

**MEMORANDUM ON THE OBJECTS OF THE TAX
ADMINISTRATION LAWS AMENDMENT BILL, 2019**

1. PURPOSE OF BILL

The Tax Administration Laws Amendment Bill, 2019 (the “Bill”), proposes to amend the following Acts:

- The Income Tax Act, (Act No. 58 of 1962) (the “Income Tax Act, 1962”);
- the Customs and Excise Act, 1964 (Act No. 91 of 1964) (the “Customs and Excise Act, 1964”);
- the Value-Added Tax Act, 1991 (Act No. 89 of 1991) (the “Value-Added Tax Act, 1991”);
- the Skills Development Levies Act, 1999 (Act No. 9 of 1999) (the “Skills Development Levies Act, 1999”);
- the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002) (the “Unemployment Insurance Contributions Act, 2002”); and
- the Tax Administration Act, 2011 (Act No. 28 of 2011) (the “Tax Administration Act, 2011”).

2. OBJECTS OF BILL

2.1 *Income Tax Act, 1962: Amendment of section 3*

The proposed amendment corrects cross-referencing. A decision in terms of section 18A(5C) would be given effect to in an assessment. Should the taxpayer not agree with the assessment the taxpayer may exercise the normal remedies of objection and appeal in terms of section 104 of the Tax Administration Act, 2011, which makes a reference to this section in section 3(4) unnecessary. The correct cross-reference should be to sections 18A(1)(a)(cc), 18A(1)(b) and 18A(1)(c) where the Commissioner exercises his or her discretion to approve an organisation for purposes of section 18A.

2.2 *Income Tax Act, 1962: Amendment of section 18A*

2.2.1 Section 18A(2C) provides that the Accounting Authority contemplated in the Public Finance Management Act for the department which issued any receipts in terms of section 18A(2), must on an annual basis submit an audit certificate to the Commissioner confirming that all donations received or accrued in the year in respect of which receipts were so issued were utilised in the manner contemplated in section 18A(2A).

2.2.2 A department contemplated in section 18A(1)(c) includes the national, provincial or local sphere of government. The Public Finance Management Act, 1999, however, applies only to the national and provincial sphere of government. The Local Government: Municipal Financial Management Act, 2003, is applicable to the local sphere of government. The Local Government: Municipal Finance Management Act requires a municipality to have an accounting officer who must be accountable under that Act.

2.2.3 The fact that section 18A(2C) does not contain a reference to an accounting officer under the Local Government: Municipal Finance Management Act, appears to be an oversight, since sections 18A(5B) and (7) both refer to an accounting authority under the Public Finance Management Act and an accounting officer under the Local Government: Municipal Finance Management Act. The proposed amendment

aims to correct this oversight and align the wording of section 18A(2C) with sections 18A(5B) and (7).

2.3 *Income Tax Act, 1962: Amendment of section 49E*

- 2.3.1 Section 49E(3) requires a foreign person to or for the benefit of whom a royalty payment is made, to submit to the local person making the payment, a declaration to permit a reduced rate of tax to be applied as a result of the application of an agreement for the avoidance of double taxation. An example would be the case of a beneficial owner of a royalty payment who is a resident in the United States of America, where the Double Taxation Agreement between the United States and South Africa provides for a lower withholding tax rate than that prescribed in the Act.
- 2.3.2 It was submitted that this requirement creates an administrative burden for local persons that enter into multiple transactions with a single foreign person during the year. This would then mean that a declaration would have to be obtained by the local person from the same foreign person with regard to each and every transaction entered into.
- 2.3.3 The same issue was raised with regard to withholding tax on interest where local persons that have foreign investors need to obtain a declaration in terms of section 50E(3) where a reduced rate of tax has been applied as a result of the application of an agreement for the avoidance of double taxation.
- 2.3.4 The proposed amendment aims to alleviate this administrative burden by requiring that where more than one payment is made to the same foreign person the written undertaking need only be submitted once, namely, before the first payment to that foreign person, provided the conditions affecting the rate at which the royalty tax or withholding tax on interest is paid do not change and the payment of the royalty or interest is still made to or for the benefit of that foreign person. However, a declaration and written undertaking under this section will no longer be valid after a period of five years from the date of the declaration.
- 2.3.5 The new requirements with regard to the written undertaking have also been extended to royalties or interest payments that are exempt from royalty tax or withholding tax on interest as well as the exemption from and reduction of tax in respect of dividends in specie, withholding of dividends tax by companies declaring and paying dividends and the withholding of dividends tax by regulated intermediaries. The new provisions imposing a time limitation on the validity of the declarations and undertakings will come into effect on 1 July 2020 in order to provide the relevant entities an adequate opportunity to refresh the declarations and undertakings that they hold, while not requiring these entities that are obtaining a declaration for each payment to continue doing so for an extended period.

