

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

1. PURPOSE OF BILL

The Tax Administration Laws Amendment Bill, 2021 (the “Bill”), proposes to amend the Estate Duty Act, 1955, the Income Tax Act, 1962, the Customs and Excise Act, 1964, the Tax Administration Act, 2011, and the Disaster Management Tax Relief Administration Act, 2020.

2. OBJECTS OF BILL

2.1 *Estate Duty Act, 1955: Amendment of section 5*

The proposed amendments are textual corrections.

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

The information required by law in the receipts issued for tax-deductible donations is limited and entities issuing the receipts are not required to provide third-party data on the donations to SARS on a systematic basis. SARS has detected that receipts are being issued by entities that are not approved to do so. To ensure that only valid donations are claimed and to ensure that receipts and third party data provided to SARS match, it is proposed that the information required in the receipts be extended to allow such information as the Commissioner may prescribe by public notice from time to time. Third-party reporting will be extended in future to cover the receipts issued.

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

Section 50F of the Income Tax Act provides that a foreign person is only required to submit a return in respect of withholdings tax on interest, if the foreign person makes the payment of the tax. If another person makes the payment, no submission of return obligation for the foreign person exists. It is proposed that a similar requirement should be included for purposes of withholding tax on royalties.

2.4 *Income Tax Act, 1962: Amendment of section 64LA*

The proposed amendment is a technical correction in order to align the refund limitation rules for dividends paid in specie with that of dividends paid in cash.

2.5 *Income Tax Act, 1962: Amendment of paragraph 13 of First Schedule*

Farmers are allowed to deduct the cost of livestock purchased, within a fixed period, to replace livestock sold in a previous year of assessment on account of drought, fire or other specified reasons, by reopening the assessment for the previous year of assessment. Having regard to the time-periods allowed in paragraph 13 for a taxpayer to exercise this option, the original assessments may have prescribed. The proposed addition enables the Commissioner to issue a reduced assessment where such deductions were claimed in terms of the time-periods set out in paragraph 13 of the First Schedule, but such time-periods fall outside the prescription periods listed in section 99 of the Tax Administration Act. The record retention periods contained in section 29 and 97 of the Tax Administration Act will also be adjusted in line with the time-periods set out in paragraph 13 of the First Schedule.

2.6 ***Income Tax Act, 1962: Amendment of paragraph 6 of Fourth Schedule***

The proposed amendment is a textual correction.

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

SARS may impose a penalty for the non-submission of the six-monthly employees' tax returns by employers. The penalty is calculated as a percentage of the employees' tax for the period covered by the return. Where the employees' tax for the period is not known to SARS, due to the non-submission of monthly or six-monthly returns, the penalty can only be imposed retrospectively. This undermines the purpose and deterrent effect of the non-compliance penalty. The proposed amendment enables SARS to raise the penalty on an alternative basis in such cases, through an estimate of the employees' tax using data readily available to SARS with an adjustment once the actual employees' tax is known.

2.8 ***Income Tax Act, 1962: Amendment of paragraph 21 of Fourth Schedule***

Provisional taxpayers are required to make provisional tax payments within six months after the commencement of a year of assessment and then again by the end of the year of assessment. Currently, no provision is made for instances where a taxpayer has a short year of assessment, whether by reason of death, ceasing to be a tax resident, a company being incorporated during a year or a change of a company's financial year. It is proposed that a first provisional tax payment and return not be required when the duration of a year of assessment does not exceed six months.

2.9 ***Income Tax Act, 1962: Amendment of paragraph 23 of Fourth Schedule***

See the note on the amendment of paragraph 21 of the Fourth Schedule.

2.10 ***Income Tax Act, 1962: Amendment of paragraph 17 of Seventh Schedule***

2.10.1 Under paragraph 13 of the Fourth Schedule to the Income Tax Act, employers have an obligation to issue Employees' Tax Certificates (IRP5/IT3(a) certificates) to their employees. The Employees' Tax Certificate must reflect the total remuneration including the amount of any fringe benefit and allowance, and the sum of employees' tax (PAYE) deducted during that period. If the employer under deducts PAYE and under pays SARS as a result of understating taxable fringe benefits SARS must impose a penalty of 10% on the underpayment.

