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**THE CHAIRPERSONS OF THE
PORTFOLIO COMMITTEE ON FINANCE
(PCOF) AND THE SELECT COMMITTEE
ON FINANCE (SCOF)**

**COMMENTS ON REPRESENTATIONS TO THE JOINT SITTING OF THE
PCOF AND SCOF ON THE SECOND REVENUE LAWS AMENDMENT
BILL, 2001**

1 Introduction

As indicated to you during the hearings on the abovementioned Bill, SARS wishes to respond as follows to the various points raised by presenters on their submissions on the Bill.

2 Consultation

Within the timeframe available, SARS and the National Treasury tried to consult as widely and extensively as possible. Draft legislation was made available from the beginning of August 2001 in 12 batches and a consolidated Bill taking into account comments received from the various commentators was distributed on 10 October 2001.

The following bodies and individuals received copies of the draft legislation for comment:

- Afrikaanse Handelsinstituut;
- Association for the Advancement of Black Accountants of South Africa;
- Association of Law Societies;
- Association of Unit Trusts of South Africa;
- Banking Council;
- Commercial and Financial Accountants;
- COSATU;

- Department of Trade and Industry;
- Financial and Fiscal Commission;
- Financial Asset Management Association of South Africa
- Financial Services Board;
- Fund Managers Association;
- Institute of Retirement Funds;
- JSE Securities Exchange;
- Life Offices Association;
- National African Federated Chamber of Commerce and Industry;
- National Economic Development and Labour Council;
- South African Association of Freight Forwarders;
- South African Chamber of Business;
- South African Institute of Chartered Accountants
- South African Police Service
- Tax Advisory Committee Members
- Ernest Mazansky
- Costa Divaris
- Advocate D Meyerowitz

In developing tax policy on Corporate restructurings National Treasury had discussions with the following companies and firms:

- Barloworld
- BHP Billiton
- Bidvest
- Deloitte & Touche
- Dimension Data Standard Bank Investment Corporation
- Goldfields
- Iscor
- Kumba Resources
- Naspers
- Old Mutual
- PriceWaterhouseCoopers
- Remgro
- Sappi
- South African Breweries
- Prof. M M Katz

3 Responses to specific issues raised during the representations on the draft Bill – 19, 23 and 24 October 2001

3.1 MARKETABLE SECURITIES TAX ACT 32 OF 1948

Section 11A – objection and appeal procedures

The rules promulgated under the Income Tax Act to regulate objection and appeal procedure should form part of the Bill.
(SAICA)

See explanation under paragraph 3.3.2

3.2 ESTATE DUTY ACT 45 OF 1955

Section 25A – refunds and set-off of taxes

The section dealing with refunds of duty should come into operation on a prospective date.

(SAICA)

Agreed.

3.3 INCOME TAX ACT 58 OF 1962

3.3.1 Section 1 - definition of “foreign equity instrument”

The term “collective investment scheme” should be defined.

(SAICA)

The definition of “foreign equity instrument” will be cross referenced to paragraph (e)(ii) of the definition of “company” which deals with foreign collective investment schemes.

3.3.2 Section 3 – Objection and appeal

No justification exists for subjecting the exercise of only certain discretions to objection and appeal and it also creates confusion.

(PriceWaterhouseCoopers)

This aspect does not form part of the Bill under consideration. There are a number of discretions which are specifically not made subject to objection and appeal which are generally exercised in favour of the taxpayer, for example, extensions for the submission of annual tax returns in terms of section 66(1) of the Income Tax Act. The matter was cleared with the State Law Advisor.

The failure to subject the exercise of each and every discretion in the revenue acts to an internal objection and appeal procedure, does not conflict with the constitutional right to just administrative action in terms of s 33 of the Constitution, 1996 (Act No. 108 of 1996) as read with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000 - "the AJA"). The AJA prescribes how the powers that are given to administrators by other laws must be exercised, and gives members of the public the right to challenge administrative action that does not follow these rules and principles. For example, the Constitutional Court in the case of **METCASH TRADING LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE, AND ANOTHER** 2001 (1) SA 1109 (CC) confirmed the constitutionality of certain provisions of the Value Added Tax Act, 1991, which provisions conferred discretionary powers on the Commissioner without subjecting such powers to internal objection and appeal, on the basis that whenever the Commissioner exercised discretionary powers conferred upon him, this constituted an administrative action which was reviewable in terms of the principles of administrative law and the Constitution.

Section 33 of the Constitution and the AJA does not prescribe that all current and new legislation must be amended to give effect to the right to just administrative action, for example by ensuring that all discretionary powers are

subject to an internal objection and appeal process. This was the purpose of enacting the AJA which provides for a review of such powers.

3.3.3 Section 4 – preservation of secrecy

The Income Tax Act is not the correct code to combat crime and SARS should only reveal privileged information on application to a High Court Judge in respect of matters of threat to public safety and State security.

(SACOB)

The penalty for a contravention of the secrecy provisions should be substantially increased to avoid possible abuse of the relaxation of the existing provisions.

(AHI)

Officials of the National Treasury who receive information should be required to take the oath of secrecy.

(SAICA)

Information should only be disclosed to the National Commissioner of the South African Police or the National Director of Public Prosecutions where the Commissioner obtained an order from a judge in chambers.

(SAICA; AHI)

It must be expected that wrongdoers may be reluctant to declare ill-gotten gains for tax purposes if there is a risk that SARS will reveal their identities to prosecuting authorities.

(AHI)

If the Commissioner discloses information that is incorrect the Commissioner may become liable to damages.

(SAICA)

The confidentiality of information supplied by taxpayers remains a fundamental principle of taxation. However, SARS should be able to pass on information obtained which reveals evidence of a serious non-tax offence or of an imminent and serious public safety or environmental risk. This is also in line with international trends and in the general public's interest as such disclosure outweighs the potential harm to the taxpayer concerned.

The following amendments have been effected:

- Such information may only be disclosed after a judge of the High Court has approved an application for disclosure. This will provide sufficient protection to both taxpayers and SARS and upholds the right to privacy of a person.
- Self-incriminating evidence *provided by a taxpayer* may not be used against him/her in a court of law. This will uphold the taxpayer's constitutional right that he or she may not be compelled to provide self-incriminating evidence.

The National Treasury and other bodies to whom information is supplied, will also be subject to secrecy.

3.3.4 Section 8 – Certain amounts to be included in income or taxable income

In the case of assets donated that leads to a donations tax liability there should not be a resultant income tax liability.

(PriceWaterhouseCoopers)

The disposal of an asset for less than market value could be subject to taxation under this section as well as under the donation tax provisions.
(SACOB)

The principle that previously granted deductions or allowances in respect of an asset, are to be recouped where that asset is donated was introduced in the Income Tax Act in 1993. The imposition of donations tax on the donation is in terms of separate provisions of the Income Tax Act. The imposition of more than one tax triggered by an event is not foreign to our tax system. On death both estate duty and capital gains tax are imposed, but based on different tax bases. As a further example PAYE and Skills Development Levy are both imposed on the same base, the remuneration of an employee.

3.3.5 Section 9D – Controlled Foreign Entities

Capital gains of CFE's should not be subject to tax in South Africa; at the very least a transitional period be allowed. The UK excluded CGT from its CFC legislation. The use of exemptions as opposed to the exclusion of CGT from the scope of CFE legislation is fraught with difficulty.

(Naspers; PriceWaterhouseCoopers)

Rejected. In order to have parity with onshore transactions CFE's should be subject to capital gains tax. See presentation by National Treasury.

The proposed participation exemption is limited, exceedingly complex, unwieldy and could be subject to varying interpretations. An extensive administrative burden is created for companies.

(Naspers)

A participation exemption is proposed as a relief measure for multinational groups of companies. Simplicity was a key determinant in the development of the provision.

The 18 month holding period is overly restrictive in the fast pace of modern international business. The 18-month holding requirement should be reduced to 12 months.