2.4 *Income Tax Act, 1962: Amendment of section 50E*

See the note on section 49E above. However, an exception to the five year validity limitation has been created for banks and other financial institutions involved in the payment of interest, where that bank or financial institution is subject to the Financial Intelligence Centre (FIC) legislation, Foreign Account Tax Compliance Act (FATCA) or the Common Reporting Standard (CRS) regulations with regard to the foreign person to or for the benefit of which the payment is to be made and takes account of these provisions in monitoring the continued validity of the declarations, i.e. the content of the declarations is monitored under or subject to the anti-money laundering, “know your client”,

FATCA or CRS requirements. In these instances, no time limitation will be imposed on the validity of the declarations and undertakings.

2.5 *Income Tax Act, 1962: Amendment of section 60*

The proposed amendment is a technical correction to ensure that assessments issued in terms of this section is done in accordance with Chapter 8 of the Tax Administration Act, 2011.

2.6 *Income Tax Act, 1962: Amendment of section 64FA*

See the note on section 49E above. The proposed amendment aims to align the wording of section 64FA with the proposed amendments to section 49E and 50E. The exception to the time limitation on the validity of the declarations and undertakings, as proposed in section 50E(4), will also apply to dividends tax by companies declaring and paying dividends in terms of this section.

2.7 *Income Tax Act, 1962: Amendment of section 64G*

See the note on section 49E above. The proposed amendment aims to align the wording of section 64G with the proposed amendments to section 49E, 50E and 64FA. The exception to the time limitation on the validity of the declarations and undertakings, as proposed in sections 50E(4) and 64FA(3), will also apply to dividends tax by companies declaring and paying dividends in terms of this section.

2.8 *Income Tax Act, 1962: Amendment of section 64H*

Paragraphs (a) and (d):

See the note on section 49E above. The proposed amendment aims to align the wording of section 64H with the proposed amendments to sections 49E, 50E, 64FA and 64G. The exception to the time limitation on the validity of the declarations and undertakings, as proposed in sections 50E(4), 64FA(3) and 64G(4), will also apply to dividends tax by regulated intermediaries in terms of this section.

Paragraph (b) and (c):

Currently, in order to ensure that dividends tax is not withheld from dividends declared on shares held as a tax free investment in terms of section 12T of the Income Tax Act, the regulated intermediary through which the investments are held will need to be provided with the required declaration and written undertaking as contemplated in section 64H. Failing this, dividends tax will have to be withheld and the investor would need to seek a refund of the dividends tax from the regulated intermediary once the required declaration and written undertaking has been provided. The proposed amendment aims to remove this requirement insofar as tax free investments are concerned.

2.9 *Income Tax Act, 1962: Amendment of paragraph 14 of Fourth Schedule*

The proposed amendment aims to clarify that the penalty in terms of this paragraph may also be imposed where an employer submits an incomplete return.

2.10 *Income Tax Act, 1962: Amendment of paragraph 19 of Fourth Schedule*

2.10.1 The last day of the year of assessment of a natural person, in the year of his or her death, is the date of death. At present there is no exemption from the payment of provisional tax by a natural person in respect of the period ending on the date of death, which can result in the imposition of underestimation penalties under paragraph 20 of the Fourth Schedule.

2.10.2 In this regard, paragraph 19(6) of the Fourth Schedule provides that a person that fails to submit an estimate of provisional tax within four months of the end of the second period is deemed to have submitted an estimate of nil. As a result, a deceased person may be subject to the underestimation penalty in paragraph 20 of the Fourth Schedule on assessment if no estimate was submitted by the executor within the four-month period. In order to have this penalty remitted under paragraph 20(2C) of the Fourth Schedule, the executor would have to lodge an objection.