2.10.2 The employer has an obligation to determine the cash equivalent of the value of the taxable benefit granted to its employees. Paragraph 17 of the Seventh Schedule to the Income Tax Act provides that the nature of the taxable benefit and the cash equivalent of the value thereof must be reflected on the Employees' Tax Certificate or a separate certificate. If an employer fails to comply with this requirement, SARS may impose a penalty equal to 10% of the amount by which the cash equivalent is understated.

Two separate penalties may thus be imposed for the same understatement. The proposed amendment removes this double penalty.

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

The proposed amendment inserts an interpretation provision in relation to the different references in the Customs and Excise Act to the Department currently known as the Department of Trade, Industry and Competition.

2.12 *Customs and Excise Act, 1964: Amendment of section 6*

Section 6(1)(hC) contemplates *inter alia* the unpacking or deconsolidation of imported air cargo at degrouping depots. Current practice has however shown that there is also a need to regulate the consolidation of air cargo at degrouping depots for export and the removal thereof to transit sheds. The proposed amendment is intended to expand the purposes for which air cargo may be removed to degrouping depots to include consolidation and removal to transit sheds for export.

2.13 *Customs and Excise Act, 1964: Amendment of section 38A*

The effect of the proposed amendment is that not only accredited licensees or exporters will be able to supply goods to foreign going ships or aircrafts on the issuing by that such licensee or exporter of a dispatch and delivery note or such other document as the Commissioner may prescribe or approve by rule. This amendment is proposed as a result of the announcement in Budget 2021 that SARS is changing its accreditation system to more closely reflect the requirements of the SAFE Framework of Standards issued by the World Customs Organisation. The effect of the new accreditation system is that certain provisions in the Act requiring a person to have accredited client status were reviewed.

2.14 *Customs and Excise Act, 1964: Amendment of section 60*

The proposed amendment is a technical correction. The section has developed over time and the heading no longer reflects the content of the section.

2.15 *Customs and Excise Act, 1964: Amendment of section 64E*

The repeal of subsection (4) is proposed as a result of changes to SARS' accreditation system announced in Budget 2021. Subsection (4) is outdated.

2.16 *Customs and Excise Act, 1964: Amendment of section 75*

Paragraph (a): The proposed amendment is a technical correction.

Paragraph (b): Section 75(1C)(a) provides the scope for what SARS may investigate to confirm the validity of a diesel refund claim. Currently subparagraph (iii) only caters for the diesel delivery and storage practices of users and their "dry" contractors (where the diesel is provided to the contractor by the user), but not "wet" contractors (where the contractor obtains the diesel itself). The proposed amendment is required as the policy intention is to accommodate "wet" contractors in the diesel refund scheme in the future. Furthermore, it will ensure that smaller users are not excluded as they often collect and dispense their diesel purchases directly for use without it being stored at the user's premises.

2.17 *Customs and Excise Act, 1964: Amendment of section 79*

The proposed amendment aims to specifically make the unlawful possession or use of a customs uniform an offence.

2.18 *Tax Administration Act, 2011: Amendment of section 93*

The proposed amendment is a textual correction.

2.19 *Tax Administration Act, 2011: Amendment of section 95*

2.19.1 SARS may make an original, additional, reduced or jeopardy assessment based in whole or in part on an estimate, if the taxpayer does not submit a return (section 95(1)(a)), submits a return or relevant material that is incorrect or inadequate (section 95(1)(b)), or does not submit a response to a request for relevant material after delivery of more than one request for such material (section 95(1)(c)). In the event that SARS raises an assessment based on an estimate in terms of section 95(1)(b), that assessment will be subject to objection and appeal in terms of section 104(1) of the Tax Administration Act.

2.19.2 Section 95(6) provides that a taxpayer in relation to whom an assessment based on an estimate was made in terms of section 95(1)(a) or (c), may within 40 business days from the date of the assessment, request SARS to make a reduced or additional assessment by submitting a true and full return or the relevant material.

