

# **DRAFT MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2020**

## **1. PURPOSE OF BILL**

The Tax Administration Laws Amendment Bill, 2020 (the “Bill”), proposes to amend the Estate Duty Act, 1955, Income Tax Act, 1962, the Customs and Excise Act, 1964, the Value-Added Tax Act, 1991, the Skills Develop Levies Act, 1999, the Unemployment Insurance Contributions Act, 2002, and the Tax Administration Act, 2011.

## **2. OBJECTS OF BILL**

### **2.1. *Estate Duty Act, 1955: Amendment of section 10***

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

### **2.2. *Income Tax Act, 1962: Amendment of section 1***

The terms “mentally disordered” and “defective person” are inappropriate. It is proposed that these terms be replaced with a modern term of more general application, namely, “mentally disabled”.

### **2.3. *Income Tax Act, 1962: Amendment of section 3***

The proposed amendment to section 18A(1)(bA) to specify that the approval for purposes of section 18A is subject to the discretion of the Commissioner, should be subject to objection and appeal. Section 3(4)(b) should therefore be amended to include section 18A(1)(bA)(dd).

### **2.4. *Income Tax Act, 1962: Amendment of section 18A***

Paragraph (a):                      Currently a conduit public benefit organisation (PBO) approved under section 18A(1)(b), can only provide funds and assets to a PBO or an institution, board or body approved by the Commissioner under section 18A(1)(a) carrying on public benefit activities (PBAs) in Part II of the Ninth Schedule, in South Africa. The proposed

amendment aims to ensure that a conduit PBO can also provide funds and assets to any department of government of the Republic contemplated in section 10(1)(a) which has been approved by the Commissioner under section 18A(1)(c).

Paragraph (d): The amendment intends to align section 18A(1)(bA) with sections 18A(1)(a), (b) and (c) to clarify that an application for approval by the Commissioner is required.

Paragraph (e): The proposed amendment is a textual correction to ensure that the proviso to section 18A(1)(c) is applicable to both paragraphs (A) and (B).

Paragraph (f) and (g): The proposed amendments to section 18A(1)(2A)(b)(ii) and 18A(2D) as consequential to the amendment to section 18A(1)(b) allowing a conduit PBO to also provide funds or assets to a department contemplated in section 18A(1)(c). The proposed amendment furthermore, affects some textual changes, clarifies existing wording and aligns the current wording with that of section 18A(1)(b) that provides for a conduit PBO to provide funds as well as assets.

Paragraph (h): Consequential amendment for purposes of adding a new paragraph (d).

Paragraph (i): It is a requirement that a public benefit organisation, an institution, board or body or a department approved by the Commissioner for purposes of section 18A carrying on a combination of PBAs in Parts I and II of the Ninth Schedule, must obtain and retain an audit certificate confirming that all donations received or accrued in the year of assessment for which section 18A receipts were issued were used solely in carrying on PBAs in Part II in South Africa. In the case of a department the audit

certificate must be submitted annually to the Commissioner.

In the case of a conduit PBO, it is a requirement to obtain and retain an audit certificate to confirm that at least 50% of the donations will be distributed within 12 months and that the funds or assets will be used to fund a PBO, institution, board or body or a department carrying on PBAs in Part II.

It is proposed that the audit certificate requirement be added to the listed requirements where non-compliance may give rise to the taxation of donations and ultimately the invalidity of section 18A receipts.

#### ***2.5. Income Tax Act, 1962: Amendment of section 49G***

The withholding tax on interest provisions provide for a refund of excess withholding tax on interest withheld if the required declaration was not submitted in time (a refund to the person entitled to the interest) or the interest subsequently proves to be irrecoverable (a refund to the person who withheld and paid over the tax when it became due and payable). However, the withholding tax on royalties provisions only provide for a refund if the declaration is not submitted. It is proposed that provision be made for a situation where the withholding tax on royalties that was due and payable (in other words, it triggered a withholding tax on royalties) subsequently becomes irrecoverable, to be aligned with the withholding tax on interest provisions.

