



**Office**  
Commissioner

**Enquiries**  
J J Louw

**Telephone**  
012 422 5155

**Facsimile**  
012 422 5254

**Room**

**Reference**

**Date**  
14 June 2002

**South African Revenue Service**  
299 Bronkhorst Street,  
Nieuw Muckleneuk, Pretoria  
P O Box 402, Pretoria, 0001  
SOUTH AFRICA  
E-mail [jdelarey@sars.gov.za](mailto:jdelarey@sars.gov.za)

**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 TAXATION LAWS AMENDMENT BILL, 2002**

**1 Introduction**

As indicated to you during the hearings on the above-mentioned Bill, SARS wishes to respond as follows to the various points raised by the submissions on the Bill.

**2 Consultation**

Within the timeframe available, SARS and the National Treasury tried to consult as widely and extensively as possible.

The draft changes to the current list of public benefit activities and draft amendments to the legislation affecting public benefit organisations were circulated earlier this year and several discussions took place between SARS, National Treasury and representative bodies such as the Non-Profit Partnership (NPP), Tshikululu Social Investments, the Department of Education, the SA Muslim PBO Tax Commission and the SA Council of Churches. The last of the meetings occurred on 21 May 2002 and great progress has been made in amending the provisions to address the concerns of all parties.

A draft of the wage incentive legislation was made available for public comment on 8 February 2002.

Further draft legislation covering the remaining parts of the Bill was made available in two batches on 8 April 2002 and 9 May 2002.

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

### **Representative organisations**

- 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;
- Non-Profit Partnership
- South African Association of Freight Forwarders;
- South African Chamber of Business
- South African Council of Churches;
- South African Institute of Chartered Accountants

### **Tax specialists**

- Tax Advisory Committee Members
- Ernest Mazansky
- Costa Divaris
- Advocate D Meyerowitz
- Prof A de Koker

A consolidated Bill, which took into account comments received from the various commentators, was placed on the websites of SARS and the National Treasury on 24 May 2002.

### **3 Responses to specific issues raised during the presentations on the draft Bill – 7 and 12 June 2002**

#### **3.1 INCOME TAX ACT 58 OF 1962 (IT ACT)**

##### **3.1.1 Section 1 – definition of “year of assessment” and section 5 – levy of normal tax**

**Allow for trusts to also have years of assessment ending on dates other than at the end of February.**

(SAICA)

Not accepted. Section 5 of the IT Act currently provides that a person other than a company shall pay tax in respect of a year of assessment ending on the last day of February each year. This also applies to a trust which is included in the definition of a “person”. The general rule has, therefore, always been that a trust must have a year of assessment ending at the end of February. This principle has been retained and has been incorporated in the draft legislation.

##### **3.1.2 Section 8 – allowances and advances**

**Extend the ambit of non-taxable reimbursements or advances to situations where the employee does not spend at least one night away from his or her usual place of residence and to all expenses incurred for business purposes where proof is provided to the principal.**

(SAICA)

Accepted. Allow tax neutral reimbursements and advances in respect of any expenditure where the expenditure is incurred on the instruction of the principal in the furtherance of the trade of the principal and the recipient of the reimbursement or advance must account to the principal for that expenditure. A condition is proposed to preclude the tax-free treatment where the recipient obtains ownership of an asset which was acquired on a reimbursive basis or by using an advance from the principal.

##### **3.1.3 Section 10 – wholly owned subsidiaries of institutions established under law**

**Where a company is wholly owned by several section 10(1)(cA) institutions, boards or bodies the company should qualify for an exemption in the case of collaborative research and educational facilities.**

(NPP)

Section 10(1)(cA) requires a review from a broader perspective. This matter will be included as part of that review. However, in the meantime the issue could be addressed administratively.

**Where the “subsidiary company” is not a company limited by shares, but limited by members’ guarantees (section 21 companies) an exemption should be granted.**

(NPP)

In terms of current law no exemption can be granted. This aspect will be taken into account in reviewing the provisions of section 10(1)(cA) at a later stage.

3.1.4 **Section 10** – exemption of interest and dividends

**Clarify that the exempt amount of domestic interest and dividends received by or accrued to persons 65 years of age and older must be reduced by the amount of taxable foreign interest and dividends which qualifies for an exemption.**

(SAICA)

This aspect was corrected in the draft Bill which was made available for comment on 24 May 2002.

3.1.5 **Section 11(u)** – entertainment expenses

**Clarify that taxpayers who derive remuneration and commission will be granted a deduction for entertainment against commission income.**

(SAICA)

Accepted. However, the proposal to refer to “solely remuneration” will not have the desired effect. It is proposed that a deduction be granted to agents or representatives whose remuneration is normally derived mainly in the form of commissions based on sales or turnover.