(Naspers; PriceWaterhouseCoopers)

An alternative to the 18 month period was to have a two year period with an discretionary waiver by the Commissioner. However, to simplify the system and to create more certainty it was decided to introduce a fixed period of 18 months.

The exclusion relating to financial instruments held should be applied with reference to the aggregate assets of the CFE's foreign parent, foreign sister companies and foreign subsidiaries.

(PriceWaterhouseCoopers)

Partially accepted by introducing a look through to foreign companies in which the CFE holds equity shares of more than 75 per cent. See presentation by National Treasury.

The logic of the amendment to limit the exemption of certain types of income, of e.g. offshore treasury companies, where the income is derived mainly from connected persons is questioned.

(SACOB)

The requirement that the receipts and accruals of a banking, financial services, insurance or rental business be derived mainly from persons who are not connected persons in relation to the CFE before an exemption applies should not be implemented as it interferes with transactions with non-residents and is contrary to the intra-CFE income exemptions.

(PriceWaterhouseCoopers)

An exemption is available for intra CFE interest, foreign dividend and rental payments. As a policy, passive income from investments outside a group of companies should be taxed on a current basis. See presentation by National Treasury.

The exclusion of capital gains taxed at 13.5% results in additional complexity and compliance burden which is out of proportion to the cash flow benefit to the Fiscus. Simply tax foreign dividends at 100%

(SACOB)

The exemption of capital gains taxed at 13.5% is applicable to both controlled foreign entities and profits distributed as a foreign dividend. The proposed amendment is a tax relief measure as a result of the introduction of capital gains tax.

The proposal to tax certain income received by a CFE, which is trading as a bank, financial service, insurance or rental business, from South African residents which hold a 5 per cent interest in the CFE should rather be limited to the current situation where the income is derived from transactions with South African residents who are connected persons.

(SACOB)

Not accepted. South African tax can be avoided where a resident holds an interest in an offshore financial service company which is not a connected person in relation to the resident.

A capital gain in respect of an asset from which passive income is earned should be divided by the number of whole years it was held prior to disposal and losses in respect of those assets should be taken into account.

(PriceWaterhouseCoopers)

Not accepted. Where a capital gain is realised the full amount should be taken into account as no unrealised capital gains were taken into account during prior years during which the relevant assets were held. CGT operates on a realisation basis.

The criteria to determine whether the participation exemption applies should be a percentage of the participation right or votes or control instead of a percentage of the equity share capital. This would be in line with an active management test.

(PriceWaterhouse; Naspers)

Not accepted, as the proposal is not practical. It is much easier to determine the percentage equity share capital held in a foreign company which is not a CFE than to establish the participation rights, votes or control. An economic interest has a closer link to equity share capital than to votes or control.

Reduce the 25% threshold to qualify for a participation exemption to 10% in line with European precedents as well as the domestic cut-off for underlying tax credit relief, application of CFE provisions to residents and the designated country exemption. Where a contract generates taxable income in South Africa a lower rate of 5% should be introduced.

(PriceWaterhouseCoopers; Naspers)

Not accepted. A stake of 25 per cent equates to a meaningful stake in the foreign company.

The book value of assets of the company which is disposed of by the CFE or from which the CFE gets a foreign dividend should not be taken into account in determining whether a participation exemption applies, but solely the market value of its assets. The requirement of taking the book value into account is unfair and international precedent generally is to refer to market value.

(PriceWaterhouseCoopers)

Partially accepted by taking into account book value based on historical cost before provision for depreciation. The reason for retaining the book value as a test is to simplify the application of the rule because the financial statements of most companies reflect historical costs and not necessarily market value of all assets.

The 5% rule to determine whether a listed foreign company qualifies as a CFE should be extended to cover unlisted foreign unit trusts as well.

(LOA)

This matter is still under consideration.

The interaction between section 9D and section 31 appears to result in double taxation and inequitable consequences.

(AHI; PriceWaterhouseCoopers)

No legislative amendment is deemed necessary as this issue is dealt with in practice on a case-by-case basis where the same income is not subject to double taxation. SARS practice note 7 addresses this issue.

It is proposed that capital gains arising from the disposal by a CFE of shares or interest-bearing debt in another CFE which generates income which is exempt in terms of sections 9D(9)(f) and 9D(9)(fA) should be exempt.

(PriceWaterhouseCoopers; Naspers)

The proposed participation exemption will to a large extent result in an exemption of capital gains on the sale of a CFE by another CFE. Furthermore, provision will be made for foreign CFEs to rely on foreign group members to qualify for the business establishment exemption where an asset is sold.

Sections 9D(9)(f) and 9D(9)(fA) should apply retroactively and be made effective from 23 February 2000.

(PriceWaterhouseCoopers)

This aspect does not form part of the Bill under consideration. However, the investment income of CFE's derived from other CFE's has been subject to tax since July 1997 and since 23 February 2000 section 9D(9)(f) provided for situations where profits distributed as a foreign dividend should not be subject to double tax.

3.3.6 Section 9E – taxation of foreign dividends

An administratively unworkable system has been created in that profits declared as a foreign dividend may have accrued offshore over many years from various types of income and countries. Many companies do not keep detailed financial information longer than 6 years.

(PriceWaterhouseCoopers)

This is an issue which is not addressed in the Bill as it was considered when section 9E was enacted. However, each matter is dealt with on its own merits and SARS has thus far followed a very reasonable approach in this regard.

Amendments to sections 9E(5A) (deduction of interest) and 9E(7)(d) (designated country exemption) should be implemented from 23 February 2000.

(PriceWaterhouseCoopers)

Agreed. However, the amendment relating to the exemption of capital gains will come into operation on 1 October 2001.

3.3.7 Section 9G – Taxable income in respect of foreign equity instruments

Disputes will arise between the Commissioner and taxpayers in determining whether or not a foreign currency instrument was held as trading stock or as a capital asset.

(SAICA)

This aspect is part of a larger concern relating to the revenue/capital distinction which will be addressed comprehensively at a later date.

3.3.8 Section 11(o) – scrapping allowance

The limitation of an allowance on disposal of an asset to a connected person is unnecessarily harsh and not consistent with the recoupment provisions.

(SACOB)

Not accepted. The principle of limiting a tax deduction on sales to connected persons is consistent with the loss limitation provided for CGT purposes in paragraph 39 of the Eighth Schedule.

3.3.9 Section 18A – Deduction of donations to certain public benefit organisations

The requirement that the PBO must solely carry on an approved public benefit activity in order for donors to benefit from a tax deductible donation is overly restrictive.

(SACOB)

Is the intention that PBO's seeking section 18A recognition should conduct the approved public benefit activities in a separate entity vis a vis any other activities that may be conducted?

(SAICA)

The proposed amendment has been withdrawn.

3.3.10 Section 23A – Limitation of allowances granted to lessors of certain assets

The requirement that an asset must be leased by members of the general public directly from the lessor does not take into account sub-leases.

(SACOB)

A sub-lease is not excluded from the definition of an operating lease where an asset is leased to a taxpayer, who in turn sub-leases the asset to the general public for periods of less than one month. However, the first lease is excluded from the definition of an operating lease as members of the general public are not a party to the lease. If the first lease were to be included in the definition, the first lessor would be permitted the benefits of this classification even if the first lessee was the main user of the asset and only sub-leased the asset to the general public on an infrequent basis.

3.3.11 Section 24I – Gains and losses on foreign exchange transactions

The description of a natural person who is subject to the provisions of section 24I is too restrictive in that an exchange item may arise out of the disposal of trading stock but not itself be held as trading stock. Natural persons conducting business should not be treated differently to companies or trusts that are trading.

(SAICA)

Accepted. Although this proposal will complicate record keeping to a certain extent, the provision has been reworded to refer to any natural person who holds any exchange item for purposes of trade. The effect of this change is that all taxpayers will be subject to the provisions of this section in respect of their exchange items held for purposes of trade. However, all exchange items of trusts carrying on a trade and companies are subject to section 24I.