2.10.3 The purpose of the amendment is to exempt the executor from having to submit an estimate of provisional tax on behalf of the deceased person in respect of the period up to date of death. This amendment has no impact on the deceased person's obligation to make a first period estimate where he or she is still alive on 31 August. This proposal will avoid unnecessary administration for SARS and the executor. Any tax owing will be collected on assessment of the final return of income made under section 66(13)(a) of the Act.

2.11 *Customs and Excise Act, 1964: Amendment of section 1*

Paragraph (a):

The proposed amendment is aimed at setting aside Part 6 of Schedule 1 for purposes of any future export duties.

Paragraph (b):

The proposed amendment inserts a correction to reflect the new name of the country previously known as Swaziland.

Paragraph (c):

The proposed amendment inserts a definition for Tax Administration Act, 2011, consequential to the proposed amendments to section 4(3) of the Act.

2.12 *Customs and Excise Act, 1964: Amendment of section 4*

Paragraphs (a) to (c):

The proposed amendments to subsections (3) and (3A) provide the authorisation for the sharing of information required to administer carbon offsets and greenhouse gas emissions reporting with the Department of Mineral Resources and Energy and the Department of Environment, Forestry and Fisheries. Provision is also made for the sharing of information with authorised dealers in foreign exchange to assist such dealers in the verification of applications for advance foreign exchange payments in respect of goods that are to be imported. It is anticipated that the sharing of such information will aid in the verification of legitimate financial flows.

Paragraph (d):

The proposed amendment is aimed at alignment with a similar approach followed in section 69(8)(d) of the Tax Administration Act, 2011.

2.13 *Customs and Excise Act, 1964: Amendment of section 41*

The proposed amendment aims to clarify that an invoice may, if an amount reflected on the invoice is to be changed, be amended by the issuing of a credit or debit note, without reissuing the invoice.

2.14 *Customs and Excise Act, 1964: Amendment of section 47*

Paragraph (a):

The proposed deletion of subsection (9)(a)(iii) and insertion of the content of the subparagraph in adjusted form as subsection (11A) clarifies that a tariff determination made in terms of subsection (9) applies to identical goods entered by the same person, whether the goods were entered before or after the date when the determination is issued. A tariff determination made in terms of subsection (9) can be applied retrospectively to identical goods imported by the same person before the determination was issued for purposes of refunds for overpayments of duty as well as liability for underpayments of duty, taking into account the applicable prescription period.

Paragraph (b):

The proposed amendment has the effect that removals of bulk wine between excise manufacturing warehouses are excluded from compulsory tariff determination. Such removals are aimed at further manufacture and the bulk wine removed is not the final alcoholic beverage.

Paragraph (c):

See paragraph (a) above.

2.15 *Customs and Excise Act, 1964: Amendment of section 53*

The proposed amendment is intended to retrospectively correct an inadvertent overlap between sections 53 and 54G of the Act. Part 7 of Schedule No. 1 has already been set aside for the health promotion levy in terms of section 54G.

2.16 *Customs and Excise Act, 1964: Amendment of section 65*

The proposed amendment is related to the amendment to section 47(9) and clarifies that a value determination made in terms of subsection (4)(a) or (5) applies to goods mentioned in the determination entered by the same person before or after the date when the determination is issued. A determination made in terms of subsection (4)(a) or (5) can be applied retrospectively to goods mentioned in the determination imported by the same person before the determination was issued for purposes of refunds for overpayments of duty as well as liability for underpayments of duty, taking into account the applicable prescription period.

2.17 *Customs and Excise Act, 1964: Amendment of section 76*

2.17.1 The proposed amendment is consequential to proposed amendments to items 412.09; 495.00; 497.01; 624.50; 634.03; 670.10; 680.02 and 690.01 of the Customs and Excise Tariff, which aim to exclude duty rebates in circumstances where damage, destruction or loss of goods as contemplated in those items occurs due to robbery or theft. This is in line with an international approach to not allow duty rebates in cases of robbery or theft, the rationale being that the goods have entered into home consumption and that the amount of any duty payable should be covered by an insurance policy.

2.17.2 The proposed amendment to section 76(d) intends to ensure parity in the treatment of refunds of duty already paid, and rebates in respect of duty payable, on goods damaged, destroyed or lost due to robbery or theft.