Based on the proposed revised wording of section 95(5) and 95(6), once a taxpayer submits a return or the relevant material as required in terms of section 95(6), SARS has one of the following three options and the taxpayer may respond accordingly:

- *Option 1:* After review SARS accepts the return or relevant material and makes a reduced or additional assessment as requested by the taxpayer
- *Option 2:* After review SARS does not accept all the information contained in the return or some of the relevant material and makes a reduced or additional assessment accordingly. In this instance, the reduced or additional assessment will be subject to objection and appeal in the ordinary course, since it replaces the assessment contemplated in section 95(1)(a) or (c)
- *Option 3:* After review SARS does not accept the return or any of the relevant material, does not make a reduced or additional assessment and relies on the assessment based on an estimate. In this regard the proposed new section 95(8) clarifies that, should SARS decide not to make a reduced or additional assessment, the taxpayer may object and appeal within the normal timeframes from the date of the decision.

2.19.3 In the event that the taxpayer does not submit a request in terms of section 95(6) (which request would include submission of a true and full return or the relevant material) once an assessment based on an estimate has been issued in terms of section 95(1)(a) or (c), the taxpayer cannot object against the assessment (section 95(5)) and the assessment becomes final (section 100(1)(a)). However, SARS is not prevented from making an additional assessment, provided prescription does not apply, or alternatively, where the estimated assessment has prescribed, the circumstances referred to in section 99(2)(a) and (b) apply.

2.19.4 It may happen that SARS issues an additional assessment based on an estimate close to the end of the relevant prescription period. The 40-business day period, which is calculated from the date of the additional assessment based on an estimate, may thus end very close to or after the prescription date. This may not afford the taxpayer enough time to submit a true and full return or complete relevant material as requested by SARS, which means that the taxpayer is unable to request a reduced or additional assessment under section 95(6).

- 2.19.5 Furthermore, section 95(7) currently provides that a senior SARS official may extend the 40-business day period referred to in section 95(6) for a period not exceeding the relevant prescription periods under section 99 of the Act. The extension of 40 business days is calculated from the date of expiry of the initial 40-business day period. Hence, where SARS has issued an assessment based on an estimate close to prescription, both the initial period of 40 business days under section 95(6), as well as the extension period of 40 business days under section 95(7) may fall post prescription. This can be illustrated by the following example:
- 2.19.6 SARS makes an original income tax assessment on 31 December 2018. Subsequently, SARS sends more than one request to the taxpayer to submit relevant material under section 46, to which requests the taxpayer does not respond. SARS proceeds to make an additional assessment based on an estimate in terms of section 95(1)(c) on 30 November 2021. In terms of section 95(6) the taxpayer may request SARS, within 40 business days from the date of the additional assessment based on an estimate, to make a reduced assessment by submitting the relevant material. The taxpayer responds on day 39 of the 40 business days, i.e. 25 January 2022, with a request to extend the period for another 40 business days in terms of section 95(7). By this time, the period under section 99(1)(a) for the issue of further assessments, i.e. three years after the date of the original assessment, would have prescribed.
- 2.19.7 To address this scenario, the wording of section 95(7) has been amended to provide that SARS may extend the initial 40-business day period for a period not exceeding the relevant prescription period referred to in section 99(1), or 40 business days, whichever is the longest. In the example above, this means that the taxpayer may be granted an extension of an additional 40 business days from expiry of the initial period that expires on 26 January 2022, irrespective of the fact that this extension would fall outside the relevant prescription period. The maximum extension to be granted in terms of the proposed wording would then be 24 March 2022.
- 2.19.8 To cater for instances where the 40-business day period in terms of section 95(6) or extended period in terms of section 95(7) fall outside the relevant prescription periods under section 99(1), the proposed section 99(2)(d)(iv) provides that the prescription periods contained in section 99(1) will not apply to the extent it is necessary to give effect to the reduced or additional assessment requested.

2.20 *Tax Administration Act, 2011: Amendment of section 99*

The proposed amendment is consequential to the amendments to section 95 of the Tax Administration Act, and provides that the prescription periods under section 99(1) will not apply to the extent that it is necessary to give effect to the reduced or additional assessment request under section 95(6).