3.3.12 Structured finance transactions

Amendments not available.

(SAICA)

Matter will be dealt with next year.

3.3.13 Corporate restructurings

The blanket exclusion of “financial instruments” from most of the provisions is of concern as it will impede the conduct of business by banks, assurers as well as other legitimate financial service businesses. Shares in a subsidiary company should not be excluded.

(LOA; AHI; PriceWaterhouseCoopers)

See response by National Treasury.

Propose that the existing relief provisions for corporate reorganisations and unbundling be expanded to include roll-over relief for CGT purposes.

(AHI)

Not accepted. The intention is to rather replace the current rules with the new comprehensive corporate restructuring system.

The anti-avoidance measures are far too strict and complex and will be so difficult to police as to render them ineffective.

(AHI)

This sentiment is not supported as the proposed rules are fairly liberal compared to the rules followed by most tax jurisdictions. Most of the restrictions fall away after a holding period of 18 months.

The appropriateness of requiring SARS approval for these types of transactions is questioned.

(AHI)

It is submitted that the corporate restructuring relief should be voluntary and elective.

(PriceWaterhouseCoopers)

Of all the restructuring rules only the transfers between group companies is elective. In essence the other rules are elective in that companies can structure transactions to fall within or outside the relief provided for. Reporting requirements are to be imposed for all corporate restructurings. Rulings will be required in respect of transactions in excess of a specified threshold.

Sections 22A, 24A and 28bis should not be repealed but should be limited to situations where the proposed sections 42 to 46 do not apply.

(PriceWaterhouseCoopers)

Not accepted. The view is held that the relief measures for corporate restructurings should be regulated in a separate Part of the Income Tax Act and not in terms of any other sections of the Act. The relief granted by section 28bis was incorporated into the new section 42(12). However, the scope of the provisions of sections 22A and 24A is wider than the new provisions. The present provisions of section 24A are open to abuse. The

abuse occurs where certain items of trading stock are exchanged for listed shares. Although the listed shares received are deemed to be trading stock, the recipient of the listed shares holds them for a 5 year period, sells the shares and then claims that the proceeds on disposal of the shares are income of a capital nature in terms of section 9B. Income of a revenue nature is effectively converted to income of a capital nature.

The current section 28bis should be available for transfers from a South African subsidiary company to the branch of a foreign corporation.

(PriceWaterhouseCoopers)

Not accepted. From an administrative point of view preference is given to the taxation of an incorporated business rather than of branch operations.

The new corporate relief measures should come into effect on 1 December 2001.

(PriceWaterhouseCoopers)

Not accepted. As capital gains tax comes into operation from 1 October 2001, it would be unfair not to grant restructuring relief to taxpayers who entered into corporate restructuring transactions from that date until 1 December 2001.

The generally required 18-month holding period is arbitrary and will inhibit and interfere with business activities and fluidity, which is important in an era of globalisation and turbulence. Period should be shortened and, at the very least, SARS should have the discretion to reduce or waive the period.

(PriceWaterhouseCoopers)

An alternative to the 18 month period was to have a two year period with an discretionary waiver by the Commissioner. However, to simplify the system and to create more certainty it was decided to introduce a fixed period of 18 months.

The limitation of relief to residents is too rigid and broadly formulated as it will not apply to controlled foreign entities, non-resident companies listed on the JSE and SA branches of foreign corporations.

(PriceWaterhouseCoopers)

Allow relief for transaction taxed where the relief would apply but for the residence requirement.

(PriceWaterhouseCoopers)

Not accepted. The participation relief proposed for CFE's is a form of group relief for foreign entities. The other foreign entities are not subject to tax on their worldwide income and should not benefit from the domestic corporate restructuring relief measures.

Provision should be made for the procedure and form for claiming stamp duty, MST and UST exemptions.

(PriceWaterhouseCoopers)

Accepted. Provision will be made for specific procedures in this regard.

New forms, endorsements and declarations would be required for the exemption and submission to share registrars / custodians.

(PriceWaterhouseCoopers)

Accepted. Provision will be made for specific procedures in this regard.

3.3.14 Section 41 – Corporate restructuring definitions

A definition of “share” should be introduced in section 1 as it is also required for the definition of a “foreign equity instrument” which also refers to “share”

(SAICA)

Not accepted. The definition of “share” in section 41 is narrower than the meaning of the word in the definition of “foreign equity instrument”. This distinction will be clarified.

Extend the definition of “depreciable asset” to include assets the recovery or recoupment which must be included in income in terms of paragraph (jA) of the definition of gross income.

(PriceWaterhouseCoopers)

Not accepted. The disposal of an asset contemplated in paragraph (jA) of the definition of gross income does not result in a recovery or recoupment, but the full selling price constitutes gross income. It is therefore akin to trading stock and not a depreciable asset.

It is not clear whether the definition of “share” includes a close corporation.

(PriceWaterhouseCoopers)

Yes, a share includes a member’s interest in a close corporation.

3.3.15 Section 42 – Corporate formations

The rules should provide that the purchaser of a business be allowed to claim bad debts or a doubtful debt allowance in respect of debts transferred.

(SAICA)

Accepted. The section will be amended to enable the purchaser to claim bad debts and a doubtful debt allowance.

Allowances available under sections 24 and 24C should not be recovered or recouped in the hands of the seller, but the buyer should be liable for the reversal in the subsequent year of assessment.

(SAICA)

Accepted. The section will be amended to avoid the reversal of allowances in the hands of the seller, but provide for a recoupment of allowances in the hands of the buyer.

The sale of a business for shares and a loan account should be catered for.

(SAICA; PriceWaterhouseCoopers)

Transactions in terms of which assets are transferred in exchange for cash, paper or other non-cash assets should be included.

(PriceWaterhouseCoopers)

Not accepted. Relief is only granted where the transferor still has an indirect interest in the asset transferred and has not exchanged an interest in an asset for cash or a cash equivalent.

The relief should be available where the asset is acquired by a member of a group in exchange for shares in that or any other group member.

(PriceWaterhouseCoopers)

Not accepted. Only basic relief is provided for in order to keep the provisions as simple as possible. More complex situations may be catered for in future.

The exclusion of trusts seems to be part of the continuing tax discrimination and persecution of trusts. The obvious way of getting rid of a trust would be to transfer its assets to a company in exchange for shares. A special trust should not be excluded.

(PriceWaterhouseCoopers)

Not accepted. The granting of relief for trusts would further facilitate the forming of estate planning structures. However, relief will be granted to special trusts.

The 25% qualifying interest threshold seems arbitrary and it is questioned why there should be any threshold.

(PriceWaterhouseCoopers)

Relief is only granted where the transferor still has an indirect interest in the asset transferred and has not exchanged an interest in an asset for cash, a cash equivalent or for an asset which can easily be converted into cash. The 25 per cent rate equates to a meaningful stake in the company.

Include assets the recovery or recoupment which must be included in income in terms of paragraph (jA) of the definition of gross income.

(PriceWaterhouseCoopers)

Not accepted. The disposal of an asset contemplated in paragraph (jA) of the definition of income does not result in a recovery or recoupment, but the full selling price constitutes gross income. It is therefore akin to trading stock and not a depreciable asset.

Bought-back already issued shares may be used by a company for the acquisition of an asset.

(PriceWaterhouseCoopers)

In terms of section 85(8) of the Companies Act, 1973, shares bought back by a company must be cancelled as issued shares. Therefore, there is no need for domestic company restructuring relief to cater for shares bought back by a

company.

Provide for the waiver of the 18-month period for an involuntary disposal.

(PriceWaterhouseCoopers)

Accepted. The section will be appropriately amended.

Where trading stock or depreciable assets comprise more than 50% of all assets disposed of and the shares acquired are disposed of within 18 months only a pro rata portion of the shares should be treated as trading stock.

(PriceWaterhouseCoopers)

Not accepted. The provision was introduced to avoid the conversion of income from revenue to capital nature. The apportionment of shares is not provided for in order to simplify the application of the provisions.