#### ***2.6. Income Tax Act, 1962: Amendment of paragraph 1 of Fourth Schedule***

Although receipts and accruals of entities as defined in section 30B(1) and approved by the Commissioner under section 30B(2) are currently fully exempt from payment of income tax, there may be instances where such entities fall within the ambit of the definition of “provisional taxpayer” by virtue of them being companies. It is proposed that these entities be excluded from the definition of “provisional taxpayer”.

#### ***2.7. Income Tax Act, 1962: Amendment of paragraph 13 of Fourth Schedule***

Many provisions of the Fourth Schedule still cater for the manual process that was in place prior to the modernisation of the employees' tax system. In order to ensure that the Act keeps up to date with the system changes the proposed amendments aim to align the Act with the modernised process of employees' tax between SARS and employers. The proposed amendment furthermore removes the reference to a deleted provision.

## **2.8. Income Tax Act, 1962: Amendment of paragraph 30 of Fourth Schedule**

Paragraph (a): Currently this section requires that a taxpayer must have acted "wilfully and without just cause" in order to be found guilty of having committed an offence. Before the Tax Administration Act, 2011, these requirements did not exist in this section and they were used inconsistently in respect of offences in the various tax Acts. In view of their inconsistent use, the decision was to use both of them in the introductory wording in paragraph 30 of the Fourth Schedule, section 58 of the Value-Added Tax Act, 1991, and section 234 of the Tax Administration Act. However, the use of the term 'wilfully' in respect of a statutory crime is not correct for the reasons set out below.

In South African Law there are two types of culpability, namely intention (*dolus*) and negligence (*culpa*). Intention has a positive character i.e. the person willed and knew and foresaw something. Negligence on the other hand, always has a negative character i.e. the person did not will or know or foresee something, although according to legal standards he or she should reasonably have known or foreseen it.

A reference to wilful conduct must necessarily exclude negligent conduct. It is not notionally possible for a person to wilfully neglect to do something. Hence the reference to "a person who wilfully and without just cause" fails to do something as required in a tax Act may be problematic. Furthermore, whereas the test for intention is subjective, the test for negligence is objective. In

other words, in the latter instance the person's conduct must be measured against the standard of a reasonable person.

The current wording of this section requires the State to prove that the conduct was "wilful and without just cause". This is purely subjective and there can be no reference to what a reasonable person would have done in the circumstances.

The National Prosecuting Authority (NPA) is of the view that the current wording relating to criminal offences substantially undermines the ability of SARS to ensure compliance based on the objective standard expected of the reasonable person. Consequently this may hamper the criminal prosecution of non-compliant taxpayers by the NPA in seeking to prove the elements of the crime.

For this reason it is proposed that the requirement of wilful conduct be removed with regards to criminal offences in the wording of the statutory offence. This will enable the NPA and SARS to measure a taxpayer against such objective standards where required. The amendment is also proposed in respect of similar sections in other tax Acts, that is, section 58 of the Value-Added Tax Act (see clause 20 of the draft Bill) and section 234 of the Tax Administration Act (see clause 32 of the draft Bill).

Paragraph (b): Paragraph 30(1)(a) of the Fourth Schedule, essentially duplicates section 234(p) of the Tax Administration Act, 2011. It is proposed that this paragraph be deleted for purposes of clarity and consistency between the two Acts. It is also proposed that section 234(p) of the Tax Administration Act be amended to make a technical correction highlighted by comparing it with paragraph 30(1)(a).

Paragraph (c): The proposed deletion of paragraph 30(1)(g) of the Fourth Schedule is consequential to the deletion of paragraph 13(11) of the Fourth Schedule.

Paragraph (d): Paragraph 30(2) of the Fourth Schedule contains a reverse onus provision in terms of which a taxpayer who fails to make payment of employees' tax (PAYE) deducted or withheld, to the Commissioner, within the prescribed period for payment, is deemed to have used or applied the amounts for purposes other than the payment thereof to the Commissioner. Such taxpayer would have to prove his or her innocence, in other words, the taxpayer is deemed to be guilty of the offence in terms of paragraph 30(1)(b) of the Fourth Schedule, until such taxpayer furnishes proof to the contrary. This provision places the legal burden of rebuttal on the taxpayer, to prove his or her innocence beyond a reasonable doubt.

