2023 DRAFT TAX BILLS

PRESENTED BY:

National Treasury and SARS

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national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

2023 DRAFT TAX BILLS

The 2023 Draft Tax Bills contains:

- 2023 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Rates Bill)
- 2023 Draft Revenue Laws Amendment Bill (Two Pot Retirement System)
- 2023 Draft Pension Fund Amendment Bill
- 2023 Draft Taxation Laws Amendment Bill (TLAB)
- 2023 Draft Tax Administration Laws Amendment Bill (TALAB)

Rates Bills
(Draft Rates Bill)

- The 2023 Draft Rates Bill was first published on Budget Day (22 February 2023) and published again on 30 July 2023, in order to solicit comments on the tax proposals contained therein.

- The 2023 Draft Rates Bill contain tax announcements made in the 2023 Budget, dealing with changes in rates and monetary thresholds to the personal income tax tables and increases of the excise duties on alcohol and tobacco.

2023 Draft Rates Bill: Adjustment in the excise duty on alcohol & tobacco
General inflationary increase in the excise duty on alcohol & tobacco
(Main reference: Schedule No. 1 to Customs and Excise Act, 1964: Clause 7 of the Draft Rates Bill)

Alcohol Related Comments:

- Generally, welcome the in-line with projected inflation adjustment to the excise duty rates.
- But recommend there be a long-term, sustainable application of the in-line with projected inflation excise adjustment, which will provide certainty for the industry for long-term investments.
- Introduce a multi-year taxation approach, where taxes on tobacco products, e-cigarettes and alcohol increase annually by a pre-announced amount (or percentage) above the inflation rate.
- Excise duties for Traditional African beer powder and Traditional African beer have not been increased with inflation.
- Systemically, the application of an Alcohol-By-Volume (ABV) or an alcohol-content based system be applied to the full alcohol category, like that which currently applies to beer and spirits.

Responses:

- All comments are noted.
- Adjustments in excise duties refer to current policy guidelines where the annual adjustments are calculated based on either excise tax incidence derived from projected prices for the next fiscal year, or the expected inflation rate, whichever is higher.
- However, it is the Minister of Finance that makes the decision about the excise duty rates and adjustments.
- The Traditional African or sorghum beer market is very informal and small in South Africa, and has been taxed lower to account for the negative distributional effects.
- The alcohol content for wines varies quite substantially (i.e., between 4.5 & 16.5% volume for natural wine, and 15 & 22% volume for fortified wine) and changing the base to ABV will complicate the administration of the system.
- This is not unique to South Africa - other wine producing countries such as Australia, France, Italy, USA and European Union apply this standard approach.
- Any changes in the guidelines and excise policy will be considered in the current excise policy framework review process, which will consider all stakeholder inputs.

2023 Draft Rates Bill: Adjustment in the excise duty on alcohol & tobacco
General inflationary increase in the excise duty on alcohol & tobacco
(Main reference: Schedule No. 1 to Customs and Excise Act, 1964: Clause 7 of the Draft Rates Bill)

Tobacco Related Comments:

- Request National Treasury to continue to increase cigarette excise in a balanced manner which fully appreciates the extent of the illicit trade problem in South Africa,
- In line with global best practice, South African fiscal policy in respect of cigarettes should be determined on Weighted Average Price ("WAP") as the Most Popular Price Category ("MPPC") concept with Peter Stuyvesant as an anchor brand is no longer relevant in the current market,
- Urge National Treasury to substantially increase the excise tax (i.e., suggest a 10%) on tobacco products in the 2024/2025 budget cycle,

Responses:

- All comments are noted,
- The adjustments in excise duties prioritize the main policy objectives, which is discouraging consumption of tobacco (and similar products), reducing affordability of these products over time and revenue generation,
- The excise policy framework for tobacco products is currently under review and all these comments will be considered. Once completed, all the stakeholders will be informed, and a consultative process initiated.

2023 Draft Rates Bill: Adjustment in the excise duty on alcohol & tobacco
General inflationary increase in the excise duty on alcohol & tobacco
(Main reference: Schedule No. 1 to Customs and Excise Act, 1964: Clause 7 of the Draft Rates Bill)

Illicit Trade Related Comments:

- A recent exercise by the industry working closely with SARS has shown that sugar fermented beverages (Ales) don't attract the correct excise tariff,
- South Africa now has one of the highest illicit cigarette trade levels in the world at up to 70% of annual consumption,
- Factors that facilitate illicit trade are insufficient enforcement, organised crime syndicates, high levels of corruption, inadequate sanctions for offenders, porous borders,
- Request National Treasury to introduce into the Act, through a primary legislation change, a Minimum Retail Price ("MRP") point of R34 per pack of 20 cigarettes to achieve effective enforcement and to address retail tax compliance,
- South African government should ratify the Protocol to Eliminate Illicit Trade in Tobacco Products and the process towards implementation of a track-and-trace system should be expedited for cigarettes and vaping products.

Responses:

- All comments are noted,
- National Treasury acknowledges the problem of illicit trade and that it undermines the health and excise policy objectives, however SARS is implementing a number of compliance measures, including collaborating with other law enforcement agencies to address the problem,
- The problem of illicit trade is also an act of criminality and cannot be dealt with through excise rate adjustments,
- The excise policy framework for tobacco products is currently under review and inputs from all stakeholders such as Minimum Retail Price will be considered.

2023 Draft Rates Bill: Adjustment in the excise duty on alcohol & tobacco
General inflationary increase in the excise duty on alcohol & tobacco
(Main reference: Schedule No. 1 to Customs and Excise Act, 1964: Clause 7 of the Draft Rates Bill)

Administration and technical comments:

- There is an overlap between unfortified wine (from 4.5 to 16.5%) and fortified wine (from 15% to 22%). Is there a risk that some wine can fall within both categories?
- There is a distinction between wine in containers holding 2li or less, wine in containers above 2li and below 10li, and other wine. However, the excise duties are the same for each of those categories. What is the purpose of making this distinction?
- All spirits are subject to an excise duty of R257.23/li aa except for brandy, which is subject to a lower excise duty rate. This may be considered discriminatory. Is there a justification for the lower duty on brandy?

Responses:

- There is no risk of wine falling in both categories. Wine is either fortified by means of adding distilled grape spirits to the final product of fermenting grapes or not. And alcohol ranges are in terms of the Regulations to the Liquor Products Act.
- The purpose of the distinction is not related to the excise duty structure but rather the trade of the goods in the international arena as per the Harmonised System Convention.
- The rationale for lower duty on brandy is that brandy is at a cost disadvantage compared with other forms of alcoholic spirits because it takes 4-5 litres of wine to produce a litre of brandy. Further, Pot stilled brandy and vintage brandy have an extended maturation period. Pot stilled brandy must be matured by storage for a period of at least three years, and up to eight years, in oak casks with a capacity of not more than 340 litres.

2023 Draft Rates Bill: Delaying the increase to the health promotion levy for two years
(Main reference: Section 58 of Customs and Excise Act, 1964: Clause 7 of the Draft Rates Bill)

The 2022 Budget stated that the HPL would be increased by inflation at 4.5 per cent to 2.31 cents per gram from 1 April 2022. On 1 April 2022, the Minister of Finance released a media statement to delay the implementation of the increase on the HPL to 1 April 2023. However, in the February 2023, the Minister further announced that there will be no increase in the HPL in 2023/24 and 2024/25. A discussion paper on the HPL Review will still be published for consultation on proposals to extend the levy to pure fruit juices and lower the 4-gram threshold.

<u>Health Promotion Levy Comments:</u>

- Notes with disappointment that yet again, the bill fails to bring the Health Promotion Levy (HPL) in line with the international best practice of a 20% sugar-sweetened beverage tax,
- The continued failure of government to adjust the HPL to account for inflation has led to worrying erosion of the tax,
- This delay is an unacceptable and unjustifiable failure to protect the rights of South Africans to health, access to nutritious food, life and dignity.

<u>Responses:</u>

- The Minister announced in 2023 Budget that there will be no increase in the health promotion levy in 2023/24 and 2024/25 to enable stakeholders in the sugar industry to restructure, given the challenges from greater regional competitive pressures and the effect of recent floods.
- The HPL is not the only intervention being implemented but rather complements other interventions by the National Department of Health through the Strategy for the Prevention and Management of Obesity 2023 – 2028, National Strategic Plan for the Prevention and Control of Non-Communicable Diseases 2022 –2027.

Taxation of electronic nicotine and non-nicotine delivery system (Main reference: Part 2A of Schedule No. 1 to Customs and Excise Act, 1964: Clause 25 of the 2022 TLAA)

Government implemented a tax on electronic nicotine and non-nicotine delivery systems (ENDS / ENNDS) with effect from 01 June 2023. This was a culmination of a process that started with an announcement made in budget 2019 and subsequently in budget 2020 due the growing evidence that these products are not harmless. The initial proposal as announced in the 2022 Budget was to implement the excise duty from 1 January 2023. However, in the 2022 draft TLAB a decision was made to have a later implementation date of 01 June 2023 to provide SARS and taxpayers sufficient time for the administration of the system. Section 25 of the 2022 Taxation Laws Amendment Act (Act No. 20 of 2022) gave effect to the implementation as of 01 June 2023.

Electronic Cigarette Taxation Comments:

- E-cig tax is not well-targeted at reducing consumption of vaping products among youth (i.e. disposable vaping devices),
- Government should introduce a minimum excise tax on e-liquid of R50 per unit/container, and this would have no additional tax impact for e-liquid containers with more than 17.5 ml but would have a sizable impact on the price of disposables,
- Based on detailed analysis performed and also separately by Oxford Economics, the rate of R2.90 per ml is far too high in the South African context and may have unintended consequences in the medium to long term.
- It would be too soon to call for a marked change in the excise rate as the impact of the excise needs to be fully observed over the medium to long term. But recommend that for the 2024/2025 Budget, National Treasury hold the vaping excise rate at R2.90 per/ml.

Responses:

- The current proposed rate is an introductory rate that may be adjusted in the short to medium term during the budget process,
- The proposed excise rate is comparable to other rates applied in other jurisdictions that have implemented excise duties on ENDS/ENNDS,
- It is the Minister of Finance that is empowered to make decisions about the annual excise duty rates adjustments.