3.1.6 **Section 12D** – deduction in respect of certain pipelines, transmission lines and railway lines

**The amendment to this section should take effect from a prospective date.**

(SAICA)

Accepted.

**The allowance is not effective in the case of a taxpayer with a small amount of taxable income.**

(SAICA)

The reason for excluding taxpayers conducting banking, financial services, insurance or rental businesses from the scope of this section was specifically to preclude taxpayers with low or no taxable income from utilising the tax bases of financial institutions. A survey done by the Banking Council confirmed that one of the main reasons for the very low effective rate of tax paid by the banking industry was the industry's involvement in structured asset-backed financing, such as financial leasing.

As announced in the Budget Review this year the taxation of financial leases will be investigated with the view to developing appropriate policy measures in this regard.

### **3.1.7 Section 12H – deduction in respect of learnership agreements**

The President's 2001 opening of Parliament address provided the direction for the design of the wage incentive in the following key points –

- “The objectives we seek to achieve are moving the economy onto a high-growth path, increasing its competitiveness and efficiency, raising employment levels and reducing poverty and persistent inequality.”
- “Government has approved a Human Resource Development Strategy that will enable us to launch an accelerated skills development programme for those areas that are critical to a more competitive economy.”
- “... investigations into the feasibility of reducing the cost of labour without reducing workers' wages.”

The Minister of Finance announced in his 2001 Budget Speech that; “In the 2001 Budget, R600 million is set aside for a wage incentive to encourage job creation by reducing the cost of hiring new workers and of offering learnerships.”

Draft proposals for the incentive were released for public comment on 8 February 2002 after extensive interdepartmental consultation. The proposals were generally supported by commentators and were incorporated, with minor technical amendments, in the draft Bill released on 24 May 2002. However, as foreshadowed in SARS's briefing on 4 June 2002 and set out in COSATU's presentation on 12 June 2002, COSATU had several substantive concerns with the proposed legislation.

These concerns can be summarised in five broad categories.

**The incentive should be targeted at job creation in preference to skills development, which should be considered a secondary objective. It should therefore:**

- **be targeted at people not already in employment,**
- **not displace existing workers, and**
- **promote retention of the learners after completion of the learnership.**

Partially accepted. A differential in the allowance granted on the signature of a learnership agreement, based on previous employment status, is proposed to encourage the signature of agreements with new workers. The allowance in respect of existing workers is set at 70% of the allowance in respect of new workers. No differential in the allowances granted on successful completion of a learnership is proposed. The incentive has not been restricted to new workers as its extension to existing workers reduces the risk of displacement of existing workers, encourages the upgrading of the skills of existing workers, and facilitates the retraining that is required as part of business's restructuring in the face of globalisation.

No measures have been proposed with respect to displacement of existing workers. A comprehensive legislative framework already exists to protect the rights of workers. Monitoring displacement is difficult and the adjudication of disputes in this area is not one of SARS' core competencies. The impact of the entire learnership programme, which this incentive supports, will be monitored by the Department of Labour to identify unintended consequences and areas for improvement. It should be noted that, with the exception of the differential discussed in the previous paragraph, the incentive is neutral between new and existing workers. Accordingly, the incentive itself should not be a significant driver in the displacement of existing workers.

No measures have been proposed with respect to the retention of learners as this would do no more than defer the point at which a learner could be dismissed while requiring a substantial commitment of SARS's audit resources. This follows from the fact that SARS audits will only enjoy synergies with the monitoring of learnerships by SETAs and the Department of Labour up to the completion of the learnerships. It should be noted that experience with Technikon experiential training candidates is that approximately 90% of the candidates are employed after completion of their training. Even where a learner is not retained, previous work experience in a sector improves a learner's prospects for employment or the establishment of an SMME in that sector.

**The effective subsidy is too high, particularly with reference to learnership wage rates.**

Accepted. It is proposed that the flat R25 000 allowance on signature of a learnership agreement and successful completion of a learnership be replaced by an allowance equal to the annual remuneration of the learner. This will bring the quantum of the allowance closer to the cost to the employer. The allowance on the signature of a learnership agreement has been capped at R17 500 in the case of existing workers and at R25 000 in the case of new workers. The allowance on successful completion of a learnership has been capped at R25 000.

**The R600 million budget is too low, particularly with reference to the R3 billion allocated to the Strategic Industrial Programme (“SIP”).**

The R600 million is an estimate of the cost of the incentive from 1 October 2001 to the 31 March 2002. No cap has been set on the incentive, although it will expire on 30 September 2006. On the other hand, the R3 billion allocated to the SIP is an explicit cap over its period of operation from 1 August 2001 to 31 July 2005.