Reverse onus provisions of this nature have been held by our courts to be unconstitutional and to conflict with amongst others, the right to a fair trial, previously enshrined in section 25 of the Interim Constitution and subsequently in section 35 of the Constitution.

It is proposed that paragraph 30(2) be amended in order to align the wording of the provision with the views expressed by our courts, as well as section 235(2) of the Tax Administration Act, 2011, in order to replace the reverse onus with an evidentiary burden upon the taxpayer in these circumstances.

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

The proposed amendment is a technical correction.

### **2.10. *Customs and Excise Act, 1964: Amendment of section 3***

The proposed amendment is a technical correction.

### **2.11. *Customs and Excise Act, 1964: Amendment of section 4***

Paragraph (a): The proposed amendment caters for the possible replacement of the regulations in order to deal with the

new capital flow management framework announced in the Budget 2020.

Paragraphs (b) and (c): The proposed amendment of section 4(3) and (3A) provides the authorisation for the sharing of information regarding purchases of goods free of duty or value-added tax at licensed special customs and excise warehouses (tax free shops), with the Director-General of the Department of International Relations and Co-operation (DIRCO), and the protection of such information. Tax evasion through these kinds of duty and value-added tax free purchases has become an increasing problem and because diplomats must be dealt with through diplomatic channels, DIRCO must be involved in managing the abuse of privileges granted in terms of the Diplomatic Immunities and Privileges Act, 2001.

Paragraph (d): The proposed amendment of section 4(3D) provides for the publication of tariff determinations with a view to enhancing consistency and transparency in respect of the classification of goods. The Commissioner is furthermore authorised to prescribe rules dealing with the circumstances in which such publication may take place, the kind of information that may be published as well as the manner of publication.

## **2.12. Customs and Excise Act, 1964: Amendment of section 18**

Section 18(1)(d) provides for containerized goods to be moved in bond under cover of a manifest and without payment of security, to a container depot or container terminal to which the goods were consigned. The proposed amendment clarifies that such a depot or terminal must be licensed in terms of section 64A or appointed or prescribed by the Commissioner as contemplated in section 6(1)(hA), as the case may be. The amendment removes any doubt that the container depot or terminal must be situated in the Republic. A container operator will therefore only be able to

move goods under cover of a manifest for national transit movements; an international transit bill of entry is required for delivery of goods beyond the borders of the Republic.

### **2.13. Customs and Excise Act, 1964: Amendment of section 40**

Paragraph (a): The proposed amendment aims to effect a correction in section 40(3)(a)(i) to clarify that a bill of entry may be adjusted in the following ways: The importer, exporter or manufacturer may upon discovery that a bill of entry submitted by him or her does not comply with section 39 or is invalid in terms of section 40(1), amend the bill of entry by way of a voucher of correction or in another manner as the Commissioner may prescribe. The other way to adjust a bill of entry is set out in subsection (3)(a)(ii), namely by substitution of a fresh bill of entry and cancellation of the original.

Paragraph (b): Paragraph (a) is furthermore subjected to a proviso to the effect that if the purpose for which goods are entered as specified on a bill of entry is incorrect, the adjustment must be made by way of substitution in terms of paragraph (a)(ii).

The current wording of subsection (3)(a)(i) creates uncertainty as to whether the time periods for substitution referred to in subsection (3)(b)(i) and (ii) apply for purposes of a substitution referred to in subsection (3)(a)(i)(B). The proposed amendment removes uncertainty in this regard.

### **2.14. Customs and Excise Act, 1964: Amendment of section 44**

All but the first amendment proposed to this section relate to the announcement in Budget 2020 that legislative steps would be taken to alleviate difficulties in relation to containerized goods arising due to the prolonged liability of the master of a ship, pilot of an aircraft or other carrier of goods.



- Paragraph (a): The proposed amendment of section 44(1) is aimed at providing for the commencement of liability for an export duty on goods specified in Part 6 of Schedule No.1 (to be published). This amendment relates to announcement in Budget 2020 concerning the introduction of an export tax on scrap metal.
- Paragraph (b): The proposed amendment of subsection (5) is intended to provide for additional circumstances in which the liability of the master or pilot or other carrier referred to in that subsection will cease, namely upon delivery of the goods to a licensed remover in bond for transport of the goods for purposes of examination. This will encourage competition and afford the importer or the importer's agent a choice to use another transporter onto whom the liability for duty will be transferred.
- Paragraph (c): The insertion of subsection (5AA) provides for the circumstances in which the liability of the licensed remover in bond will cease, whilst the proposed amendment of subsection (6) clarifies that the licensed remover in bond assumes liability in circumstances contemplated in proposed subsection (5)(e).