Two-Pot Retirement System
(Draft Revenue Laws Amendment Bill & Draft Revenue Administration and Pension Laws Amendment Bill)

The 2023 Draft Revenue Laws Amendment Bill incorporates the following key tax proposals that were mentioned in Chapter 4 of the 2023 Budget Review:

- A proposed implementation date for the "two pot" retirement system of 1 March 2024.
- Proposal for seed capital: This makes provision for access by the member of the retirement fund to a portion of the available balance in the retirement fund on implementation date of the "two-pot" retirement system, i.e., 1 March 2024.
- In order to limit the adverse effect on liquidity, it is proposed that seed capital should be calculated as ten percent of the benefit accumulated in the "vested component" as at 29 February 2024, limited to R25 000, whichever is the lesser.
- It is important to note that when a member of a retirement fund withdraws the savings component, this withdrawal will be taxed at their marginal tax rates.
- Legislative amendments include to cater for defined benefit funds in an equitable manner, it is proposed that defined benefits funds calculate the one third contributions to the "savings component" based on one-third of the member's pensionable service increase and two-thirds contributions to the "retirement component" based on two-thirds of the member's pensionable service increase.
- Given that the inclusion of legacy retirement annuity funds will require a re-design of these historic acquired products, it is proposed that they rather be exempted from the two-pot system.

The 2023 Draft Revenue Administration and Pension Laws Amendment Bill contains consequential legislative amendments to the Pension Funds Act, 1956 (Act No. 24 of 1956) to ensure the smooth implementation and administration of the "two pot" retirement system.

Two-Pot Retirement System (broader retirement policy matters)

Comment: High level of support for the reform. Many commentators indicated that they may have specific areas where they raise objections with how a particular aspect of the reform is proposed to be implemented, but that they agree with the overall direction of the reform. Of the 287 submission received, only 13 indicated that they do not support the reform. The reasoning proffered for not supporting the reform was because those individuals preferred not to split contributions into two pot, but preferred to consolidate their contributions into their retirement component to increase investment gains over longer periods.

Response: Noted. While the system will be set up with some defaults in place, members will always have the option to consolidate their savings component into their retirement component. Therefore, that option is not precluded.

Comment: Some commentators argue that the proposed implementation date is not feasible, stating that 12-18 months is required after promulgation of legislation to implement necessary changes with respect to systems, training staff, communication and educating fund members on the two-pot system. However, other commentators are calling for an effective date of 1 March 2024 as they recognise that individuals are likely in desperate need of money as there has been a delay in implementing the legislation.

Response: Accepted. Due to the magnitude of the reform and the desire to ensure that when implemented the system operates as seamlessly as possible, **Government proposes an implementation date of 1 March 2025**. This also provides sufficient time for funds and trustees to consult fund members about rule changes and to communicate clearly to members what the impacts on their future contributions will be.

Comment: The proposed cap for seeding capital is argued to be too low. Commentators representing fund members request an increase in the value of the seeding amount. Such requests range from R50 000 to R500 000, while other commentators want a third of the vested amount as at pre-implementation vested fund value without applying the 10% limit. Other commentators warn Government of possible liquidity risks and adverse asset market implications that will come with the seeding capital proposal.

Response: Partially accepted. The original value of R25 000 was based on industry statistics which showed that about 61% of fund members had less than R50 000 in fund value as at July 2020. The higher the seeding amount the worse the retirement outcome will be for fund members. Further, the strength of the two-pot system lies in the savings component being accessible in the future. Concerns about liquidity and the effect on the asset market must also be considered.

Given these considerations, government is considering an inflation adjustment to the proposed 2020 amount of R25 000 which would amount to R30 000. Meaning that the **seed capital would be calculated as the lesser of ten per cent of the "vested component" and R30 000.**

Two-Pot Retirement System (broader retirement policy matters)

Comment: To reduce and mitigate liquidity concerns and effects of market pressure, it was proposed that some form of staggering be introduced, e.g., withdrawals on birth month.

Response: Not accepted. Staggering might be administratively cumbersome and not coincide with varying member needs and emergency circumstances.

Comment: Request that flexibility be permitted in respect of defined benefit funds that might not be able to apply the two-pot system based on the reduction of period of service methodology. In practice this could include hybrid funds, DC funds with DB underpins, or funds with no active contributors.)

Response: Accepted. It is proposed that defined benefit funds which are unable to apply the reduction of pensionable service basis be allowed to use an alternative method of calculating the value of the two-pot system contribution split. The application of this alternative method should be fair and equitable and will be subject to approval by the Financial Sector Conduct Authority (FSCA) to ensure financial and actuarial soundness.

Comment: The Bill seems explicit that costs should be deducted from contributions, however, funds deduct costs from contributions and other costs from fund values.

Response: Accepted. Legislation will include enabling provisions for the deduction of fees or costs with the nature and structure left to fund rules.

Comment: It is requested that the proposed definition of legacy retirement annuity policies is refined to provide clarity on aspects such as whether universal life policies without risk cover or paid up are also included, the general manner in which a legacy retirement fund is distinguished from other types of funds, and the format and content of the declaration to be submitted to the FSCA. Further to the above, consideration should be given to the fairness as relates to the proposal to exclude contracts entered into after 1 January 2022 from the exemption.

Response: Accepted. The proposed definition for legacy retirement annuity funds as contained in the draft legislation shall be amended to include features unique to a legacy policy, i.e., universal life or pre-universal life construct. Further to the above, the exemption shall be amended to only apply to legacy retirement annuity policies entered into before the implementation date of the reform. Further, clarity shall be provided on the content and detail of the declaration to be submitted to the FSCA for legacy retirement annuity funds applying for an exemption from the two-pot system.

Two-Pot Retirement System (broader retirement policy matters)

Comment: Clarity is requested on possible amendments to Regulation 28 to cater for investment strategies under the proposed regime and how the two-pot system would be required to comply with Regulation 28 of the Pension Funds Act.

Response: Not accepted. The current Regulation 28 thresholds are sufficient to cater for the two-pot system, therefore, there is no need to make amendments.

Comment: Clarity is requested on whether the grandfathering provision issued in terms of Regulation 28 for retirement annuity funds will fall away once the two-pot regime comes into effect.

Response: Noted. It is proposed that retirement annuity funds retain their grandfathering status in terms of Regulation 28(3)(c) of the Pension Funds Act.

Comment: Clarity is requested on the proposed approach for provident fund members that were 55 years old and older on 1 March 2021. It is requested that the default position as relates to them be one where they are automatically excluded from the two-pot regime with the ability to opt-in should they choose.

Response: Noted. The draft legislation shall be amended to reflect the policy position that provident fund members who were 55 years and older as at 1 March 2021 shall, by default, be excluded from the two-pot regime with the opportunity to opt-in should they choose. The decision to opt into the two-pot regime will be left to the fund and members.

Comment: There is a general view that exemption from the two-pot regime should not only be limited to legacy retirement annuity funds. The following groups of funds or members should also be exempted from the regime: (i) funds with no active participating members, i.e., funds in liquidation, beneficiary funds , closed funds, and dormant funds, and (ii) pensioners.

Response: Accepted. It is proposed that these funds and pensioners be exempted from the two-pot regime.

Two-Pot Retirement System (broader retirement policy matters)

Comment: Clarification is requested on whether the amount credited to the member's benefit will include a loyalty bonus.

Response: Noted. All amounts credited or allocated to the member's account post-implementation date should be split in terms of the savings and retirement components.

Comment: Clarity is requested on the additional deductions over and above section 37D of the Pensions Funds Act that have not been addressed. Suggestions were made that deductions, debits, and withdrawals be allocated separately as administrators may want to allocate specific fees to specific components.

Response: Noted. The treatment of additional deductions, credits, and debits will be as per current rules.

Comment: Clarity is requested on the omission of group life and disability cover, and which component(s) should these be allocated to.

Response: Noted. All other credits and allocations to the member's account should be split between the savings (1/3rd) and retirement (2/3rds) components.

Comment: Clarity is requested on the apportionment of seeding capital between vested benefits vs non-vested benefits with respect to provident fund members younger than 55 years as at 1 March 2021.

Response: Noted. The draft legislation will be amended to clarify that seed capital in such instances should be taken proportionately from the pre-1 March 2021 vested and non-vested benefits.

Comment: Clarity is requested on the extent to which intra-fund transfers can be effected, if a member is able to transfer a portion of the funds in their respective component or 100% of the balance should be transferred.

Response: Noted. The policy intent is to allow members flexibility as relates to the amounts transferred in the event of an intra-fund transfer. As such, members are able to transfer either a portion or 100% of the balance in their respective components.

Two pot retirement reform – tax policy matters (summary)

Accepted	Noted (often to provide clarity)	Misplaced	Not Accepted
• Simplified directive system for withholding tax on savings withdrawals	• Allowable withdrawals when ceasing to be tax resident in SA • Amounts available for commutation on retirement		• Change (lower) tax rates of saving withdrawals • Reduce annuitisation proportion to lower than 2/3

Two-Pot retirement System (tax policy matters)
(Clause 1 the Draft RLAB: definitions of “pension fund”, “pension preservation fund”, “provident fund”, “provident preservation fund”, “retirement annuity fund”)

Comment: Clarify the allowable withdrawals and tax treatment upon cessation of tax residence in South Africa.

Response: Noted. The current treatment of withdrawals of pension interest in the case of ceasing residence would also apply after implementation of the two pot reforms. This means, that (1) any permissible withdrawals remain permissible and (2) beyond permissible withdrawals, the remaining retirement interest that cannot be withdrawn for a period of 3 years to confirm the change in residency status. This means that:

- Vested component: Preservation fund members who have not exercised their right to a withdrawal will remain eligible to do so, taxed according to the relevant lump sum tax table.
- Vested component: Occupational fund members who are entitled to a withdrawal upon resignation / retrenchment will remain eligible to do so – taxed according to the relevant lump sum tax table.
- Remainder of vested component (beyond permissible withdrawals): retain same provisions as is in place before implementation of two pot amendments (i.e. waiting period of 3 years), taxed according to the relevant lump sum tax table.
- Savings component remains accessible to member upon their exit and during the subsequent 3-year period, and taxed as gross income (subject to treaty provisions) as any other withdrawal from the savings component (i.e. no specific drafting required -as it is not an exception.)
- Retirement component: will become available for withdrawal after 3 years, taxed according to the relevant lump sum tax table (subject to treaty provisions).