**The incentive should be financed through a tax on companies.**

The programme is funded from general tax revenue. It should be noted that the share of revenue contributed by companies has increased substantially in recent years.

**The style and the draft of the legislation are too technical and inaccessible.**

The legislation has been drafted in a style consistent with that of the existing Income Tax Act, 58 of 1962, in order to limit the unintended consequences that arise from the interpretation of inconsistent wording. The legislation has, however, been simplified by the removal of provisions, such as those relating to multi-level learnerships, which do not appear to be required in practice.

Furthermore, the Department of Labour and SARS will embark on an information campaign in order to ensure that employers are fully aware of the incentive.

In addition to the concerns raised by COSATU, two additional proposals were made, the first by SAICA and the second by SACOB.

**Propose that the allowance on the signature of a learnership agreement be recovered or recouped if a learnership agreement is terminated at any time other than for reasons of death or other specific circumstances.**

(SAICA)

Accepted. The allowance will be recouped on the premature termination of a learnership other than by reason of death or dismissal due to ill-health or injury.

**Propose the substitution of “and” for “or” in the listing of events triggering an allowance in a year of assessment in order to make it clear that provision is made for multiple allowances in respect of the same learnership in a year of assessment.**

(SACOB)

Accepted. The provision has been restructured to achieve this result.

### 3.1.8 Section 18A – deduction of donations to certain public benefit organisations

**All public benefit activities should be eligible for section 18A tax deductible status.**

(NPP)

**Add the following activities to Part Two of the Ninth Schedule:**

- **Education and Development: Training of persons employed in the national, provincial and local spheres of government.**  
(NPP; Jeremy Ractliffe)
- **Education and Development: The provision of hostel accommodation to students of a PBO or a section 10(1)(cA) institution, board or body.**  
(NPP; Jeremy Ractliffe)
- **Education and Development: The provision of certain scholarships, bursaries and awards.**  
(NPP; Jeremy Ractliffe)

**A public benefit organisation which is building schools and clinics in remote areas of the country is now also upgrading and renovating schools and clinics but these activities do not qualify under part II for section 18A benefits.**

(Jeremy Ractliffe)

Section 18A activities are determined by the Minister of Finance as part of the Budgetary process, based on the availability of funds. The above activities did not generally enjoy section 18A status previously. Any possible inclusion will have to await the next cycle of the process, which normally occurs during the National Budget process.

- **Education and Development: Training for unemployed persons.**  
(NPP; Jeremy Ractliffe)

This activity has been provided for in paragraph 3(e) of the Part II of the Ninth Schedule.



- **Providing funds, assets or other resources to any public benefit organisation approved in section 18A of the IT Act.**  
(Jeremy Ractliffe)

**Educational funds in the form of trusts raising funds from the public for a university or secondary school should qualify for section 18A benefits as was the case previously.**  
(SAICA)

The provision of funds is already provided for in section 18A(1)(b). Consideration is still being given to the possible transfer of this activity to the Ninth Schedule.

- **General: The supply, building, the equipping, the installing, or maintaining of plant, equipment, structures, facilities or amenities for the benefit of any public benefit organisation contemplated in section 18A of the IT Act.**  
(Jeremy Ractliffe)

This is dependant on the outcome of the previous issue.

**The Minister should be enabled to add activities to the list with retrospective effect.**  
(NPP)

Not accepted. Qualifying public benefit organisations are required to issue section 18A receipts on receipt of a donation in order to prevent abuse and maintain proper control over the tax expenditure associated with the donation. It would be extremely difficult to deal with the administrative implications of issuing, processing and controlling section 18A receipts in respect of a tax year prior to the identification a new activity by the Minister. When the Minister announces new activities the effective date would also be announced.

**The Commissioner should have the power to back-date an approval.**  
(NPP)

Not accepted. In the case of an application by an organisation, the approval may be effective from the date of receipt of the application provided the organisation complied with the provisions of section 18A.

**Additional requirements which the Minister may decide to impose should be included in the substantive legislation within a period of twelve months.**  
(NPP)

Accepted.

**Propose that the “penalty” on a regulating or co-ordinating body failing to exercise control only be imposed where the failure was deliberate or negligent.**

(NPP)

Accepted. Qualified by incorporating an intent or negligence test.

**Suggest that provision be made for a particular errant constituent organisation to be penalised for its default rather than the entire group.**

(NPP)

This may be achieved if the directing or supervisory body notifies the Commissioner of the default and expels the defaulter from the group.