The deemed disposal of shares where a shareholder's interest falls below 25% should not apply in the case of involuntary disposals, due to factors beyond that person's control or a disposal in terms of a share-for-share transaction.

(PriceWaterhouseCoopers)

Accepted. The provision will be amended appropriately.

The disposer of an asset is unlikely to receive a share in exchange where the debt assumed by the acquirer exceeds the value of or consideration paid for an asset which is security for that debt.

(PriceWaterhouseCoopers)

Where debt assumed exceeds the value of an asset transferred it is highly unlikely that a share or other compensation will be received by the disposer. Ordinary rules will apply.

Where a subsidiary of a foreign entity takes over the assets and liabilities of the entity's branch the CGT implications should also be dealt with.

(PriceWaterhouseCoopers)

Accepted and provided for in the legislation.

In order for relief to apply for a transfer from a branch of a foreign entity to a subsidiary of the foreign entity all the issued share capital of the subsidiary should be held by the foreign entity. The only requirement should be that they are connected persons.

(PriceWaterhouseCoopers)

Not accepted, as other shareholders who have no interest in the foreign entity will benefit from the transfer of the tax attributes of the branch to the subsidiary.

Relief should be provided where trading stock or depreciable assets are disposed of to an exempt body.

(PriceWaterhouseCoopers)

Where trading stock is donated, the market value will be deemed to have been recovered or recouped. The same market value may be deducted if the donation meets the requirements of section 18A of the Income tax Act. However, this aspect does not form part of the Bill and will be considered at a later stage as part of the further review of the taxation of public benefit organisations.

Relief should not be precluded where there is a disposal of a business as a going concern and the assets include financial instruments forming part of that business, other than section 24J instruments.

(PriceWaterhouseCoopers)

Since the first draft of the legislation the rule has already been relaxed by allowing tax relief for the transfer of trade debtors and by introducing a *de minimis* provision. No further relaxation in respect of financial instruments is proposed.

It is suggested that there should be no 18-month limitation of the losses.

(PriceWaterhouseCoopers)

Not accepted. If it were to be allowed it would be possible for loss assets to be transferred and the loss claimed and gain assets to be transferred subsequently to get the benefit of the roll-over relief.

The 18 month minimum holding period should apply only where the majority of assets that were part of a formation transaction are disposed of in the 18 month after the formation.

(PriceWaterhouseCoopers)

Not accepted. The 18-month holding period applies in respect of each asset transferred.

3.3.16 Section 43 – share-for-share transactions

The period of 30 days in the definition of share-for-share transaction, before or within which any other share for share transaction is accepted on the same terms in terms of the offer, is too short.

(SAICA)

Not accepted. The total period within which an offer can be accepted is 61 days, which is considered to be sufficient.

Why should a South African resident who disposes of shares in a non-resident company listed on the JSE to another South African resident not qualify for the relief?

(PriceWaterhouseCoopers)

See response by National Treasury.

Relief should include the disposal by a company and/or its subsidiaries for an exchange of shares in the acquiring company and/or its holding

company and/or subsidiary companies.

(PriceWaterhouseCoopers)

Not accepted. Only basic relief is provided for in order to keep the provisions as simple as possible. More complex situations may be catered for in future.

The limits of 35% and 75% are arbitrary and capricious and the relief should rather be based on value.

(PriceWaterhouseCoopers)

Partially accepted. The 35% requirement in the case of a listed company is reduced to a shareholding of more than 25% where no other shareholder holds a bigger interest in the listed company. The 75% requirement in the case of unlisted shares is changed to more than 50% of the equity share capital.

Use the company law definition of “holding company” instead of the 75% requirement which is unrealistic.

(PriceWaterhouseCoopers)

Not accepted. The reduction referred to above (more than 50%) addresses the concern raised.

If it is hoped that this section will mobilise capital the 35% level would have to be no more than 20%.

(PriceWaterhouseCoopers)

It is proposed that the 35% threshold be reduced to a shareholding of more than 25% where no other shareholder holds a bigger interest in the listed company.

In the case of an unlisted company the 75% holding is measured after the transaction but in the case of a listed target company at least 35% must be acquired.

(PriceWaterhouseCoopers)

Accepted. The new 25% test will be measured as the total percentage of shares held after the transaction.

Why should a listed target company have been listed for 12 months prior to the transaction?

(PriceWaterhouseCoopers)

Accepted. The 12-month requirement will be removed.

It is not clear whether the 25% interest of the disposer should exist before, at the time of or after the disposal and why a holding requirement is imposed on the acquiring company in the case of an unlisted company but not in the case of a listed target company.

(PriceWaterhouseCoopers)

The 25 per cent shareholding should be held immediately after the disposal. It is not practical to introduce a holding requirement in the case of listed companies. Furthermore, the listing of companies on the JSE securities exchange is to be promoted. A greater anti-avoidance concern exists for unlisted companies.

If a person disposing of shares must have held 25% in the capital of the acquiring company and up to 35% of the target company to start with, hardly anyone will qualify for this relief.

(PriceWaterhouseCoopers)

It is proposed that the 35% threshold be reduced to a shareholding of more than 25% where no other shareholder holds a bigger interest in the listed company.

A share-for-share will inevitably be of the holding company and not the subsidiaries holding business assets and new inventions.

(PriceWaterhouseCoopers)

Accepted. A look through approach will be introduced where the assets of a more than 75% held company will be taken into account.

Involuntary disposals should not be penalised.

(PriceWaterhouseCoopers)

Accepted. Relief measures will be introduced.

The deemed disposal rule where a 25% direct interest ceases to be held in the acquiring company within 18 months has unreasonable consequences where a hostile bid is made for the acquiring company and there is a compulsory acquisition in terms of section 440K of the Companies Act.

(PriceWaterhouseCoopers)

The 25% direct interest rules only apply in the case of unlisted shares and acquisitions in terms of section 440K of the Companies Act will mainly involve listed companies.

Provision should be made for donations tax and STC exemption.

(PriceWaterhouseCoopers)

A transaction entered into which does not reflect market value should be subject to donations tax and possibly secondary tax on companies.

It is not clear when the 50% requirement in the context of the financial instruments exclusion must be measured.

(PriceWaterhouseCoopers)

Immediately before the transaction is entered into.

Allow further share for share transactions within the period of 18 months.

(PriceWaterhouseCoopers)

Not accepted. A similar limitation is imposed in the case of company formation transactions.

3.3.17 Section 44 – transfers between group companies

The heading should be Intra-group transactions.

(PriceWaterhouseCoopers)

Agreed.

The rules should provide that the purchaser of a business be allowed to claim bad debts or a doubtful debt allowance in respect of debts transferred.

(SAICA)

Accepted. The section will be amended to enable the purchaser to claim bad debts and a doubtful debt allowance.

Allowances available under sections 24 and 24C should not be recovered or recouped in the hands of the seller, but the buyer should be liable for the reversal in the subsequent year of assessment.

(SAICA)

Accepted. The section will be amended to avoid the reversal of allowances in the hands of the seller, but provide for the recoupment of allowances in the hands of the buyer.

A South African branch of a foreign company should be included within the scope of the relief in order not to fall foul of non-discrimination articles in the SA tax treaties.

(PriceWaterhouseCoopers)

Not accepted. The relief measures are limited to residents of the Republic and not on the basis of nationality.

The 75% holding requirement should include shares subject to an employee share incentive scheme as was the case with the previous rationalisation relief.

(PriceWaterhouseCoopers)

Not accepted. This holding requirement mirrors the test introduced in section 64B(5)(f).

Define a “controlling company” to mean a holding company as contemplated in the Companies Act instead of using the 75% test.

(PriceWaterhouseCoopers)

Not accepted. A test based on a percentage of equity share capital is easier to apply than a test based on voting rights and is also a better measurement of economic interest in a company.

It is not clear when and how the election by the transferor and transferee companies must be made.

(PriceWaterhouseCoopers)

Procedures and the required format will be developed.