Two-Pot retirement System (tax policy matters)
(Clause 1 the Draft RLAB: definitions of "pension fund", "pension preservation fund", "provident fund", "provident preservation fund", "retirement annuity fund")

***Comment**:* Confirm the amount available for commutation upon retirement and its tax treatment, with particular attention to the de minimus value for commutation.

Response: Noted. Upon retirement, the member has 3 options for any amounts remaining in the savings component.

- Should the member choose to make a withdrawal from the savings component upon retirement, that withdrawal will be taxed according to the table applicable to retirement fund lump sum benefits.
- The member could choose to transfer any portion / the full amount to the retirement component – which will be annuitised and attract normal tax upon pay-out.
- Any amounts remaining after exercising the choices mentioned above would remain in the savings component, and can be withdrawn after retirement. Such withdrawals will be included in gross income and therefore attract marginal tax rates.

To evaluate the de minimus value which can trigger an automatic commutation upon retirement (R165 000) is a separate calculation and includes member's interest in the retirement component plus no more than 1/3 of the member's interest in the vested component. The savings component is not relevant to that calculation.

***Comment**:* Reduce the annuitisation proportion of the vested component (set at 2/3) and / or retirement component (100%).

Response: Not accepted. The reform aims to provide flexibility in the savings component so that withdrawals can be made in accordance with the members' circumstances – effectively spreading the 1/3 lump sum upon retirement over the members' lifetime. This flexibility is not available for the retirement component, which represents the other 2/3 of all contributions from the date of implementation.

Two-Pot retirement System (tax policy matters)
(Clause 1 the Draft RLAB: definition of "savings withdrawal benefit")

Comment: Taxation of the withdrawals from savings component should not be taxed at marginal personal income tax rates. There were some proposals for flat rates, some to revert to the pre-retirement withdrawal table.

Response: Not accepted. This is not a new provision – indeed it was identified as one of the policy options in the 2021 Discussion Paper and formed part of the first set of draft amendments published in 2022. As indicated in the Explanatory Memo at that time, the harmonisation of tax rates that applies to pre-retirement withdrawals and all other sources of income:

- restores the progressivity of the Personal Income Tax (PIT),
- restores equity within the withdrawal system by taking other income sources into account when levying tax,
- ensures that a taxpayer in income distress who is charged at a rate that may well be lower than their previous tax rate, rather than an artificially high rate,
- is simple, certain and transparent, and
- encourages preservation even in the savings component, by discouraging unnecessary early withdrawals, to the extent possible.

Two-Pot retirement System (tax policy matters)
(Clause 7 the Draft RLAB: Amendment of paragraph 9 of Fourth Schedule)

Comment: A directive system similar to the current system in place for pre-retirement withdrawals would be too onerous to implement and suffer from long delays. Remedies proposed tended to focus on tax policy adjustments (discussed above). The main administrative remedy that was proposed was flat rates for withholding purposes, with over/under payment to be adjusted on assessment.

> ***Response:*** Partially accepted. The drafting of the provision will be corrected so that it rather refers to the withholding method contemplated in paragraph 2B of the Fourth Schedule. This means that SARS will indicate the correct tax rate to the fund administrator (as it currently does for pensioners with more than one pension income). The alternatives proposed tend to result in either over-withholding in case of taxpayers with lower marginal rates; or under-withholding during the year, which means a large tax liability that arises on assessment.

2023 Draft Pension Funds Amendment Bill

Comment: It is requested that the calculation and settlement of section 37D deductions in terms of the Pension Funds Act should reference all components and be deducted proportionally from all three components.

Response: Accepted. Legislation will be amended for 37D deductions to be effected proportionately across all components.

Comment: Clarity is requested if section 37D divorce order related transfers to a non-member spouse retirement fund would maintain components from where benefit is transferred.

Response: Accepted. Current rules will apply to section 37D deductions for divorce order settlements, which allows for both cash lump sum withdrawals and transfers. If a non-member spouse transfers to his/her fund, the transfer would mirror or maintain the components from where the transfer was made.

Comment: It is proposed that the Revenue Administration and Pension Laws amendments only focus on two-pot system related changes and no other consequential amendments already covered under the CoFI Bill.

Response: Accepted. Legislation will be amended to remove CoFI Bill related changes because timelines for the CoFI Bill and two pot retirement system related Bills might not coincide.

Comment: It is requested that the definition of “pension interest” be amended to do away with complexities and misinterpretations.
Response: Accepted. The legislation will be amended to simplify the definition and address any possible confusions.

2023 Draft Pension Funds Amendment Bill

Comment: Clarity is requested on the definition of retirement component proposing changes to the payment of death benefits - whereby beneficiaries of deceased members will no longer be able to take cash lump sums. Suggestion is made that current practice be retained.

Response: Noted. Legislation will be amended to retain current disposition of death benefits in terms of section 37C of the Pension Funds Act.

Comment*:* Clarity is requested on the proposal to cap housing guarantees and loans at 65 per cent.

Response: Noted. The amendment is not a two-pot system related change but mere alignment to a policy decision taken and already included in Regulation 28 to reduce pension benefit exposure to housing loans and guarantees.

Solar energy tax credit (summary): High level of support

Accepted	Noted	Misplaced	Not Accepted
• Simplified directive system for withholding tax on savings withdrawals • Certificate of Compliance in case of rental: refer to address (rather than taxpayer's name) • Remove recoupment provision • Remove apportionment provision	• Equity concerns	• Claims under diplomatic privileges and immunities	• Rather through VAT zero-rating • Extend duration • Remove cap • Increase % of credit • Include batteries, inverters, installation etc. • Remove requirement for Electrical Certificate of Compliance • Extend to "rent-to-buy""

Solar energy tax credit

General matters

Comment: High level of general support for the rebate and the objective to increase residential solar power generation. There was also specific support for the inclusion of expansion of existing systems.

Response: Noted.

Comment: A tax incentive through the PIT system will only benefit the upper income groups.

Response: Noted. The personal income tax system is indeed highly progressive, including a relatively high tax threshold. This measure takes the form of a rebate to ensure that the benefit is equalised for all taxpayers who can claim the incentive. This measure is part of a policy package from government, which also includes support for other affordable options (like the Energy Bounce Back loan guarantee scheme and on-budget support for specific projects.)

Comment: The objective would be better met through a VAT zero-rating of solar panels.

Response: Not accepted. Beyond the fact that VAT zero-ratings have impact far beyond residential use, there is no evidence that the benefits of previous zero-ratings were passed on to consumers.

Comment: Clarify claims under diplomatic privileges and immunities.

Response: Comment misplaced. The taxpayer must have a tax liability to offset the rebate against.

Solar energy tax credit

(Clause 2 of the draft TLAB: New Section 6C of the Income Tax Act)

Comment: A duration of 1 year is insufficient time for the incentive to be effective. Reasons included the time required for households to plan, save and acquire expensive components and engage contractors; the legislative process itself takes almost a year; and the scope of the electricity problem.

> ***Response:*** Not accepted. The rebate will only be available for 1 year to incentivise the fastest possible mobilisation of additional generation at residences with urgency. An extension would add to a pressurised fiscal position. Moreover, the large increase in solar panel imports in the first 2 quarters of 2023 suggests that behaviour has been very responsive. Tax incentives tend to work best when they are targeted and temporary.

Comment: In order for the incentive to be more effective, the cap should be removed (or increased).

> ***Response:*** Not accepted. The cap represents a value that is fiscally responsible while still significant to taxpayers. There were also some commentators that supported the cap on equity grounds.

Comment: Increase the percentage of the cost of solar PV panels that determines the value of the credit.

> ***Response:*** Not accepted. This impedes fiscal affordability. The percentage implies that government subsidises 1 in 4 panels bought and installed (up to a value of R60 000).

Solar energy tax credit

(Clause 2 of the draft TLAB: New Section 6C of the Income Tax Act)

Comment: Limiting the incentive to only solar panels is too restrictive. Suggestions for additions included: batteries, inverters, installation costs and solar geysers. The main contention was that these components work as a system. Another strain of comments to the same effect suggested aligning the eligible components to that of the energy generation incentives available to businesses. An alternative suggestion was to make batteries a prerequisite to claim the incentive (for panels and batteries).

> ***Response:*** Not accepted. The rebate is aimed at expanding generation capacity – and the component in solar PV systems that is most closely related to that objective is the panels. Indeed, batteries and inverters do not require the installation with panels – in which case it increases demand from the electrical grid (with no additional supply). The batteries, inverters and installation costs are certainly required for panels to be effective, but they are also the components with the highest private benefit (to avoid the impacts of loadshedding) and lowest public benefit (as it does not benefit anyone else beyond the residents of the dwelling). This is also the main difference between residential use and the energy use of a business: customers and employees are reliant on a business' ability to remain operational during load shedding. A system of prerequisites would impose a very high administrative burden – while the current design is simple to administer and understand.

Solar energy tax credit

(Clause 2 of the draft TLAB: New Section 6C of the Income Tax Act)

Comment: Remove requirement to obtaining a Certificate of Compliance, as it is costly and takes long.

Response: Not accepted. It is an existing regulatory requirement, so we cannot incentivise unsafe installations. We note the potential delays, which should not pose any difficulties if the certificate is still issued during the same year of assessment. We will monitor developments and any potential administrative remedies.

Comment: In the case of home rental, the Certificate of Compliance may not be issued in the name of the renter who may want to claim the rebate (but in the name of the owner).

Response: Accepted. In such cases, the supporting documentation to claim the incentive should include a rental agreement to indicate the names of the renter and the owner.

Comment: Extend to "rent-to-buy" and asset leasing arrangements.