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

The proposed amendment authorises the Commissioner to prescribe rules relating to the making of advance foreign currency payments in relation to the

importation of goods. The purpose of these rules is to aid in the verification of legitimate financial flows by requiring persons intending to apply to authorised dealers in foreign exchange for making advance foreign exchange payments, to first notify the Commissioner of such intention, and by requiring authorised dealers to report certain information in relation to advance foreign exchange payments to the Commissioner.

2.19 Value-Added Tax Act, 1991: Amendment of section 20

Section 20(5B) requires the Minister to prescribe the particulars to be contained on a tax invoice issued by a foreign supplier of electronic services, by regulation. This regulation has not been issued but the Commissioner has issued Binding General Ruling No. 28 in this regard. The proposed amendment removes the requirement for the Minister to prescribe these particulars by regulation and now enables the Commissioner to prescribe them by public notice in the *Gazette*.

2.20 Value-Added Tax Act, 1991: Amendment of section 41B

The proposed amendment corrects the numbering of the section and aims to clarify that rulings in terms of section 41B of the Value-Added Tax Act, are not subject to the prescribed fee (i.e. the application fee and the cost recovery fee) as set out in section 79(6) and section 81(1)(b) of the Tax Administration Act, 2011.

2.21 Skills Development Levies Act, 1999: Amendment of section 5

Paragraph (a):

The Director-General of the Department of Higher Education and Training, instead of SARS, is regarded as the person most capable of evaluating whether or not an employer has been classified under the jurisdiction of the correct SETA. The proposed amendment aims to ensure that the Director-General is able to classify the employer under the jurisdiction of the correct SETA.

Paragraph (b):

In view of the above, an amendment is also proposed to allow the Director-General to direct that a SETA selection by an employer is not binding in certain circumstances.

2.22 Skills Development Levies Act, 1999: Amendment of section 7

2.22.1 In terms of section 190(4) of the Tax Administration Act, 2011, an erroneous payment will be regarded as a payment to the National Revenue Fund unless the amount is refunded by SARS (in the case of self-assessment) within 5 years from the later of the date the return had to be submitted, or, if no return is required, payment had to be made in terms of the relevant tax Act or the erroneous payment was made, or where that refund is claimed by the taxpayer within the five year period, but not paid by SARS within that five year period.

2.22.2 The proposed amendment aims to align the refund provisions in the Skills Development Levies Act, 1999, with section 190(4) of the Tax Administration Act to provide that a refund by the Director-General in terms of the Skills Development Levies Act, must be made by the SETA within five years from the date the payment was made or where that refund was claimed by the employer, within the five year period, but not paid by the SETA within that period.

2.23 Skills Development Levies Act, 1999: Amendment of section 11

The proposed amendment is a technical correction to cross referencing.

2.24 *Skills Development Levies Act, 1999: Amendment of section 12*

The proposed amendment is a technical correction to cross referencing.

2.25 *Unemployment Insurance Contributions Act, 2002: Amendment of section 9*

2.25.1 In terms of section 190(4) of the Tax Administration Act, 2011, an erroneous payment will be regarded as a payment to the National Revenue Fund unless the amount is refunded by SARS (in the case of self-assessment) within 5 years from the later of the date the return had to be submitted, or, if no return is required, payment had to be made in terms of the relevant tax Act or the erroneous payment was made, or where that refund is claimed by the taxpayer within the five year period, but not paid by SARS within that five year period.

2.25.2 The proposed amendment aims to align the refund provisions in the Unemployment Insurance Contributions Act, 2002, with section 190(4) of the Tax Administration Act to provide that a refund by the Commissioner in terms of the Unemployment Insurance Contributions Act, must be made by the Commissioner within five years from the date the payment was made or where that refund was claimed by the employer, within the five year period, but not paid by the Commissioner within that period.

2.26 *Tax Administration Act, 2011: Amendment of Arrangement of Sections*

The proposed amendment is consequential to the amendments to section 212 of the Tax Administration Act, 2011.

2.27 *Tax Administration Act, 2011: Amendment of section 11*

2.27.1 A one-week notice period has proven to be impractical in practice to give effect to the rationale for the notice, i.e. to enable SARS an opportunity to investigate the matter further and to decide how to resolve the dispute, for example by exploring a dispute resolution process, thereby avoiding litigation at the public's expense. The proposed amendment increases the current one week period to 10 business days in order to afford SARS sufficient time to investigate the matter to see if it can be resolved without resorting to litigation, unless a competent court directs otherwise, for example in the case of urgency.