The deemed disposal of an asset by the transferee company once the transferor company and transferee company cease to form part of the same group of companies should only apply within a period of six months after the asset was acquired.

(PriceWaterhouseCoopers)

Not accepted. The reason therefor relates to tax avoidance concerns. Individual assets could be placed in a separate company to effect artificial intra-group sales or “enveloping” as it is known in the UK.

The Stamp Duty exemption has no purpose if the transfer of financial instruments is not allowed. The exclusion should be confined to section 24J instruments.

(PriceWaterhouseCoopers)

Refer to the presentation by National Treasury.

The typical South African way of doing business is to house different divisions of business in separate companies and then to move the companies around. Provision should be made for this otherwise the section will be rendered virtually useless.

(PriceWaterhouseCoopers)

Accepted. A look through approach will be introduced, which will allow shareholdings of certain companies to be transferred.

Where an asset acquired in terms of an intra-group transaction is disposed of within 18 months a scrapping allowance should be allowed as there is no necessary correlation between a CGT loss and an income tax recoupment.

(PriceWaterhouseCoopers)

The limitation of the deduction is comparable to the loss limitation provisions contained in paragraph 39 of the Eighth Schedule.

Provide for exemptions for marketable securities tax and uncertificated securities tax.

(PriceWaterhouseCoopers)

Accepted.

The transferor and transferee companies should be able to be taxed as if they were one company to allow for the transfer of tax allowances.

(PriceWaterhouseCoopers)

Accepted. New provisions will be introduced to give effect to this proposal.

3.3.18 Section 45 – Unbundling transactions

The section should be expanded to cater for the situation where a foreign company distributes shares to a South African resident.
(SAICA)

Not accepted. The introduction of the proposal could result in a foreign company which is a CFE no longer qualifying as a CFE as a result of the distribution.

The provisions should allow shares acquired in terms of an unbundling transaction in terms of section 60 of the Income Tax Act of 1993 to be included as "distributable shares" even if they are not held for 18 months.
(SAICA; PriceWaterhouseCoopers)

Accepted.

The requirement that the distributable shares be held directly is unrealistic as often some or all of these shares are held indirectly by subsidiaries of the unbundling company.
(PriceWaterhouseCoopers)

Consideration will be given at a later stage to measures to deal with more complex unbundling transactions.

In order not to inhibit inward investment there should be relief for transaction taxes where, but for the residence requirement, the transaction would qualify as an unbundling transaction.
(PriceWaterhouseCoopers)

The new provisions are limited to domestic transactions. Consideration will be given to extending the relief to non-residents at a later stage.

The "date of the unbundling transaction" is vague and could be interpreted to mean a number of dates.
(PriceWaterhouseCoopers)

Agreed. The wording will be clarified to refer to the date of transfer of the shares.

The 35% and 51% requirements are unnecessarily too high and exclude a large number of commercially justifiable unbundlings. A minimum of 10% is suggested. A company holding 35% in a listed company is unlikely to unbundle and more likely to accumulate major assets.
(PriceWaterhouseCoopers)

Partially accepted. It is proposed that the 35% threshold be reduced to a shareholding of more than 25% where no other shareholder holds a bigger interest in the listed company.

As is the case with the existing unbundling several counters should be allowed to be unbundled if at least one comprises of 10% of the issued shares (piggy-backing).
(PriceWaterhouseCoopers)

Not accepted. Such a rule is unprincipled and effectively allows the distribution of a disguised cash dividend.

The emphasis should be on value and not on the percentage holding in unlisted companies.

(PriceWaterhouseCoopers)

Not accepted. Value is irrelevant in this context as the interests of all shareholders could have a low value.

The 18-month period should not apply for shares held for at least 18 months within the unbundling group.

(PriceWaterhouseCoopers)

Not accepted. Under the proposed rules indirect shareholdings are not taken into account; only direct holdings can be unbundled.

To make unbundling provisions more accessible reduce the 75% threshold to be a holding company or use the holding company concept in the Companies Act.

(PriceWaterhouseCoopers)

Not accepted. The holding company must have a significant economic interest in the unbundling company. This would not necessarily be the situation in the case of a holding company contemplated in the Companies Act, where the criteria are based on voting rights.

The 25% shareholders will be indirectly penalised if the relief is confined to distributable shares unbundled to the holding company.

(PriceWaterhouseCoopers)

The 25% shareholders do not form part of the group and cannot qualify for relief.

Allow partial unbundlings as full unbundlings are not always possible because of legal or enforceable restrictions or to remain liquid and solvent or to cover liabilities or guarantees.

(PriceWaterhouseCoopers)

Not accepted. This proposal undermines the reason for allowing unbundlings and it will be difficult to establish good business reasons for which an exception should be provided for.

The relief should include shares not held by a person but in respect of which a person has the right to acquire them as contemplated in section 8A.

(PriceWaterhouseCoopers)

Not accepted. No relief should be granted to options to acquire shares. International experience has shown that such a step could result in abuse.

Provide for a donations tax exemption.

(PriceWaterhouseCoopers)

The view is held that it is not necessary to provide for an exemption for purposes of donations tax. The normal rules should apply.

The 5% non-resident shareholder disqualification should not apply where the non-resident is a company whose shares are listed in the JSE, has a South African branch or is a CFE.

(PriceWaterhouseCoopers)

Not accepted. The intention behind the unbundling provisions is to grant relief for domestic transactions at this stage.

In many cases the unbundling company will not know the residence status of its shareholders and cannot apply the 5% non-resident shareholder exclusion.

(PriceWaterhouseCoopers)

Not accepted. Internationally it is common practice to publicly disclose interests of 5 per cent or greater.

3.3.19 Section 46 – Transactions relating to liquidation, winding-up and deregistration.

It would have been preferable to have the steps companies must take to liquidate within the six -month period in the law.

(SAICA)

The Minister of Finance will prescribe by way of regulations the steps to be taken within the six-month period.

3.3.20 Section 64B – secondary tax on companies

The Minister is urged to publish the regulations in terms of section 64B(5)(c) as soon as possible and the amendment should not come into operation until the regulations are published.

(SAICA)

The Minister of Finance will prescribe by way of regulations the steps to be taken within the six-month period.

Interest may be charged on a Rand-denominated loan within an international group of companies at a rate below the official rate of interest (10.5%) which may represent a market-related rate of interest. In this case the loan may be treated as a deemed dividend which is subject to Secondary Tax on Companies. In order to bring it into line with international norms the actual rate should not be less than either the “official rate of interest” or a market related rate of interest.

(PriceWaterhouseCoopers)

Not relevant to this Bill.

3.3.21 Sections 70A and 70B – Return of information by unit portfolios and portfolio

administrators

Prescribe the details required to be submitted to taxpayers as soon as possible.
(SAICA)

Details required have been published in draft format on the SARS website.

3.3.22 Section 81 – time and manner of lodging objections

Rules under section 107A should be finalised and promulgated as soon as possible.
(SAICA)

Two new sections will now be inserted. Section 107A which will provide for the enabling provisions to determine and promulgate the court rules. Section 107B will provide the enabling provisions with regard to the wider settlement powers.

With regard to the court rules the intention is to promulgate them as soon as possible. However, we require further consultation on the matter before it can be finalised. A first draft was circulated for comment. A second draft will now be circulated whereafter we will hopefully be in a position to promulgate.

Court rules do not form part of the main body of the legislation and are always contained in secondary legislation. This is the case as far as Magistrates Courts and the High Courts are concerned. This is also so in the case of the existing Special Court Rules. These rules normally regulate issues of a procedural nature and the appropriate level of regulation is in terms of subsidiary legislation.

With regard to the write-off provisions and settlement powers, two points need to be made:

- The write-off of tax provisions which we intended to insert in each Revenue law, will now be withdrawn. The reason therefor being that discussions with the National Treasury revealed that the provisions currently in the Public Finance Management Act, 1999, which deals with the write-off of debt, will now also apply to taxes.
- The enabling provisions with regard to the settlement of disputes will be contained in section 107B. This is a very sensitive issue and much more research and consultation is required in this regard to determine the appropriate criteria, control and reporting rules.