Response: Not accepted. The personal income tax system is ill-equipped for a rebate in those circumstances. To keep the incentive as simple as possible to understand and administer, it pertains to assets that are acquired (in full) and brought into use. Alternative mechanisms – like the Energy Bounce Back guarantee scheme – are better placed to support such arrangements.

Comment: The recoupment and apportionment provisions – while well-intentioned – introduce a lot of unintended complexity – to the extent that the additional administrative burden outweighs gains in compliance.

Response: Accepted. The provisions will be deleted.

Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in the production of renewable energy

(Clauses 4,11,16,17,18, 19,24 and 25 2 of the draft TLAB: Sections 8,11, new section 12BA,12E,12N,12P,23A,23G of the Income Tax Act)

Given the country's continued struggle to produce reliable electricity through the national grid, government is proposing to enhance the attractiveness of the existing tax incentive that seeks to encourage greater private investment in renewable energy. To stimulate rapid private investment to alleviate this energy crisis – in the 2023 Budget Review, Government proposed to temporarily enhance the current renewable energy tax incentive available in section 12B of the Act. The enhanced renewable energy tax incentive will be available for qualifying assets brought into use from 1 March 2023 until and including 28 February 2025. It will apply in respect of the currently eligible renewable energy sources under section 12B of the Act listed below, but there will be no electricity generation limits for the duration of this temporary incentive. Assets will qualify if they are used together in the generation of electricity. While eligibility will be based on facts and circumstances, it is the policy intention that assets will qualify if used to generate electricity from:

- Wind power
- PV solar energy
- Concentrated solar energy
- Hydropower to produce electricity
- Biomass compromising organic wastes, landfill gas or plant material

The enhanced renewable energy tax incentive will also apply to supporting structures as per section 12B of the Act in which the above-mentioned assets are mounted on or are affixed to, provided that:

- the foundation or supporting structure is designed for the above-mentioned asset and constructed in such a manner that it is or should be regarded as being integrated with that asset; and
- the useful life of the foundation or supporting structure is or will be limited to the useful of the asset mounted thereon or affixed thereto.

Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in the production of renewable energy

(Clauses 4,11,16,17,18, 19,24 and 25 2 of the draft TLAB: Sections 8,11, new section 12BA, 12E, 12N, 12P, 23A, 23G of the Income Tax Act)

Comment: The two-year period is insufficient and will exclude several large projects that are in the pipeline – causing a further delay in the alleviation of the current pressure. Many of the projects are delayed by regulatory approvals.

Response: <u>Not accepted.</u>

- Purpose of the incentive is to change behaviour and encourage as many businesses as possible to invest in renewable energy generation capacity as soon as possible – i.e. accelerate investment within a constrained fiscal envelope.
- Intention is not to assist with projects that were already planned, and which would have proceeded without government assistance. As an example, the independent power producer projects will happen regardless as it is their business model to generate electricity. Government does not need to subsidise these efforts.
- Recognise that larger companies investing in large-scale embedded electricity generation require regulatory approval for offsite grid connections, which has been taking longer than is ideal. However, a one-stop shop has been set up by the Department of Trade Industry and Competition, and the time taken for approvals is being reduced.
- Government wants to encourage assist those businesses that do not have the means to invest in electricity generation as they contribute to our economy and employ people. Many such businesses do not meet the generation threshold required to apply for regulatory approval or perform environmental impact assessments as they will be able to produce electricity on-site, so approvals are not a stumbling block for them.
- Our sense is that small and medium firms requiring systems of less than 1MW (less than 2000 solar panels and falling into the small-scale embedded generation category) would be able to make use of the incentive within the two-year timeframe. This should be the case even if Nersa registration and municipal/Eskom approval is required.
- For those with insufficient cash to take advantage of the incentive, the tax incentive is complemented by the Energy Bounce Back Scheme which provides loan funding to enable qualifying investment.

Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in the production of renewable energy

(Clauses 4,11,16,17,18, 19,24 and 25 2 of the draft TLAB: Sections 8,11, new section 12BA, 12E, 12N, 12P, 23A, 23G of the Income Tax Act)

Comment: There is no definition for eligible assets, which is creating confusion. This is particularly because the solar rebate incentive for individuals has explicitly excluded storage and conversion assets, and there is no clarity whether such assets are eligible for the business incentive.

Response: ***Not accepted.*** Government recognises the source of confusion.

- However, it would be difficult to create a definition that includes a list of assets as some cases may be viewed differently depending on which assets are being claimed for.
- The incentive is not solely for assets that produce electricity. If storage and conversion assets form part of a system of assets that together produce electricity, it is likely that they will qualify for this incentive.
- If there is a scenario where a taxpayer is simply drawing power from the grid and storing it, these assets will likely not qualify. The latter example is not aligned to the policy objective of encouraging more generation capacity and should not be claimable under the proposed section 12BA.
- This is why it is important that SARS retains the ability to apply a facts and circumstances approach to each case.

Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in the production of renewable energy

(Clauses 4,11,16,17,18, 19,24 and 25 2 of the draft TLAB: Sections 8,11, new section 12BA, 12E, 12N, 12P ,23A, 23G of the Income Tax Act)

Cont.

Comment: There is no definition for eligible assets, which is creating confusion. This is particularly because the solar rebate incentive for individuals has explicitly excluded storage and conversion assets, and there is no clarity whether such assets are eligible for the business incentive.

Response: ***Not accepted.*** Government recognises the source of confusion.

- With respect to eligibility for the solar rebate available to individuals, it is important to highlight that the personal and corporate income tax systems operate differently.
- It is not common for an individual to deduct the cost of an expense or investment from their taxable income. The solar rebate is an exception to this rule and targets solar panels exclusively given that they are directly linked to additional generation capacity.
- While batteries and inverters can be used on their own to provide a private benefit to a particular household, the addition of solar panels enhances generation supply, which provides a public benefit.
- In contrast, it is common for a business to deduct costs in relation to assets used in the production of income and there is no reason to specifically exclude assets such as batteries and inverters, unless they are being used in isolation to draw and store power from the grid (which detracts from the primary objective of the temporarily enhanced renewable energy incentive – to encourage investment in additional generation capacity).

To further enhance clarity, Government will publish an FAQ document along with the Response Document so that investors can have all the information in one document and gain a better understanding of how this incentive works.

Enhanced deduction in respect of certain machinery, plant, implements, utensils and articles used in the production of renewable energy

(Clauses 4,11,16,17,18, 19,24 and 25 2 of the draft TLAB: Sections 8,11, new section 12BA, 12E, 12N, 12P, 23A, 23G of the Income Tax Act)

Comment: Commentators have questioned some of the constraints in the leasing space, e.g. why operating leases are eligible whereas finance leases are subject to stricter requirements. Some hold the view that finance leases should qualify rather than operating leases. The draft legislation currently requires that the lessee in a finance lease arrangement be conducting a trade for eligibility. There are also requests for clarity in respect of ownership between the lessee and lessor.

Response: <u>Accepted.</u>

- Government recognises the source of confusion and wishes to instill certainty.
- From a strict policy eligibility perspective, those businesses who lease out qualifying assets under operating lease arrangements do not require a subsidy as the demand for their investment is driven by those businesses and individuals who are leasing the assets and demand is currently high).
- It is also impossible for government to require that lessors pass the benefit on to lessees.
- However, because section 12BA's design was based on section 12B, lessors in an operating lease context were included from the outset because they own the assets. Ownership is an important criterion that runs through the Income Tax Act as it is a prerequisite for capital allowances.
- It would be unfair to remove eligibility at this stage (given that the incentive has commenced, and investor certainty is key).
- For this reason, government is proposing to apply the same treatment to finance lease arrangements.
- The trade requirement for lessees will be removed so that there are no hurdles for claiming this incentive.
- Because the ownership of assets only transfers at the end of a finance lease arrangement and the incentive is only available for two years, the lessors of these types of arrangements will be eligible to claim section 12BA.

More detail provided in response document on other matters, e.g. recoupments, mining capex, interactions with sections 12B and 12E, etc.

OTHER TLAB AMENDMENTS

Reviewing the principles of Practice Note 31 of 1994

(Clause 14 of the Draft TLAB: new section 11G of the Income Tax Act)

- In 1994, Practice Note 31 of 1994, titled "Interest paid on moneys borrowed" was issued. On 16 November 2022, the South African Revenue Service (SARS) issued a notice informing the public of the intention to withdraw this practice note, with effect from years of assessment starting on or after 1 March 2023 due to the increasing abuse of the tax deduction concession provided for in Practice Note 31.

- After reviewing the public comments received on the withdrawal of the practice notes, government considered the impact of the proposed withdrawal and is proposing changes to tax legislation to accommodate legitimate transactions affected by such withdrawal. Ordinarily, deductions are allowed where the requirements of the general deduction formula is met (i.e. trade requirement, income production requirement and revenue nature requirement). Where one of these is not satisfied and a deduction is justified and intended, specific rules are introduced (for example section 24O that allows for the deduction of interest in respect of share acquisitions in qualifying operating companies).

- As such, the practice under Practice Note 31 was limited to minimise the adverse effect of withdrawal on companies and proposed legislation was included in the Draft TLAB that was published for public comment to allow for a deduction of interest where one company within a group of companies raises debt that it on-lends to a fellow group company that uses the debt for income producing purposes within its trade. Any deduction in this regard is limited to the interest income accruing directly or indirectly from that other company during that year of assessment.

Reviewing the principles of Practice Note 31 of 1994

(Clause 14 of the Draft TLAB: new section 11G of the Income Tax Act)

Comments raised in written submissions

Comment: The proposed concession under section 11G provides that for amount to be deductible against interest income, such amount should not be of a capital nature. In addition, the Income Tax Act already contains rules in section 24J for the deduction of borrowing costs. The scope of the interest that is eligible for deduction under section 11G should be comparable to that which is eligible for deduction under section 24J. As such, it is proposed that reference be made to the definition of interest as set out under section 24J and that no regard should be given to whether the amount to be deducted is of a capital nature or not.

Response: Accepted. Changes will be made to the Draft TLAB ensure that the borrowing costs eligible under section 11G are comparable to those eligible for deduction under section 24J by referring to the definition of "interest" in section 24J. The requirement that the interest should not be of a capital nature will be withdrawn.