#### **2.15. Customs and Excise Act, 1964: Amendment of section 72**

The proposed amendment clarifies the meaning of "free on board" in relation to goods for purposes of section 72.

#### **2.16. Customs and Excise Act, 1964: Amendment of section 76B**

The proposed amendment aims to limit applications for refunds in relation to export duty to a period of two years calculated from the date of entry for export. This is a further amendment relating to the announcement in Budget 2020 concerning the introduction of an export tax on scrap metal.

#### **2.17. Customs and Excise Act, 1964: Amendment of section 113**

The proposed amendment aims to widen section 113(2) to apply to exported goods for which a certificate or other authority is required to be produced.

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

The proposed amendment caters for the possible replacement of the regulations in order to deal with the new capital flow management framework announced in the Budget 2020.

**2.19. Value-Added Tax Act, 1991: Amendment of section 14**

Where a recipient is required to pay tax in terms of section 7(1)(c), and the exceptions and exclusions listed under section 14(5), *inter alia*, do not apply, the recipient is required to furnish a return to the Commissioner, i.e. a Form VAT215.

However, as a consequence of the VAT modernisation initiative, the channel to furnish the Commissioner with a return, i.e. the VAT215, was removed. Consequently, the recipient of the imported services will not be able to file the return as required by legislation and it is proposed that this requirement be substituted with a requirement to obtain, complete and retain the VAT215.

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

Section 20(8) refers to an identity document contemplated in section 1 of the Identification Act, 1997. This Act no longer contains a definition of an “identity document” but rather an “identity card”. It is proposed that section 20(8) be amended to align with the terminology prescribed in terms of the Identification Act.

**2.21. Value-Added Tax Act, 1991: Amendment of section 58**

See the note on the amendment to paragraph 30(1) of the Fourth Schedule to the Income Tax Act, 1962, in paragraph 2.7 above.

**2.22. Skills Development Levies Act, 1999: Amendment of section 6**

In terms of the Income Tax Act, 1962, SARS may refuse to authorise a refund until a taxpayer furnishes any returns that are outstanding under the Act. A similar but broader provision exists in the Employment Tax Incentive Act, 2013. In view of the tight integration between the PAYE, skills development levy, unemployment insurance contributions and employment tax incentive systems, it is proposed that this power also apply to the Skills Development Levy Act.

**2.23. Unemployment Insurance Contributions Act, 2002: Amendment of section 8**

In terms of the Income Tax Act, 1962, SARS may refuse to authorise a refund until a taxpayer furnishes any returns that are outstanding under the Act. A similar but broader provision exists in the Employment Tax Incentive Act, 2013. In view of the tight integration between the PAYE, skills development levy, unemployment insurance contributions and employment tax incentive systems, it is proposed that this power also apply to the Unemployment Contributions Act.

**2.24. Tax Administration Act, 2011: Amendment of section 12**

The proposed amendment is a technical correction.

**2.25. Tax Administration Act, 2011: Amendment of section 70**

The proposed amendment caters for the possible replacement of the regulations in order to deal with the new capital flow management framework announced in the Budget 2020.

**2.26. Tax Administration Act, 2011: Amendment of section 86**

The original wording in section 76M(4) of the Income Tax Act, 1962, was lengthier but concentrated on the “pre-decision” phase with respect to the withdrawal or modification of a binding ruling. The new wording was also intended as affording a prior hearing, and not a post decision “objection”, which interpretation is possible under the current wording, although this has not arisen in practice. The taxpayer retains the right to object to the assessment wherein SARS does not follow the

original form of the withdrawn or modified binding ruling and so has an effect that 'dissatisfies' the taxpayer.

### **2.27. Tax Administration Act, 2011: Amendment of section 91**

It is proposed that certain provisions that specifically deal with an assessment based on an estimate be deleted in section 91 and relocated to section 95, which section deals with the issue of such assessments by SARS.

