayer.

The application of accounting impairments in the financial statements of SARS has since matured and provides a better way to deal with such matters. It is therefore no longer necessary to account for the temporary write-off a tax debt during business rescue.

2.30 Clause 30: Amendment of section 236 of Tax Administration Act, 2011

The proposed amendment aims to correct an incorrect cross-reference.

2.31 Clause 31: Amendment of section 246 of Tax Administration Act, 2011

Every company that carries on business or has an office in South Africa must be represented by a public officer. Given that companies are automatically registered for income tax on formation, it is proposed that the one month period within which the public officer must first be appointed be removed. A newly formed company will thus have both its directors and public officer in place on formation. Should a company fail to appoint a public officer at the time of formation, the proposed amendment provides for a default rule of

senior officials of the company who will be regarded as the public officer in order of priority.

The public officer must be eligible to be so appointed in that they meet the requirements that they be a senior official of the company and be resident in South Africa, amongst others, in subsection (2) and not be disqualified under subsection (8). Should the public officer not be so eligible or be regarded by SARS as not suitable to represent the company as public officer, the company will be regarded as not having appointed a public officer. The company has 21 business days within which to appoint a new public officer who complies with the requirements as laid down by this section, failing which, a default list of who will be regarded as the public officer will apply or SARS can designate a suitable person to represent the company as the public officer.

2.32 Clause 32: Amendment of section 247 of Tax Administration Act, 2011

The proposed amendments are consequential to the proposed amendment of section 246. See the notes on the proposed amendment of section 246 above.

2.33 Clause 33: Amendment of section 30 of Tax Administration Laws Amendment Act, 2022

The proposed amendment is a textual correction.

2.34 Clause 34: 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 2024 Budget Review, tabled in Parliament on 21 February 2024.

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(1)(a) 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.