Comment: The proposal under section 11G is extremely limited as it caters for back-to-back lending arrangements within a group of companies. This proposal results in back-to-back lending arrangements that involve trusts and natural persons that are partners in professional firms and shareholders not being able to raise debt funding necessary for their businesses or firms without the unjustified tax leakage that would arise in the absence of a concession similar to that granted by Practice Note 31. In addition, by limiting the relief to lending arrangements between groups of companies, many arrangements between parties where the lender holds less than 70 per cent of the equity shares in the borrower are excluded. Amongst these are funding arrangements involving BEE partners and limited partners of private equity funds where the shareholdings are considerably lower.

Response: Noted. It is Government's intention that access to business funding should not be adversely affected by the proposed withdrawal of practice note 31. As a result, the concession contained in section 11G will be expanded to apply to any person that incurs interest expenditure in the production of interest income (limited to said interest income) without regard to any shareholding threshold of any back-to-back lending arrangement.

Reviewing the principles of Practice Note 31 of 1994

(Clause 14 of the Draft TLAB: new section 11G of the Income Tax Act)

Comments raised during public workshops hosted by National Treasury and the public hearing of the Standing Committee on Finance

Comment: It is welcomed and noted that Government intends to ensure that access to funding for business purposes (whether raised by corporates, natural persons or trusts) should not be negatively impacted. However, it is equally concerning that the same concession is not being extended to back-to-back lending arrangements entered into to raise funding to cover personal expenses or the acquisition of personal use assets. These arrangements do not result in any tax avoidance but rather ensure that the natural person that is able to raise debt with a lending institution to on-lend to another (typically a child or relative that would otherwise not be able to access such debt) is not unfairly taxed on interest income that is merely passed on to the lending institution (and will consequently be subject to tax in its hands) while the ultimate user of the debt funding to fund expenditure of a personal nature will also not eligible to deduct the interest expense he or she incurs.

Response: Noted. The introduction and continued existence of the interest exemption the was intended to, in spite of the absence of business activities, also limit any tax liability that may arise in the hands of a natural person that earns interest income outside of a trade. It is noted that the interest exemption may be at a level much lower than the interest income that may arise under some of the lending arrangements of concern. As such, there will be no exclusion in respect of natural persons entering into back-to-back arrangements to fund personal expenditure. It is noted, that further consultation on the proposed section 11G may be desired by taxpayers on the amended provisions of section 11G. It is therefore proposed that section 11G should only come into effect on 1 January 2025 in respect of years of assessments commencing on or after that date to allow for further stakeholder engagement during the 2024 legislative cycle. In the interim, Practice Note 31 will remain in effect until this newly proposed effective date.

Clarifying the foreign business establishment exemption for controlled foreign companies

(Clause 8 of the Draft TLAB: Section 9D of the Income Tax Act)

- The Act contains anti-avoidance rules in section 9D aimed at taxing South Africa residents on an amount equal to the net income of a controlled foreign company (CFC). In order to strike a balance between protecting the South African tax base and the need for South African multinationals to be competitive offshore, the South African CFC rules contains various exemptions of certain types of income.
- For example, amounts that are attributable to a foreign business establishment (FBE) of a CFC, as defined in section 9D, are excluded from the net income of the CFC. A foreign business establishment must consist of a fixed place of business located outside South Africa that is used or will continue to be for the carrying on of business of the CFC for a period of at least 1 year.
- It was proposed in the Draft TLAB that amendments be made to the FBE definition such that all important functions for which a CFC is compensated should be performed either by the CFC or by another CFC in the same group of companies that is located and subject to tax in the same country as the CFC's fixed place of business to qualify for the FBE exclusion.

Comment: The proposed amendment should be withdrawn and the existing concept of "primary operations" be retained in the FBE definition because this proposed amendment is following on from the court decision in the CSARS v Coronation Investment Management SA (Pty) Ltd. Currently, the judgement that was delivered by the Supreme Court of Appeal upholds that which National Treasury and SARS have placed in the legislation.

- ***Response:*** <u>Accepted.</u> The proposed amendment will be withdrawn pending the Constitutional court judgement.

Aligning the fuel emissions factors with methodological guidelines and regulations

(Clause 66 of the Draft TLAB: Schedule 1 of the Carbon Tax Act)

- The tax base of the Carbon Tax Act is greenhouse gas emissions reported to the Department of Forestry, Fisheries and the Environment (DFFE). The emissions are reported according to the 2016 National Greenhouse Gas Emission Reporting Regulations, which were gazetted in terms of the National Environmental Management: Air Quality Act, No.39 of 2004. The DFFE published the methodological guidelines for quantifying greenhouse gas emissions to provide the approach for companies to report greenhouse gas emissions. Section 4 of the of the Carbon Tax Act defines the tax base according to activities with emissions factors in Schedule 1 of the Carbon Tax Act.

- In October 2022, the DFFE gazetted amended methodological guidelines for quantifying greenhouse gas emissions. The amendments include updated carbon dioxide emission factors for domestic (tier 2) emissions reporting for existing fuel types and also added fuel types. The guidelines further include default emission factors for fugitive emissions based on the 2019 Intergovernmental Panel on Climate Change (IPCC) refinements study on emission factors. To align the Carbon Tax Act with these guidelines, it is proposed that tables are added to Table 1 and Table 2 of Schedule 1 of the Carbon Tax Act to provide the tier 2 emission factors and default emission factors for fugitive emissions.

Aligning the fuel emissions factors with methodological guidelines and regulations

(Clause 66 of the Draft TLAB: Schedule 1 of the Carbon Tax Act)

***Comment**:* The Draft TLAB published, the Net Calorific Values (NCVs) in Schedule 1, Table 1 which are reflected in TJ/tonne. The TJ/tonne for petrol, diesel and jet kerosene have been incorrectly calculated. The litres have not been converted into kilograms using the densities. This must be done to ensure the NCVs in Schedule 1, Table 1 are correctly reflected. It is recommended that each country-specific NCV in Table of Schedule 1 of the Carbon Tax Act should have its own units specified next to it in order to align with Table D.1. in the Methodological Guidelines. There was a suggestion for improved collaboration between the South African Revenue Service, Department of Forestry, Fisheries and the Environment and the National Treasury to ensure that the GHG emissions methodological frameworks align with the prescribed carbon mitigation system.

***Response**:* Accepted. Considering the comments by stakeholders and to ensure alignment of the Carbon Tax Act Schedules and the DFFE technical guidelines, it is proposed that the table on country specific carbon dioxide emission factors is withdrawn from the TLAB. Further consultations will be held with DFFE and SARS on the application of the tier 2 emission factors and determination of the appropriate net calorific values to be used for the different fuel types and for calculation of greenhouse gas emissions under the Carbon Tax Act. . It is also proposed that the table on the default emission factors for fugitive emissions from coal mining, oil and gas operations is withdrawn. Further announcements will be made in Budget 2024. For purposes of the Act, taxpayers can use the default factors in Schedule 1 to calculate their greenhouse gas emission where appropriate, and in terms of Section 4(1), emissions can be determined using the tier 3 emissions determination methodology as approved by the DFFE.

Clarification of the interest limitation rules

(Clause 26 of the Draft TLAB: Section 23M of the Income Tax Act)

Government received requests for further clarity the section 23M rules and the 2023 Budget outlined several issues that would be considered. These include, for example, how assessed losses are considered in the definition of “adjusted taxable income”, whether a definition for “creditor” is required, and if the definition of “controlling relationship” is appropriate.

It is proposed that legislation be amended to:

i. align with the policy intent of adding only the balance of assessed losses from prior years to taxable income. The starting point for adjusted taxable income should be taxable income calculated before applying the section and setting off any assessed loss.

ii. the definition of the term "creditor" be included in section 23M to clarify that any person to whom interest is payable is considered a creditor for the purpose of the section.

iii. to address the uncertainty arising from the treatment of exchange gains and losses, it is proposed that exchange gains be classified as interest received or accrued for the purposes of section 23M of the Act.

iv. Clarify and to make it clear that the proviso to section 23M(2) is only applicable to interest when the recipient is a non-resident.

Two concerns raised in Parliament that are not specific to the proposed clarification changes in the draft 2023 TLAB:

- Whether the 30% limit is reasonable given interest rate increases
- How the rules affect the unlisted property industry, which obtains funding from regulated institutions like pension funds, retirement funds and insurers

Clarification of the interest limitation rules

(Clause 26 of the Draft TLAB: Section 23M of the Income Tax Act)

Comment: It was questioned whether 30 per cent of adjusted taxable income is a reasonable test considering interest rate increases

Response: Noted. The interest limitation test in section 23M used to fluctuate with changes to the repo rate. However, when a review was conducted following the OECD best practice recommendations in respect of this policy area, it was determined that no other country's rules had such flexibility. The proposal was for net interest expense to be limited to 10 to 30 per cent of earnings ("tax EBITDA"). Government proposed 30 per cent given that South Africa's interest rate environment is relatively higher relative to advanced economies. During the time the analysis was conducted for the review, which was published with the February 2020 Budget, interest rates were only 1-2pp lower than they are currently. There was a significant decrease in interest rates during 2020 and 2021 (following the proposal), which was followed by the recent increases. The analysis showed that most companies would have been able to deduct all their interest expense. For those that exceed the limit, the interest expense can be carried forward. It is also important to recognise that a decrease in interest rates is possible in future. The policy position for now is to keep the limit as is.

Clarification of the interest limitation rules

(Clause 26 of the Draft TLAB: Section 23M of the Income Tax Act)

Comment: The unlisted property industry relies on debt funding to grow and create asset pools that can be utilised by other industries (listed REITS). This industry is funded by regulated institutions like pension funds, retirement funds and insurers and plays a crucial role in the South African economy – particularly in undertaking new developments, resulting in it being a major employer. To limit the impact of the current interest limitation rules and create a more even playing field with the listed REIT sector, the industry proposes extending the exclusion in section 23M(6), section 8F(3)(d) and section 8FA(3)(d) to debt funding where these vehicles are owned and funded by regulated institutions such as pension funds, long-term insurers and short-term insurers.