### **2.28. Tax Administration Act, 2011: Amendment of section 93**

The proposed amendment is consequential to the amendments to section 95 of the Tax Administration Act.

### **2.29. Tax Administration Act, 2011: Amendment of section 95**

Paragraph (a): SARS may currently issue an assessment based on an estimate to a taxpayer who does not file a return. The assessment may not be disputed until the relevant return is filed and SARS has failed to revise the assessment in the light of the return. This ensures that all the facts are available when the assessment is revisited and that the dispute resolution timelines that would otherwise apply may be relaxed in appropriate circumstances. It is proposed that this approach be extended to cases where specific relevant material was requested from a taxpayer on more than one occasion, without an adequate response.

Paragraph (b): The proposed amendment aims to relocate the provisions that specifically relate to the issue of an assessment based on an estimate, currently housed in section 91, to section 95 which is the section under which an assessments based on an estimate is issued by SARS. In this way all the rules relating to the issue of an assessment based on an estimate will be housed together in the same section.

Although the new proposed subsection (4) and (5), in essence contain provisions that are similar to the provisions contained in

section 91, now being repealed, the following matters can be highlighted:

- The time-period within which the taxpayer may request SARS to issue a reduced or additional assessment, once the outstanding return or relevant material has been provided by the taxpayer, has been extended from 30 to 40 business days;
- The time period within which a senior SARS official may extend the period is aligned with the prescription periods contained in section 99;
- The new wording furthermore contains a technical correction to align the words of the proposed section 95(4)(c) with wording used elsewhere in the Act, i.e. to replace the words “complete and correct return” (currently used section 91(5)(b)) with the words “true and full return” used in section 25 and 26 of the Act.

### ***2.30. Tax Administration Act, 2011: Amendment of section 187***

Payments that are not properly allocated by a taxpayer are administratively difficult to allocate correctly. SARS requires a period to determine if the payment was in fact erroneous or not. If the payment had to be allocated to a specific tax type, but is refunded as an erroneous payment, the taxpayer will be charged interest on the debt that remains. The proposed amendment aims to insert a specific effective date for erroneous payments referred to in section 190(1)(b) of the Tax Administration Act. This provides SARS a period of 60 business days to determine the erroneous nature of the payment prior such payment being refunded to the taxpayer.

### ***2.31. Tax Administration Act, 2011: Amendment of section 188***

Chapter 12 of the Tax Administration Act created a framework to support the modernisation of SARS’ accounting system regarding interest. Due to the similarities in relation to the interaction between provisional and income tax on the one hand and the estimation and final payment of royalties for mineral and petroleum

resources on the other, it is proposed that Chapter 12 be amended to achieve uniformity with the provisions of the Mineral and Petroleum Resource Royalty (Administration) Act, 2008. This alignment includes aligning interest payable for royalties, in respect of the first and second payment, with provisional tax interest under Chapter 12.

### ***2.32. Tax Administration Act, 2011: Amendment of section 189***

The proposed amendment provides that the current interest rate applicable to refunds of provisional tax and employees' tax paid for the relevant year of assessment, upon final assessment of income tax, will also apply to refunds of mineral and petroleum resources royalties, paid for the relevant year of assessment, in excess of the amount properly chargeable under the Mineral and Petroleum Resources Royalty Act, 2008, upon final assessment.

### ***2.33. Tax Administration Act, 2011: Amendment of section 190***

The Tax Administration Act provides that SARS may withhold a refund until such time that a verification, inspection or audit of the refund is finalised. It is proposed that this provision be extended to also include criminal investigations.

### ***2.34. Tax Administration Act, 2011: Amendment of section 234***

See the note to the proposed amendment of paragraph 30(1) of the Fourth Schedule to the Income Tax Act, 1962.

### ***2.35. Short title and commencement***

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

### **3. CONSULTATION**

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

### **4. FINANCIAL IMPLICATIONS FOR STATE**

An account of the financial implications for the State was given in the 2020 Budget Review, tabled in Parliament on 26 February 2020.

### **5. PARLIAMENTARY PROCEDURE**

- 5.1 The State Law Advisers, the National Treasury and South African Revenue Service are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.
- 5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.