It is questioned why an assessment should be regarded as final *vis-a-vis* the taxpayer when an objection has not been lodged against an assessment or the disallowance of an allowance has been accepted by the taxpayer. However, the Commissioner can, even after allowing an objection, choose to review and revisit the same matter that was previously in dispute. This is inequitable and should be reviewed.
(SAICA)

The power conferred on the Commissioner to review and revisit a matter after an objection has been allowed is based on the fact that not to do so would confer an unfair advantage on a taxpayer where an error has been made in allowing an objection.

This power was considered in *Commissioner for Inland Revenue v Hilewitz* 60 SATC 86. In deciding the matter in SARS' favour, Wunch J. noted that in its absence; "Not only would a taxpayer have escaped from assessment where the Commissioner made a mistake but he would have done so also where a Receiver of Revenue or more junior official allowed an objection and the Commissioner wanted to reverse his decision or where, for example, a decision of the Appellate Division or some other court, given after an objection had been allowed, were to have shown that it should not have been allowed."

The constitutionality of this power was considered in *Carlson Investments Share Block (Pty) Ltd v Commissioner, SA Revenue Service* 2001 (7) JTLR 207 (W) where Navsa J. held that; "[T]his statutory power to revisit is in the national interest. Section 79(1) of the Act does not sanction arbitrary and capricious behaviour and is not unconstitutional. Statutes such as the one in question are to be found in comparable legal systems and the underlying rationale is accepted."

It is hoped that in terms of the rules the Commissioner will be compelled to make a decision on an objection within a prescribed period.

Objections are often delayed for years.

(SAICA)

While a number of periods for actions to be taken will be prescribed in order to speed up the objection and appeal process, it is not possible to prescribe a period for the consideration of an objection in view of the varying degrees of complexity of such objections.

3.3.23 Section 83 – Appeals to Special Court

In order for the Registrar of the Tax Court to exercise its functions independently and impartially would it not be preferable if the Registrar is appointed by the Ministry of Justice and remained an employee of that department?

(SAICA)

In discussions with various role-players (including judges and tax practitioners) it was indicated to SARS that the flexibility of the current arrangement in terms of which cases are placed on the Special Income Tax Court roll should be retained.

Since the administration of the Special Court is distinct from that of the High Court (handled by the Registrar of the High Court under the Department of Justice), it is unlikely that the appointment of the Special Court Registrar by the Minister of Justice would guarantee the "independence" of the Special Court Registrar.

The question of the “independence” of the Registrar was considered by the Special Court in ITC 1567 56 SATC 72 in which it was held that the perception that the Commissioner through the office of the Registrar had influenced the selection of members appointed to the Special Court was not justified. It was expressly found that the Registrar carried out his/her functions independently from the legal department of SARS.

3.3.24 Section 88 – Payment of tax pending appeal

Where an objection is lodged against an assessment the taxpayer should have the right to postpone payment of the tax in the event that the Commissioner agrees thereto.

(SAICA)

This aspect requires further investigation. However, in practice it is extended to taxpayers where appropriate.

3.3.25 Capital Gains Tax

Request that the date of implementation be postponed to 1 March 2002 so as to ensure that the legislation will be finalised by the date on which it takes effect. 52 out of the 86 paragraphs are amended.

(SAICA)

This Bill attempts to rectify the consequences of a rushed process to legislate for a very complex new tax. Having to amend more than half of the provisions promulgated less than 4 months ago is, with respect, an embarrassment for the Minister and the country.

(AHI)

Mixed and confusing messages are sent by government for example fundamental changes to CGT legislation are in the process after implementation date of the tax.

(AHI)

It is an absolute overstatement to say that so many fundamental changes are now being made to the Bill that it will lead to such a level of uncertainty that a further delay in implementation is required. The reasons therefor being the following:

- An extensive consultation process was followed to obtain the input from all interested parties. Refer in this regard to the Guide published on Budget Day last year, the two draft Bills published for comment and the extensive process of hearings via the Parliamentary Committees. We certainly did not follow the route of Australia where the tax was announced from an effective date with no Act in place.
- The overwhelming majority of the provisions and fundamental principles did not change at all and sufficient certainty exists to proceed.
- Most of the changes are-
 - of a textual nature;
 - to provide greater certainty; and
 - to provide further relief (corporate rules).

- It is a natural phenomenon that refinements are introduced after new legislation has been implemented as it is never possible to anticipate all implications and consequences. Even today, after 90 years we are still refining our income tax legislation on an annual basis. This is in line with international trends.
- To now delay the issue further will cause more uncertainty which cannot be afforded.

CGT has negative implications on wholly owned investment subsidiaries of life companies and retirement funds because of different inclusion rates. Relief should be granted to assurers.

(LOA)

Acceding to this request would undermine the classical tax system in use in SA. It is also difficult to see how this case differs from that of an individual who holds all his or her investments in a company especially in view of the trustee principle applied to long-term insurers. This company also holds its investments on behalf of the individual.

The insurer has deliberately decided to keep its investment portfolio in a separate legal entity, i.e. a company. What is now requested is that we must apply a look through approach and if the investment held in the company is for the benefit of the individual policyholder fund, we must apply the inclusion rate for individuals.

The exemption afforded unit trust companies should be extended to include investment holding companies.

(AHI)

A unit trust is a different investment vehicle which is regulated in terms of the Unit Trust Control Act. A unit trust scheme is therefore conceptually totally different to a company and is effectively an arrangement which allows groups of individuals to pool their resources into a unit trust for investment purposes. These assets are, therefore, held in trust on behalf of the unit holders. Such a trust is subject to strict limitations and borrowing is for example prohibited. Furthermore, a unit trust may not exceed certain investment levels in the companies in which they invest. Interests in closely held companies are limited to 5 per cent per company and in widely traded companies to 10 per cent per company.

If we were to concede on this issue we would have to build in similar rules to those contained in the Unit Trust Control Act into the Eighth Schedule to the Income Tax Act. This would effectively mean that SARS would have to fulfil the role of a regulator, which is unacceptable. Apparently this is done in the United Kingdom. We have in the past learnt expensive lessons in this regard when we still had the Sixth Schedule and SARS had to regulate the operation of insurance policies.

Should we allow one form of company structure to utilise these benefits, it would become difficult to decide where to draw the line in the case of other requests for similar treatment. If an entity wants to enjoy the benefits and be subject to the regulations applicable to the unit trust industry, it must operate as a unit trust.

Consequently we cannot entertain this request

The CGT legislation is patently unfair because no inflation adjustment or currency revaluation is legislated for and inflation is effectively taxed.
(AHI)

This is an aspect that was comprehensively dealt with during the hearings on CGT earlier this year. Refer to the document by the National Treasury on inflation indexing on the SARS website.

3.3.26 Capital Gains Tax – Eighth Schedule

An updated and consolidated version of the Eighth Schedule should be made available to the public.

(SAICA)

An unofficial consolidated version of the Eighth Schedule will be prepared and published on SARS's website as soon as possible.

Proposed a number of changes to the draft Explanatory Memorandum which was circulated with the Bill.

(SAICA)

The proposals will be taken into account in finalising the Explanatory Memorandum.

3.3.27 Paragraph 20 of the Eighth Schedule

The application of South African rules to determine the base cost of an asset of a controlled foreign entity exacerbates the problem of keeping tax records and the huge administrative burden on taxpayers.

(SACOB)

The attribution of income in respect of a controlled foreign entity occurs where that entity is not in a designated country and does not have a business establishment in the country in which it operates, engages in diversionary transactions, or receives passive income. This limits the impact of the CFE provisions substantially. Where such attribution takes place, records based on South African rules will be required for purposes other than capital gains tax in most cases.

The amendment to subparagraph (1)(h)(iii) does not make sense as the proportional taxable capital gain of a CFE is included, 100% of a capital gain is excluded and a 100% aggregate capital gain is then added.