Response: Noted. Government notes that it is not a proposed amendment contained in the draft 2023 TLAB that the unlisted property industry is seeking to remedy by this comment. Rather, it is an interrelated set of issues which ranges from the fact that:

(i) the 30 per cent limitation in section 23M may not be commercially viable in terms of funding real estate;

(ii) removing the current reference to 'linked units' issued prior to 1 January 2013 to rather refer to 'funding by creditors who are long-term insurers, pension funds and provident funds'; and

(iii) finalisation of the Conduct of Financial Institution Bill (CoFI).

It is Government's intention to allow the Financial Sector Conduct Authority to regulate the unlisted property industry via the CoFI Bill because the current listed REIT framework that requires a regulatory function (to assess conformance with leverage limits, use of funds etc), which is currently being performed by the Exchanges in a quasi-regulatory function in the case of listed REITs, is not sustainable given that this industry is not listed. In government's view, this function needs to be performed by the regulator first before any tax concessions are considered.

Clarifying anti-avoidance rules dealing with third-party backed shares

(Clause 5 of the Draft TLAB: Section 8EA of the Income Tax Act)

The Act contains anti-avoidance rules targeting debt-like equity instruments – for example, third-party backed shares – and deems any dividend or foreign dividend received by or accrued to any person in respect of a third-party backed share as income. The anti-avoidance rules do not apply if the funds derived from the issue of the shares in question are used for a qualifying purpose.

The current wording of the Act could result in certain dividends or foreign dividends received by or accrued in respect of a third-party backed share not being deemed as income when the shares in that operating company are no longer held by the person who initially acquired them, at the time of the receipt or accrual of any dividend or foreign dividend. It is proposed that the legislation be amended to:

- specifically introduce an ownership requirement, of the equity shares in the targeted operational company by the person that acquired those equity shares, at the time of the receipt or accrual of any dividend or foreign dividend; and
- limit the structuring around these anti-avoidance rules through the retrospective effective date of these amendments.

Clarifying anti-avoidance rules dealing with third-party backed shares

(Clause 5 of the Draft TLAB: Section 8EA of the Income Tax Act)

Comment: The proposed ownership requirement intends that the original equity shares held in the targeted operating company that were acquired using the proceeds from the preference shares subscription must be held at the time of receipt or accrual of any dividend. The new ownership requirement will affect many commercially driven transactions which is not intended to undermine the fiscus. There are various legitimate commercial reasons why a disposal or substitution of the equity shares held in an operating company should be allowed, including:

- Disposal of operating company equity shares for the full or partial redemption of over-arching preference shares;
- Part disposal of operating company equity shares to meet scheduled dividend payments of the over-arching preference shares;
- Disposal of operating company equity shares to acquire equity shares in a different more profitable operating company;
- Corporate actions (e.g. share-for-share transaction) on the operating company equity shares outside the control of any of the parties involved; or
- Intra-group restructures.

Response: Partially accepted. Section 8EA of the Act is an anti-avoidance measure with intentional structured exceptions to cater for the limited application of a qualifying purpose of the funds derived from the issue of preference shares. In an effort to balance the integrity of the anti-avoidance measure but to also acknowledge the commercial reality of preference shares transactions, changes will be made in the 2023 draft TLAB to cater for certain corporate actions and identified commercial transactions when applying the new ownership requirements.

Clarifying anti-avoidance rules dealing with third-party backed shares

(Clause 5 of the Draft TLAB: Section 8EA of the Income Tax Act)

Comment: The proposed amendment is retrospective and is deemed to have come into operation on 31 July 2023. The impact of the proposed effective date is that it applies in respect of dividends and foreign dividends received or accrued during years of assessment ending on or after that date, which means that the amendment will apply to existing structures (i.e. it will apply to existing structures where the equity shares in the "operating company" may no longer be held by the preference share issuer, and will taint any dividends declared in respect of such preference shares going forward). As such, it may not be possible for affected preference shares issuers to arrange their affairs to comply with the amended provisions.

Response: Partially accepted. Given the required amendments around identified and accepted public submissions pertaining to the draft 2023 TLAB, changes will be made in the 2023 Draft TLAB to postpone the effective date from 30 July 2023 to 1 January 2024 where it will apply in respect of any dividend or foreign dividend received or accrued during years of assessment commencing on or after that date.

CUSTOMS AND EXCISE ACT: ADMINISTRATION

Customs and Excise: Administration

(Clauses 17, 18, 19, 20 and 22 of the Draft TALAB: Sections 7A, 15, 39, 76 and 120 Customs and Excise Act, 1964)

Background

- Providing for a single window concept in relation to the collection of advance passenger and passenger name record information.
- Enabling SARS' new online traveller management system.
- Providing for conditions for deferment of duties by rule.
- Providing for the liquidation of provisional payments that serve as security.

Comment*:* Comments received welcome the initiatives and express an interest in the rules to be issued in terms of the proposed amendments.

> ***Response****:* Noted. The rules will be published for public comment in due course. The publication of the rules relating to the single window depends on the effective date of this amendment, which must be co-ordinated with the Department of Home Affairs.

INCOME TAX ACT: ADMINISTRATION

Alignment with anti-money laundering and combatting terrorism developments

(Clauses 6, 7, 8 and 9 of the Draft TALAB: Sections 30, 30A, 30B and 30C of the Income Tax Act, 1962)

Background

- 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 Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, 2022 (the GLA Act).
- 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 entities, 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.
- It should also be noted that should a tax-exempt 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 tax-exempt entity.

***Comment**:* It is proposed that legislation be amended to clarify that only natural persons can accept fiduciary responsibility for public benefit organisations, recreational clubs, and certain dedicated associations. In order to get consistency between the various sections the definition of a "person" for purposes of sections 30, 30A and 30B must be aligned with the definition of "person" as contained in section 30C.

> ***Response:*** Noted. The draft Taxation Laws Amendment Bill contains amendments aimed to clarify that only natural persons can accept fiduciary responsibility for public benefit organisations, recreational clubs and certain dedicated associations. The proposed amendments will be moved to the draft TALAB, as they are of an administrative nature.

Alignment with anti-money laundering and combatting terrorism developments (cont.)

(Clauses 6, 7, 8 and 9 of the Draft TALAB: Sections 30, 30A, 30B and 30C of the Income Tax Act, 1962)

Comment: The proposal references a "similar" (but not same) clause in the various sections to impose the disqualification. However, the scope of the sections referenced differ. It is proposed that the scope of the disqualified persons be clarified. It should also be clarified whether the intention is to apply the disqualification to Executive/Top management as well who are usually responsible for the management and control of the income and assets.

> ***Response:*** Accepted. The intention is that all persons who accepted fiduciary responsibility in respect of the relevant organisation or entity will be subject to the disqualification. Changes will be effected to the proposed amendment to clarify the intention.
>
> As far as other employees or agents representing the organisation are concerned, the proposed amendment aims to align with other pieces of legislation relevant to this issue in an effort to achieve the same outcome. These pieces of legislation are individually quoted in the proposed amendments and focus on persons who accept fiduciary responsibility for the affairs of the organisation. They are not aiming to regulate the conduct of employees working for the organisation or agents representing the organisation.

Comment: The proposed amendment makes the holding of an office while being disqualified an offence. Given the seriousness of such a bar, it is submitted that a person who holds such a fiduciary position must within 7 days of becoming disqualified, notify the entity where such position is held, of such disqualification, so that the entities' tax exemption is not placed at risk.

> ***Response:*** Comment misplaced. A fiduciary office holder who is disqualified must resign immediately to comply with the law, hence any additional legislative duty on the office holder to notify the entity would be superfluous.

Insertion of an Advance Pricing Agreement Programme: General Comments

(Clause 10 of the Draft TALAB: Chapter III of the Income Tax Act, 1962)

Background

- 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 on proposed domestic transactions.

Comment: The confidentiality of agreed APAs has not been discussed in the supporting guidance document. SARS should include guidance as to how it will ensure that agreed APAs will be kept confidential and it should also clarify in what instances the tax authorities can obtain external industry experts to assist with the APA process.

> ***Response:*** Noted. The APA information will constitute taxpayer information, which is protected by the secrecy provisions of the Tax Administration Act, 2011. SARS will be bound by these secrecy provisions, as well as double taxation agreement confidentiality in the case of bilateral and multilateral APAs.
>
> Regarding engaging or contracting external industry experts to assist SARS with the APA process, it needs to be noted that the transfer pricing community in South Africa is very small. Although SARS could engage or contract members of this community for expert assistance, including industry experts, this will only be to the extent permitted by the secrecy provisions that prohibit the on-disclosure of taxpayer information. It is, however, intended that SARS builds its own internal capacity to implement the APA programme to ensure continuity.

Insertion of an Advance Pricing Agreement Programme: General Comments (cont.)

(Clause 10 of the Draft TALAB: Chapter III of the Income Tax Act, 1962)

Comment: It is recommended that the program be extended as soon as possible to include unilateral APAs.

> ***Response:*** Partially accepted. The draft TALAB caters for bilateral and multilateral APAs but not unilateral APAs. As with most other countries around the world, SARS relies on the OECD transfer pricing principles and guidelines extensively. These are widely publicised as a reference for all parties and advocate the use of bilateral and multilateral APAs as far as possible. This is further underscored by the OECD/G20 Base Erosion and Profit Shifting (BEPS) final reports. However, unilateral APAs may be considered at a later stage, and changes will be effected to enable this.

Comment: The application of the APA program is too narrow. Simple transactions should not be excluded. It may be easier to start with simple transactions to set the standard. The bilateral limit is enough, otherwise SARS should have full discretion on the choice.

> ***Response:*** Partially accepted. The proposed section 76J(1) provides that the Commissioner will reject an advance pricing agreement application if *inter alia* an affected transaction is not complex enough. It is proposed that the criteria for an application for an APA, as well as the rejection of an APA application be changed to provide that the criteria will be determined by the Commissioner by public notice, to permit the widening of the ambit of the programme over time.

Insertion of an Advance Pricing Agreement Programme: General Comments (cont.)