2.21 *Tax Administration Act, 2011: Amendment of section 149*

The proposed amendment corrects an incorrect cross-reference.

2.22 *Tax Administration Act, 2011: Amendment of section 233*

The proposed amendment corrects an incorrect cross-reference.

2.23 *Disaster Management Tax Relief Administration Act, 2020: Amendment of section 1*

2.23.1 In 2020, Parliament passed the Disaster Management Tax Relief Act, 2020 and the Disaster Management Tax Relief Administration Act, 2020, containing exceptional tax measures which formed part of the fiscal package aimed at assisting taxpayers who experienced cash flow constraints as a result of the COVID-19 pandemic and required national lockdown.

2.23.2 One of the exceptional tax measures included in the above-mentioned Acts was the deferral by employers of the payment of employees tax liabilities (PAYE) to SARS for a limited five-month period. This PAYE deferral was structured as follows:

- Deferral of payment of 35 per cent of the PAYE liability, without SARS imposing administrative penalties and interest for the late payment thereof
- The deferred PAYE liability for the five-month period of April to August 2020 had to be paid to SARS in equal instalments over the six-months commencing on 1 September 2020, (i.e. the first payment had to be made on 7 October 2020)
- The application of the proposal to small or medium sized businesses conducted by a company, partnership, individual or trust with a gross income not exceeding R100 million for the year of assessment ending on or after 1 April 2020 but before 1 April 2021
- The inclusion of a limitation stating that gross income should not include more than 20 per cent of income derived from interest, dividends, foreign dividends, royalties, rental from letting fixed property, annuities and any remuneration received from an employer
- Rental income derived from the letting of fixed property excludes rental income derived by a person whose primary trading activity is the letting of fixed property and substantially the whole of the gross income is rental from the fixed property.
- The requirement is that the employer is tax compliant in terms of the Tax Administration Act when making a reduced payment
- To qualify for this relief measure, the employer had to have been registered with SARS as an employer by 25 March 2020.

2.23.3 Despite the relaxation of the national lockdown, various businesses and employees are still negatively impacted by the COVID-19 pandemic. These negative impacts are further exacerbated by the impacts of the recent unrest in the country that destroyed businesses and infrastructure. The Government, therefore, wishes to provide additional assistance to those who continue to be adversely affected by COVID-19 as well as assisting in the process of reconstructing businesses.

As a result, it is proposed that the PAYE deferral relief measure be reinstated for another limited three-month period as follows:

- Deferral of payment of 35 per cent of the PAYE liability, without SARS imposing administrative penalties and interest for the late payment thereof

- The deferred PAYE liability for the three-month period of August to October 2021 must be paid to SARS in equal instalments over a four-month period commencing on 1 November 2021, (i.e. the first payment must be made on 7 December 2021)
- The proposal will be available to small or medium sized businesses conducted by a company, partnership, individual or trust with a gross income not exceeding R100 million for the year of assessment ending on or after 1 April 2021 but before 1 April 2022
- The inclusion of a limitation that gross income should not include more than 20 per cent of income derived from interest, dividends, foreign dividends, royalties, rental from letting fixed property, annuities and any remuneration received from an employer
- Rental income derived from the letting of fixed property excludes rental income derived by a person whose primary trading activity is the letting of fixed property and substantially the whole of the gross income is rental from fixed property
- The requirement that the employer is tax compliant in terms of the Tax Administration Act when making a reduced payment
- To qualify for this relief measure, the employer will need to have been registered with SARS as an employer by 25 June 2021.

The proposed measures will come into operation on 1 August 2021 and end on 31 October 2021.

2.24 *Disaster Management Tax Relief Administration Act, 2020: Amendment of section 2*

See the discussion in paragraph 2.23 above.

2.25 *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 2021 Budget Review, tabled in Parliament on 24 February 2021.

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 and Khoi-San Leadership in

terms of section 39(1)(a)(i) of the National House of Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it contains no provision pertaining to customary law or customs of traditional or Khoi-San communities.

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