(PriceWaterhouseCoopers)

The complexity of these provisions is acknowledged. However, it is required to accurately increase the base cost of the interest in the CFE by an amount equal to the capital gain and not only the taxable capital gain.

3.3.28 Paragraph 24 of the Eighth Schedule

Exclude those persons who are only resident because of the physical

presence test but who are not ordinarily resident.
(SACOB)

This paragraph excludes the portion of any gains or losses that arose during the period before a person became a resident. An exclusion from this paragraph would bring the pre-residence gains into account for capital gains tax purposes and would increase the tax burden on new residents. On the loss side, pre-residence losses would be brought into account. Neither result is appropriate.

3.3.29 Paragraphs 26 and 27

Where the valuation date value of an asset is determined by reducing proceeds with the paragraph 20 expenditure incurred after 1 October 2001 that expenditure may also be reduced in terms of paragraph 20(3). This will result in a capital gain equal to the post-valuation date allowances recouped for income tax.
(PriceWaterhouseCoopers)

The proposed insertion of paragraphs 26(3)(b) and 27(5) have been withdrawn.

3.3.30 Paragraph 29 of the Eighth Schedule

The five day volume weighted average valuation on the five trading days prior to 1 December 2001 is not a true reflection of a period of normal trading circumstances. Suggest that the last five trading days in August 2001 be used or alternatively the ruling price on 28 September 2001.
(LOA)

Not accepted. The reasons for retaining the five day weighted average are as follows:

- The JSE Allshare index is not significantly lower than it was for 1 April. The average of the index for the five days before 1 October is 6% lower than that for the five days before 1 April.
- CGT is a broadly based tax that covers many assets. Certain assets, such as gold, have increased significantly in value since 11 September. If the starting values for securities are to be adjusted upwards, the question arises as to whether these assets should be adjusted downwards.
- If a synthetic adjustment is made to security values, artificial losses may be granted if the markets maintain their current levels or fall further.
- In any event, time based apportionment, which looks to the cost of assets, and the “kink tests”, which eliminate phantom gains or losses when there is a discrepancy between cost and market value, remain an option for taxpayers other than those that use the weighted average basis of valuing assets.
- When the financial services industry requested an extension for the implementation date a point that was made was that systems changes would have to be made and that the volume of transactions was such that it would not be possible to have systems in place after 1 April and reprocess transactions to determine capital gains or losses. This is equally true now and it would be a Herculean task to reprocess transactions from

1 October to date using a new set of starting values.

3.3.31 Paragraph 35(3) of the Eighth Schedule

The provisions of this paragraph read with the amendment to paragraph 20(1)(h)(i) require a reduction of proceeds.

(PriceWaterhouseCoopers)

Paragraph 35(3) has been reworded to clarify the position.

Unclear whether proceeds should be reduced by the portion of the recoupment comprising pre-1 October 2001 allowances or that proceeds should not be reduced at all.

(PriceWaterhouseCoopers)

Wording has been clarified. Proceeds must be reduced with allowances to the extent the allowances have been disregarded in determining base cost.

Why is the amendment which deals with a share buyback confined to preference shares and not apply for all shares? Companies buying back shares are likely to make capital losses.

(PriceWaterhouseCoopers)

The amendment has been withdrawn.

3.3.32 Paragraph 43 of the Eighth Schedule

From a purist view it is correct to tax currency gains but this may not be appropriate in the South African context because of exchange controls restricting foreign investment, it is an emerging economy, has a weakening currency significant impact on foreign nationals temporarily tax resident in South Africa and the ability of individuals to relocate should not be underestimated.

(PriceWaterhouseCoopers)

Not accepted. Currency gains are only taxed in a limited form. The policy is not to incentivise the movement of liquid asset offshore. Refer to the presentation by National Treasury.

3.3.33 Paragraph 53 of the Eighth Schedule

This paragraph should be amended to exclude the assets referred to in paragraph 15.

(PriceWaterhouseCoopers)

Not accepted. The two paragraphs serve different purposes.

Other personal use assets for which an employer pays an allowance should be treated on the same basis as a motor vehicle for which an allowance is paid.

(PriceWaterhouseCoopers)

Accepted. For consistency other tangible assets will be treated on a similar

basis.

3.3.34 Paragraph 67 of the Eighth Schedule

It seems prejudicial to resident spouses that assets disposed of by transfer to their non-resident spouses are subject to CGT.

(PriceWaterhouseCoopers)

Not accepted. An asset transferred to a non-resident spouse cannot get roll-over relief because the non-resident spouse is outside the South African residence tax system.

3.3.35 Paragraph 74 of the Eighth Schedule

The same definition of “share” should be used throughout the legislation, for example, where it is used in the definition of “foreign equity instrument”, in paragraph 41 of the corporate rules and for purposes of company distributions.

(SAICA)

Not accepted. The concept “share” is used in different contexts. For purposes of the corporate rules an “equity share” has been defined to distinguish it from a share as used in the other provisions.

3.3.36 Paragraph 80 of the Eighth Schedule

The new subparagraph dealing with vested rights to capital of a non-resident trust should only apply to capital gains made on or after valuation date.

(PriceWaterhouseCoopers)

Agreed. The paragraph need not be amended as the capital gains tax provisions came into effect on 1 October 2001.

3.3.37 Paragraph 84 of the Eighth Schedule

The foreign currency regulations should be published as soon as possible.

(SAICA)

The regulations will result in onerous record keeping and an increasing level of either unintentional or intentional non-disclosure. Request that foreign currency should be exempt from CGT or at the very least to restrict the application of the provisions to persons that are ordinarily resident in South Africa.

(PriceWaterhouseCoopers)

The regulations will be adjusted to deal with administrative concerns.

3.4 CUSTOMS AND EXCISE ACT 91 OF 1964

3.4.1 Section 4 – Secrecy provisions

A fine balance is required to be struck between the right of the citizen to privacy and the right to enforce statutes of the country.

(SAICA)

Refer to paragraph 3.3.3

3.4.2 Section 43 - Disposal of goods on failure to make due entry

The section should be more specific as to the warehouse operators' responsibilities. Section 17 of the Act already provides for the general responsibilities of a warehouse operation. Section 43 also contains a cross reference to section 17.

(SAICA)

The rules may provide further responsibilities as necessary.

Warehouse operators should be liable for VAT and any other statutory charges on goods stored.

(SAICA)

The provisions of the VAT Act apply under these circumstances.

The Commissioner normally publishes notifications in the Government Gazette. Why should the list of goods not be so published?

(SAICA)

This will be impractical, as the contents at the list will almost change on a daily basis. There will be a list in respect of each warehouse.

How can the Commissioner ensure that all laws have been complied with in the light of the current staff shortage? What criteria will be looked at to determine whether a price is reasonable and does it not have too much discretion?

(SAICA)

- SARS is regularly informed by Departments of prohibited and restricted imports and exports and keeps a list at all border posts which is consulted by officers at entry.
- The issue of a reasonable price has now been addressed.

It is not practical that the police must pay duty to be able to prosecute a criminal.

(SAICA)

The section implies that duty be paid on entry of goods into home consumption by the person so entering the goods and not by the authority administering any other law.

A consequential change must be made to the Counterfeit Goods Act to empower a customs officer to detain goods for the purposes of that Act.

(SAICA)

Section 113 of the Customs Act authorises officers to detain goods for the purposes of any other Act. Goods may be seized by Customs Officers in particular circumstances under the Counterfeit Goods Act.

The proposed change is unnecessary as the Counterfeit Goods Act already empowers customs officers to detain goods in order to determine whether such goods are counterfeit goods.

The Commissioner should be given the discretion to consult with any Director General and not only with the Directors General of National Treasury and Trade and Industry.

(SAICA)

An amendment in this regard has been incorporated.

The Commissioner should not be given wide powers of discretion in deciding which purposes are in the public interest and the Commissioner should be forced to consult with other departments who will be affected by the disposal of goods not duly entered.