(Clause 10 of the Draft TALAB: Chapter III of the Income Tax Act, 1962)

Comment: Various commentators raised concerns with regards to the time periods contained in the draft APA legislation. Contradicting views were expressed, where some commentators called for the shortening of time periods and others called for the extension of time-periods in certain instances, alternatively the insertion of time-periods where the draft legislation currently does not contain such periods.

For example, it was requested that time periods that form part of the pre-application process (section 76F) should be shortened to 30 and 60 business days respectively in due course, as SARS builds capability, and that the period for making an application after a successful pre-application consultation (section 76G) be lengthened given the information and analysis required to prepare the application.

> ***Response:*** Partially accepted. Given the divergent views and need for flexibility with regards to the time periods contained in the draft TALAB, it is proposed that a similar approach to that adopted as part of the ATR system, where SARS publishes service standards containing turnaround times, also be adopted for purposes of the APA programme. Changes will be effected to remove time periods as far as possible. SARS will also endeavour to comply with Best Practice 5 of the OECD (2022), *Bilateral Advance Pricing Arrangement Manual*, in so far as the completion of a bilateral APA application is concerned.

Comment: The Commissioner may, by public notice, prescribe fees payable for an APA by an applicant. Included in these fees is a cost recovery fee for processing an application. SARS should give some indication of the proposed fee structure. The fact that there are fee levels could create some concern without knowing the proposed amounts.

> ***Response:*** Noted. The associated fees with each relevant stage will be dealt with in a public notice that will be released for public comment before implementation. As noted in the draft TALAB and by the commentator, the fees are intended to defray the costs of administering the APA programme and the processing fee is on a cost recovery basis.

Insertion of an Advance Pricing Agreement Programme: Rejection of an application

(Clause 10 of the Draft TALAB: Chapter III of the Income Tax Act, 1962)

Comment: Section 76J does not explain what the process is if an applicant disagrees with SARS' rejection of its APA application. It is proposed that before issuing a formal rejection notice, an opportunity is provided to the taxpayer to explain/present its case of why an APA should be allowed.

> ***Response:*** <u>Partially accepted.</u> In the ATR system, SARS engages with a taxpayer before rejecting the advance tax ruling application. A similar system will be considered for purposes of the APA programme.

Comment: Clarity should be provided on what the process is if an application is rejected by SARS and the applicant disagrees with this, for instance, who can this be escalated to and would the disagreement be covered by a review process under section 9 of the Tax Administration Act.

> ***Response:*** <u>Noted.</u> The internal review remedy contained in section 9 of the Tax Administration Act, 2011, would be available to the taxpayer. However, if SARS, the other competent authority and the taxpayer cannot come to consensus, the taxpayer may submit its return on the basis as proposed in the APA. Should SARS dispute the correctness of the return and issue a contrary assessment, the taxpayer may dispute the assessment, which dispute will be dealt with in the normal course of the dispute resolution process.

Comment: Clarity on whether SARS can still use the factual information that was disclosed as part of the APA application process should also be provided.

> ***Response:*** <u>Noted.</u> SARS will draw on its experience from the ATR system and voluntary disclosure programme to address this concern.

Insertion of an Advance Pricing Agreement Programme: Termination of APA

(Clause 10 of the Draft TALAB: Chapter III of the Income Tax Act, 1962)

Comment: Section 76O provides certain criteria that will serve as guidance regarding circumstances that will contribute to the Commissioner terminating an APA. One of these circumstances is where a court overturns or modifies an interpretation of the legislation on which the agreement is based. In the case of an APA the taxpayer is not seeking an interpretation of law but rather an agreement on the price of an affected transaction, which does not heavily rely on the interpretation of the legislation but rather the application of the OECD transfer pricing methodology. It is proposed that this provision be deleted.

> ***Response:*** Not accepted. In the interests of administrative transparency, section 76O provides certain criteria with respect to the circumstances that will contribute to the Commissioner terminating an APA. Given international concerns about base erosion and profit shifting, which is also prevalent in developing countries such as South Africa, it is important for SARS to reserve the right to terminate an APA under specified circumstances, subject to the checks and balances in the draft TALAB. For example, section 76O(5) provides that the party that chooses to terminate an APA must first provide the other parties to the agreement with a notice of the proposed termination, the grounds of termination and an opportunity to make representations prior to the decision to terminate.

Non-resident employers' obligation to deduct employees' tax

(Clause 13 of the Draft TALAB: Paragraph 2 of Fourth Schedule to Income Tax Act, 1962)

Background

- The proposed amendment removes the distinction between resident and non-resident employers, and therefore means that any employer (resident or foreign) must deduct employees' tax (PAYE), and then also widens the deduction obligation to include all representative employers. Hence, non-resident employers will become obliged to deduct PAYE. The proposed amendment will furthermore level the playing field between resident and non-resident employers and ensure alignment with skills development levies and unemployment insurance contributions, which many pay.

Comment: The current structure of the employees' tax system in South Africa is that where there is no representative employer in South Africa, the South African based employees are responsible to pay their taxes by way of the provisional tax system. It is unnecessary to introduce an amendment that imposes significant administrative costs for the foreign company (for example, registration as employer, deduction and payment of employees' tax, skills development levies and unemployment insurance fund contributions in respect of the local employee) where there exists a provisional tax system that addresses this.

> ***Response:*** Partially accepted. Changes will be effected to only require non-resident employers conducting business through a permanent establishment in South Africa, to withhold employees' tax. This will alleviate the administrative burden on non-resident employers in general and limit the obligation to non-resident employers that have business activities in South Africa.

Non-resident employers' obligation to deduct employees' tax (cont.)

(Clause 13 of the Draft TALAB: Paragraph 2 of Fourth Schedule to Income Tax Act, 1962)

Comment: The new 'remote/hybrid' working arrangement, has become the norm across the globe and creates employment opportunities for South African youth who are seen as reasonably cheaper and skilled compared to their foreign counterparts. The proposed legislation will add an administration burden on global employers, making South African labour resources less attractive. With unemployment in South Africa at record highs, this amendment may affect the ability of South African residents to participate in the global labour market.

> ***Response:*** Partially accepted. Changes will be effected to only require non-resident employers conducting business through a permanent establishment in South Africa to withhold employees' tax. This will alleviate the administrative burden on non-resident employers in general and limit the obligation to non-resident employers that have business activities in South Africa.

Comment: It may be difficult to implement the proposed amendment as SARS has no authority over offshore employers who may very well have no business activity/presence in South Africa. Non-resident employers will now be required to register as an employer with SARS and account for payroll taxes on remuneration paid to "employees" who live and work in South Africa, as well as those who remain SA tax residents but are "employees" who live and work outside South Africa.

> ***Response:*** Accepted. The changes to be effected will relieve non-resident employers with no business activity/presence in South Africa from withholding employees' tax.

Comment: The proposed amendment lacks a 'trigger clause' that would activate the withholding PAYE withholding requirement, and further does not indicate what the link to South Africa needs to be for a non-resident employer to be subject to the registration and withholding requirement in South Africa.

> ***Response:*** Accepted. Changes will be effected to only require non-resident employers conducting business through a permanent establishment in South Africa to withhold employees' tax.

Non-resident employers' obligation to deduct employees' tax (cont.)

(Clause 13 of the Draft TALAB: Paragraph 2 of Fourth Schedule to Income Tax Act, 1962)

Comment: It is proposed that a further amendment be effected via a change to the definition of 'employer' as contained in the Fourth Schedule, in addition to the proposed amendment to paragraph 2 of the Fourth Schedule. A 'carve-out' for foreign employers of South African tax resident employees living and working outside South Africa on a full-time basis should be inserted in the definition of "employer".

> ***Response:*** Not accepted. The commentator's proposal has been overtaken by the changes to be effected that will relieve non-resident employers with no permanent establishment in South Africa from withholding employees' tax.

Comment: There may be instances where a South African tax-resident employee is physically based abroad, where he works for a foreign employer. Where such a South African tax-resident employee is physically in South Africa (working remotely for such employer) for a certain number of days, we recommend a *de minimis* 'carve-out' rule (we suggest thirty days in aggregate).

Further, where a foreign employer, whose non-resident employee is physically present in the Republic for less than 183 days in a year of assessment, a further *de minimis* should apply so that the foreign employer will not be considered an 'employer', and consequently, not be required to withhold PAYE in respect of remuneration paid to that foreign employee temporarily in SA. This will align the non-resident employees' tax status with the taxing rights under a double taxation agreement.

> ***Response:*** Not accepted. The commentator's first proposal has been overtaken by the changes to be effected that will relieve non-resident employers with no permanent establishment in South Africa from withholding employees' tax. In as far as the second proposal is concerned, double taxation agreements already provide relief in these cases.

Non-resident employers' obligation to deduct employees' tax (cont.)

(Clause 13 of the Draft TALAB: Paragraph 2 of Fourth Schedule to Income Tax Act, 1962)

Comment: It is recommended that the amendment be postponed for a year, i.e., 1 March 2025. Given the far-reaching implications and foreseeable, practical challenges for non-resident employers, we further propose extensive consultation with stakeholders (in the interim), after which the proposed amendment may then be updated.

In addition, practical employer registration requirements for foreign employers will also need to be created that are more efficient and less onerous than the current registration and deregistration requirements (for example opening a SA Bank account and appointing a SA resident public officer), noting that some of the existing registration requirements may be challenging to obtain by virtue of the employer being non-resident.

> ***Response:*** <u>Not accepted.</u> The commentator's proposal has been overtaken by the changes to be effected that will relieve non-resident employers with no permanent establishment in South Africa from withholding employees' tax.

TAX ADMINISTRATION ACT

Insertion of definition of beneficial ownership

(Clause 24 of the Draft TALAB: Section 1 of the Tax Administration Act, 2011)

Background

- 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 beneficial ownership (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 action plan.

- BO is also crucial for tax administration because it helps 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.

Comment: The insertion of a beneficial ownership definition in the Tax Administration Act, which appears to align with the Trust Property Control Act, 1988, is welcomed. However, the definition appears to be a standalone definition that is not applied in the Tax Administration Act. Also, uniformity is required in respect of beneficial ownership information of trusts requested by the Master of the High Courts' Office, SARS and the Financial Intelligence Centre.