2.27.2 In comparison, for example, section 5(2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002, provides that no process referred to in section 5(1) of the Act may be served, as contemplated in that subsection, before the expiry of a period of 60 days after the notice, where applicable, has been served on the organ of state in terms of section 3(2)(a).

2.28 *Tax Administration Act, 2011: Amendment of section 12*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.29 *Tax Administration Act, 2011: Amendment of section 42A*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.30 *Tax Administration Act, 2011: Amendment of section 46*

The proposed amendment is a textual correction in order to align the wording of section 46(3) with the wording of section 46(2)(b).

2.31 *Tax Administration Act, 2011: Amendment of section 64*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.32 *Tax Administration Act, 2011: Amendment of section 91*

The proposed amendment aims to clarify when SARS may make an assessment based on an estimate under this provision i.e. if no return is submitted or where no return is required, the taxpayer fails to pay the tax required under a tax Act.

2.33 *Tax Administration Act, 2011: Amendment of section 100*

The proposed amendment aims to clarify that an assessment or decision is final if an appeal has been filed and is withdrawn.

2.34 *Tax Administration Act, 2011: Amendment of section 110*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.35 *Tax Administration Act, 2011: Amendment of section 111*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.36 *Tax Administration Act, 2011: Amendment of section 134*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.37 *Tax Administration Act, 2011: Amendment of section 139*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.38 *Tax Administration Act, 2011: Amendment of section 141*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.39 *Tax Administration Act, 2011: Amendment of section 191*

2.39.1 The proposed amendment aims to clarify that SARS may set off refunds against the outstanding tax debt of the taxpayer as well as amounts outstanding in terms of customs and excise legislation, even if there is no outstanding tax debt. In such instances the full amount is then utilised towards customs and excise debt.

2.39.2 The set-off of refunds against amounts outstanding in terms of customs and excise legislation is not a new principle. The principle applied prior to the enactment of the Tax Administration Act, 2011, where amounts refundable in terms of the Income Tax Act, 1962 (section 102(3)) as well as the Value-added Tax Act, 1991 (section 44(6)), could be set off against customs and excise debt. Section 76C of the Customs and Excise Act, 1964, similarly permits the set-off of customs and excise refunds against any outstanding tax debt.

2.40 *Tax Administration Act, 2011: Amendment of section 210*

It has emerged internationally that offshore structures and arrangements are being designed in an attempt to circumvent financial account reporting under the OECD's Common Reporting Standard (CRS), which is the standard used for the exchange of financial account information between countries. Subject to the approval of the Minister, the OECD's model *Mandatory Disclosure Rules* are to be implemented in South Africa in proposed new CRS regulations. These regulations will be issued under section 257, read with paragraph (a) of the definition of "international tax standard" in section 1 of the Act, and will require certain persons to report such structures and arrangements. The proposed amendment aims to enforce this reporting obligation by means of similar penalties to those currently in force for non-compliance with the reportable arrangement scheme under the Act.

2.41 *Tax Administration Act, 2011: Amendment of section 212*

See note on section 210 above.

2.42 *Tax Administration Act, 2011: Amendment of section 223*

The proposed amendment is a technical correction to effect clarity.

2.43 *Tax Administration Act, 2011: Amendment of section 234*

The proposed amendment clarifies that a person, who wilfully and without just cause issues to SARS an erroneous, incomplete or false document required to be issued under a tax Act, is subject to a criminal sanction under section 235.

2.44 *Tax Administration Act, 2011: Amendment of section 240A*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.45 *Tax Administration Act, 2011: Amendment of section 246*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.46 *Tax Administration Act, 2011: Amendment of section 256*

The proposed amendments update the provisions relating to a taxpayer's tax compliance status to take account of recent system developments that speed up the process. It furthermore enables the Commissioner to, by public notice, insert a *de minimis* for the amount of outstanding tax debt that will contribute to a taxpayer's tax compliance status as being indicated as non-compliant. It also provides for the Commissioner to allow a grace period before a taxpayer's tax compliance status is indicated as non-compliant to third parties.

2.47 *Tax Administration Act, 2011: Amendment of section 262*

The proposed amendment is consequential to the coming into effect of the Legal Practice Act, 2014.

2.48 *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 2019 Budget Review, tabled in Parliament on 20 February 2019.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers and 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.