(SAICA)

An amendment in this regard has been incorporated.

3.4.3 Section 47 – Payment of duty

Does the Explanatory Notes include the “Compendium of Opinion” issued by the World Customs Organisation?

(SAICA)

No. It only includes the Harmonised System which consists of the Headings, the section rules, the Chapter notes and the interpretative notes.

A determination should be retrospective for 2 years and not only from the date issued.

(SAICA)

The two-year principle operates both in respect of over and underpayments. The purpose of this amendment is to clarify the provision in order to clearly align it with the two-year principle.

There should not be a prescription period on the validity of a tariff determination.

(SAICA)

A prescription period is in line with European legislation. These provisions are intended for circumstances where persons use imported goods in binding contracts.

Are determinations used to classify goods that are entitled to benefits under the Motor Industry Development Programme and other export credit programmes covered?

(SAICA)

These provisions are intended for circumstances where the basis for the determination changes or the determination is amended for another reason, and the holder is bound by contract, to enable the holder to make alternative

arrangements in respect of the contract within a 6 month period. This is in line with European Union legislation.

3.4.4 Sections 47, 65 and 69 – Payment of duty, value for customs and excise duty purposes

An undue burden is placed on importers to ensure that a determination is not impacted on by changes to Explanatory Notes or court cases. This function should be performed by the Commissioner.

(SAICA)

Provision is made for circumstances where the legal instruments upon which a specific determination was made are changed. Under those circumstances the Commissioner amends current determinations affected by such changes. There is no additional burden on the relevant importer.

The Commissioner should be liable for interest if a determination is changed.

(SAICA)

The Act currently provides that interest is charged on amounts of duty outstanding. The same principle should also apply in respect of amounts due to importers in the sense that the Commissioner should also only become liable for interest from the date an amount is demanded from the Commissioner and the Commissioner fails to pay as demanded on due date.

3.4.5 Section 95A – Internal Administrative Appeal

Rules need to cover who can sit on the committee, the period people can serve on the committee and the election process.

(SAICA)

The Commissioner may make such rules.

Only interested parties should have access to the public record of the proceedings relating to internal administrative appeals considered.

(SAICA)

It is considered for the sake of transparency that a public record of matters considered and decisions reached should be maintained. This is in line with constitutional requirements and other similar foreign legislation.

Will interested parties be advised of the existence of the record and their right to inspect it in the *Government Gazette*?

(SAICA)

Interested parties are advised in terms of the legislation of the existence of the record. The SARS website will be used in this regard.

New determinations should be published in the *Government Gazette*.

(SAICA)

SARS may reconsider publication in the *Gazette* as soon as the reorganization

of Customs, administrative principles and procedures are completed.

Who will make the decision on whether information is confidential or not?

(SAICA)

The importer will have to convince the Commissioner “on good cause shown” of confidentiality.

3.4.6 General

Amend the definition of duty to include VAT as goods which are free of customs duty cannot be stored in a customs and excise warehouse (bond store).

(SAICA)

VAT is dealt with in terms of another Act. The issue whether VATable goods should be stored in a customs and excise warehouse is still under consideration.

3.5 VALUE-ADDED TAX ACT 89 OF 1991

3.5.1 Section 1 - definition of “welfare organisation”

Clarify whether the Minister of Finance will determine welfare activities which are different from the public benefit activities for purposes of section 30 of the Income Tax Act.

(SAICA)

The concept of a “welfare organisation” under the VAT Act is narrower than the concept of a “public benefit organisation” in section 30 of the Income Tax Act. The list to be determined by the Minister of Finance for purposes of the VAT Act will be limited to certain of the activities under the heading appearing in the proposed definition of “welfare organisation”.

3.5.2 Section 6 – Preservation of Secrecy

See comments made on section 4 of the Income Tax Act

(SAICA)

See reply to comments made on section 4 of the ITA in paragraph 3.3.3.

3.5.3 Section 12 – Exempt supplies

A date has not been specified when the amendment to the exemption of letted or hired accommodation will come into operation.

(SAICA)

The amendments in respect of commercial accommodation, household goods and services and dwelling as well as section 12(c) will come into effect on the date of tabling of the Bill.

3.5.4 Section 36 – Payment of tax pending appeal

Should be amended to provide for postponement or suspension of payment pending decision on objection.
(SAICA)

This aspect requires further investigation. However, in practice it is extended to taxpayers where appropriate.

3.5.5 Industrial Development Zones

Amendments in this regard not seen.
(SAICA)

Provisions have subsequently been inserted in the Bill. The definitions of "customs secured area" and "industrial development zone" in section 1 and sections 11(1)(m) and 86A deal with industrial development zones. Section 11(1)(m) will allow for the levy of VAT at the zero rate where a registered vendor consigns or delivers goods that have been sold to a registered vendor in a customs controlled area of an IDZ.

3.6 UNBUNDLING / RATIONALISATIONS

Would both the corporate restructurings and the current unbundling/rationalisation provisions apply from 1 October 2001 until 30 November 2001?
(SACOB)

Correct

Extend the proposed cut-off date for rationalisation applications to 1 October 2002 to give taxpayers sufficient time to reorganise group structures.
(LOA)

Requested that the cut-off date be extended to 1 February 2002.
(PriceWaterhouseCoopers)

Not accepted. The intention is that the new corporate reorganisation measures will replace the current provisions. A shortcoming of the current provisions is that they do not fully cater for capital gains tax.

3.7 GENERAL

3.7.1 Time to consolidate

Since 1997 10 amending statutes have been enacted and considered. It is hoped that amendments to taxing statutes will in the future be limited to that which is absolutely necessary so as to allow for a time of consolidation.
(SAICA; PricewaterhouseCoopers)

Noted. See Chapter 4 of the Medium Term Budget Expenditure Survey.

3.7.2 Monetary limits

An undertaking was given earlier this year that the monetary limits in the various fiscal statutes will be reviewed and considered for amendments in 2002.

(SAICA)

This aspect does not form part of the Bill under consideration.

3.7.3 Taxpayers' rights

The decision as to whether or not to introduce a tax ombudsman or similar office must receive attention. The Charter of Taxpayers' Rights should be expanded and legal standing given thereto.

(SAICA)

The Commissioner has already re-opened the debate in this regard.

3.7.4 Complexity

The Fiscus has successfully produced ever more complex rules and exemptions. Some amendments will not contribute to the simplification of our tax system. Proposed amendments should be reviewed against the additional administrative and compliance obligations of taxpayer and tax collector alike.

(SACOB)

Complex legislation is inevitable when introducing an international tax system. The South African tax system is still simple compared to that of countries such as New Zealand, the United Kingdom and, especially, the United States.

3.7.5 Deferral

Amendments set out in the Bill are comprehensive and wide-ranging and a six-month period of grace should be given for greater consultation and examination.

(SACOB)

This is impossible as greater certainty is of immediate importance now. Any further delays will in fact have the opposite effect.

3.7.6 Small business

The provisions to encourage small business enterprises exclude the majority of small entrepreneurs in this country, because they are restricted to close corporations and companies; and service enterprises are excluded.

(AHI)

This aspect does not form part of the Bill under consideration.

3.7.7 Share transfers between non-residents

Provide for an exemption from stamp duty and UST where shares in a South African company are transferred from one offshore non-resident to another.

(PriceWaterhouseCoopers)

This aspect does not form part of the Bill under consideration.

3.7.8 Local investment

We should not have a system which encourages foreign investment at the expense of local investment. We should not tax Rand devaluation gains but rather introduce tax incentives to promote local savings.

(PriceWaterhouseCoopers)

We certainly do not encourage foreign investment at the expense of local investment. We are trying to balance the need for local investment with the demands and challenges of globalisation.

3.7.9 Technical amendments

A large number of suggestions for improvements to the Bill were made by commentators which are not matters of principle, but merely drafting issues. These aspects have been considered and mostly incorporated in the Bill.

Prepared by SARS