> ***Response:*** Noted. BO information is a type of information that will be prescribed in a return in terms of section 25(2) or 26(2) of the Tax Administration Act, which provide that a return must contain the information prescribed and be a full and true return.
>
> The proposed amendments make it clear that BO is to be interpreted consistently with the foundational legislation in this area and corresponds to the term "beneficial owner" as described in the Financial Action Task Force (FATF) Recommendation 10 and the Interpretative Note on Recommendation 10 of the 2012 FATF Recommendations.

Insertion of definition of beneficial ownership (cont.)

(Clause 24 of the Draft TALAB: Section 1 of the Tax Administration Act, 2011)

Comment: With respect to the proposed definition of "beneficial owner" for partnerships, potential interpretation challenges are foreseen given that the Financial Intelligence Centre Act, 2001, definition of beneficial owner includes other terms defined for purposes of the Act only, such as "client".

> ***Response:*** <u>Accepted.</u> Changes to the proposed definition will be effected to address these concerns.

Comment: At present there are different channels to lodge information relating to beneficial ownership. There is an urgent need to centralise this reporting function because this is time consuming.

> ***Response:*** <u>Not accepted.</u> In line with the National Strategy on AML/CTF/CPF, SARS is committed to the implementation of new beneficial owner transparency requirements for companies and legal arrangements (such as trusts and partnerships), which will be kept in a repository.
>
> This repository will function as a Tier 2 replicator BO registry within the envisaged National BO registry framework, the Tier 1 repositories being CIPC and the Master of the High Court. Although BO information will primarily be used in the execution of SARS' mandate and the administration of tax, the information will ultimately be checked against other BO information held by the CIPC and the Master of the High Court, thus serving as a second layer of BO information to ensure the information is accurate and up-to-date as required under the FATF Recommendations (in particular recommendations 24 and 25).
>
> This approach under the National Strategy is supported by the revised FATF Interpretation Note to Recommendations 24, i.e. that countries should follow a multi-pronged approach and decide on the basis of risk, context and materiality, what forms of registry or alternative mechanisms they will use to enable efficient access to information by all competent authorities. Competent authorities or entities such as tax authorities, financial intelligence units, companies' registries or BO registries should also be required to hold BO information.

Extension of period to request an additional or reduced assessment

(Clause 28 of the Draft TALAB: Section 95(6) of the Tax Administration Act, 2011)

Background

- 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 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 ensure that the deadline for the request does not fall earlier than the close of the filing season for non-provisional taxpayers.

Comment: The amendment seeks to remedy part of the unlawful application of section 95 as the enabling legislation for auto-assessments, and therefore does not achieve the desired retroactive result. Auto-assessments legally do not fall within section 95 as it is a punitive provision applied to non-compliant taxpayers. For this reason, it deviates from the normal compliance obligations of the law and imposes a harsher process on the taxpayer. It is proposed that the amendment be withdrawn.

> ***Response:*** Not accepted. In 2020, SARS launched the auto assessment initiative on a wide scale. SARS issued simplified prepopulated returns to taxpayers based on third party data sufficient for this purpose, available to SARS. These taxpayers were afforded the option to either accept or reject the prepopulated return to facilitate ease of compliance.
>
> Acceptance of the prepopulated return would lead to an original assessment being issued by SARS, whereas the rejection of the prepopulated return would require the taxpayer to submit a full return containing the correct information as determined by the taxpayer, with an original assessment subsequently being issued by SARS based on the return submitted by the taxpayer.
>
> As explained in the Memorandum of Objects of the Tax Administration Laws Amendment Act, 2020, the set of amendments introduced at the time created a framework for SARS to make assessments based on estimations where no return is required or there is no failure to pay tax, to support and further enhance the auto assessment initiative. It is clear that these amendments enable SARS to also make assessments based on estimations where no tax is due or a refund is due to the taxpayer.

Extension of period to request an additional or reduced assessment (cont.)

(Clause 28 of the Draft TALAB: Section 95(6) of the Tax Administration Act, 2011)

Response (cont.): This in essence changed the nature of section 95, from a provision where SARS could only issue estimated assessments if a taxpayer failed to submit a return or relevant material as required or owed SARS money, to a more balanced provision where the ability of SARS to issue assessments based on estimations is housed together, easing the compliance burden on taxpayers of having to submit a return.

In 2021, SARS implemented a pure auto assessment model instead of the hybrid model of accepting or rejecting a simplified pre-populated return implemented. Under the auto assessment model, SARS issues an assessment based on an estimation that is informed by the third party data sufficient for this purpose, available to SARS. Should a taxpayer disagree with the assessment, the taxpayer has the opportunity to submit a return reflecting the correct information. SARS may then issue a reduced or additional assessment, as the case may be, based on the return submitted by the taxpayer. Should SARS decide not to issue a reduced assessment or additional assessment, the taxpayer has the option to object to and, if necessary, appeal the original auto assessment issued by SARS.

The application of section 95 for the purposes of auto assessment is neither punitive nor unlawful but a service orientated policy decision that relieves the administrative burden of taxpayers who previously had to file returns. The taxpayer still has the option to file a return where the taxpayer disagrees with the auto assessment issued by SARS. Hence the auto assessment process in no way denies the taxpayer the usual rights and remedies available to the taxpayer.

Comment: Section 95(6) does not empower the Commissioner to issue a “notice to submit a return” akin to section 25. The proposal will only allow the Commissioner to extend the period for the taxpayer to request to submit a return, it does not actually achieve extension of the submission date for the return based on a public notice.

Response: Comment misplaced. The amendment is intended to ensure that the date by which taxpayers may submit their requests for reduced or additional assessments does not fall before the date prescribed by public notice for the filing of non-provisional returns under section 25. Sections 25 and 95(6) are two separate provisions that should not be conflated.

Extension of period to request an additional or reduced assessment (cont.)

(Clause 28 of the Draft TALAB: Section 95(6) of the Tax Administration Act, 2011)

Comment: The use of section 95 for auto assessments also means SARS is required to comply with section 96, including that the statement of the grounds of assessment must accompany the estimate assessment.

> ***Response:*** Comment misplaced. The grounds for the assessment are clearly stated in the assessment along with the information upon which the assessment is based. More detailed information is available on eFiling should a taxpayer wish to access it, for example third party tax certificates. It is not clear what additional grounds or information for the assessment would be required in addition to that already provided. The commentator is invited to make suggestions in this regard through the channels that are available to recognised controlling bodies.

Comment: Section 95 blocks a taxpayer from objecting to the incorrect assessment until SARS has made a decision to either reject the "return" or make a reduced or additional assessment. There is, however, no time period prescribed within which SARS must make this decision.

> ***Response:*** Noted. SARS is required to respond within a reasonable period in terms of the general principles of administrative justice. What a reasonable period would be is dependent on the facts and complexity of a particular case. If the taxpayer believes there has been undue delay, this may be escalated within SARS and, if necessary, to the Tax Ombud.
>
> The interest free grace period for an auto assessment issued at the beginning of the 2023 filing season is synchronised with the date that would apply if the taxpayer submitted a request for a reduced or additional assessment at the end of filing season. Taxpayers, who disagree with their auto assessments and file their requests shortly after receiving the auto assessment, thus have a longer period before payment needs to be made. If SARS' review of the requests submitted is not finalised by the end of the period, whether due to complexity or the requests being submitted close to or at the end of filing season, SARS accepts that the filing of the requests indicate an intention to dispute the auto assessments. The taxpayers may thus make application for suspension of payment in terms of the existing provisions for doing so.

Extension of period to request an additional or reduced assessment (cont.)

(Clause 28 of the Draft TALAB: Section 95(6) of the Tax Administration Act, 2011)

Comment: Section 95(8) deems the date of assessment for the purposes of any objection, not to be the date that SARS actually informs the taxpayer of the outcome of its “request to amend”, but actually the date of the auto assessment. Should SARS therefore make this decision after 80 days, the taxpayer would lose its rights to automatically object as the objection would be late in terms of section 104 of the Tax Administration Act.

It is proposed that section 95(8), should be amended to deem the date of the decision taken in section 95(6) as the date that the decision was actually taken in terms of section 95(6) and not the date of the estimate assessment originally issued.

> ***Response:*** Partially accepted. As noted in the Memorandum of Objects for the Tax Administration Laws Amendment Act, 2021, this provision changes the date of assessment to be the date of the decision not to make a reduced or additional assessment under section 95(6). The result is that the time-period within which the taxpayer may object against the assessment is calculated from this extended date. Nevertheless, amendments will be proposed to section 95(8) to ensure the necessary clarity in this regard.

Extension of period to request an additional or reduced assessment (cont.)

(Clause 28 of the Draft TALAB: Section 95(6) of the Tax Administration Act, 2011)

Comment: It should be noted that errors on auto-assessments for 2023 and prior years ranged from incomplete information populated to third parties submitting incorrect/incomplete information (for example, like the SA Post Office) to SARS' system, thereby populating incorrect information (in 2022 it was interest and 2023 it was rental "doubling").

The current SARS practice penalises taxpayers for others mistakes and prevents them from submitting the correct information whilst facing punitive consequences for these mistakes.

> ***Response:*** Noted. At the outset it should be noted that the vast majority of auto assessments are accepted by taxpayers. For the 2022 filing season, 94.7% of the 2.9 million auto assessments issued were accepted by taxpayers.
>
> Although the high acceptance rate demonstrates the overall quality of the data used, SARS acknowledges that the data supplied by third parties is not always accurate and continues to engage with thirty party data providers to improve the quality of their data. It may, however, become necessary to penalise third party data providers for inaccurate data in the light of the knock-on effect on personal income taxpayers.
>
> It should further be noted that if taxpayers provide SARS with information that is contrary to the third party data that SARS received, the taxpayer would likely be subject to a verification or audit to determine the cause of the inconsistency and verify the correctness of the return information submitted by the taxpayer. It is thus in taxpayers' own interests to also engage with providers of inaccurate third party data to address the situation.