**In the case of conduit funds there may be a good purpose which mitigates against immediate distribution of 75 per cent of the funds in the year following the year of receipt. Allow the Commissioner to waive this requirement on good cause shown as was the case for the repealed section 10(1)(fA).**

(NPP)

Accepted. The legislation currently provides for the deduction of donations by the public to public benefit organisations that distribute their donations to other public benefit organisations that carry on activities approved in terms of section 18A. This is conditional on the distribution of at least 75% of the donations received, which is intended to encourage the utilisation of the donations in the year in which the State incurs a tax expenditure by allowing the donations as deductions. It is proposed that, upon good cause shown and subject to such conditions as may be imposed, this rule may be relaxed.

### 3.1.9 **Section 23** – limitation of deductions allowable against employment income

**Continue allowing premiums paid by taxpayers in respect of income protection/continuation policies as a deduction.**

(LOA; SAICA; SACOB)

Accepted. However, it will be limited to premiums paid in terms of an insurance policy-

- which covers that person solely against the loss of income as a result of illness, injury, disability or unemployment;
- in respect of which all the compensation payable in terms of the policy is taxable ; and
- the deductibility of which the premiums would not otherwise be prohibited.

This matter will again be reviewed concurrently with the review of the taxation of the Retirement Industry.

**The proposed amendments place unfair limitations on the ability of salaried individuals to reduce their tax liability. Suggest that the proposed limitations not be introduced. Continue allowing section 11(a) deductions for salaried employees.**

(LOA)

**There is no cogent argument as to why the deductions relating to expenditure incurred in the production of income of salaried individuals should be limited.**

(SACOB)

Not accepted.

This is a fundamental tax proposal made by the Minister of Finance in his Budget Review. The purpose thereof is to-

- Simplify the system for both taxpayers (employees) and SARS.
- Continue with the process of simplification commenced some time ago with the rate and rebate structure consolidations. The focus is now on the restructuring of the deductions.
- Continue laying the foundation for a clearer split between the tax treatment of business income and employment income in the Act.
- Provide greater certainty as to the types of expenses which are deductible.
- Eliminate the possibility of nuisance value expenditure claims.
- Free up capacity in SARS to be employed more productively elsewhere.

The overwhelming majority of employees will not be affected by the proposed limitation of deductions. The proposed simplification of the provisions allowing for the deduction of expenses by employees will, therefore, not have a negative impact on the average salary earner.

The simplification of the deduction rules for individuals forms part of a package of proposals announced by the Minister of Finance on Budget Day which included the significant tax relief of more than R15 billion granted to individuals.

**Recommend that commission earners be entitled to any general or special deductions in respect of expenditure incurred in the course of that trade.**

(SAICA; SACOB)

Accepted. It is proposed that the provisions be amended to allow an agent or representative whose remuneration is normally derived mainly in the form of commissions based on sales or turnover, to claim all expenditure incurred which is deductible in terms of any of the provisions of section 11.

**Limit the scope of the limitation provisions and define “salaried” employees in respect of which the limitation will apply.**

(SACOB)

The terms “employee” and “remuneration” are defined in the Fourth Schedule for the purposes of the Fourth Schedule. See paragraph 1 of the Fourth Schedule. In any event, the Budget Review distinguished between employees earning mainly commission income and employees earning salaries. Employees earning commission income are not affected by the proposed section 23(m). There is no reason, therefore, to define a “salaried employee” for purposes of the new proposed section.

A labour broker is defined in the Fourth Schedule as an “employee”, but as mentioned above, this does not mean that a labour broker is an employee for purposes of the proposed section 23(m). A legitimate labour broker, by its very nature, is a business or a service provider under common law and not an employee.

### **3.1.10 Section 30 – public benefit organisations**

#### **Introduce an automatic exemption from tax for associations of persons with annual income of less than R27 000.** (SACC)

Not accepted. Public benefit organisations do not qualify for a tax threshold as in the case of individuals. They are not treated as individuals for tax purposes, but as a company or trust and are therefore taxable on their income from the first R1 received or accrued.

The cost of the proposed exemption to the fiscus cannot be quantified and it will not be possible for SARS to accurately report on the revenue cost of the exemption granted to public benefit organisations. It must also be noted that exemption from other taxes are linked to the exemption from income tax, e.g. estate duty, donations tax, stamp duty, transfer duty and the skills development levy. An organisation that is not approved by the Commissioner will not enjoy exemption from other taxes.

An organisation which conducts section 18A approved activities will also not qualify for the section 18A benefits unless approved by the Commissioner. It would be difficult to exercise control over entities claiming to qualify for exemption when they do not submit tax returns and are not registered with SARS. Permitting automatically exempt bodies to also claim section 18A status would extend the possibilities for abuse substantially.

SARS endeavours to reduce the administrative burden as far as is possible for public benefit organisations. A special tax return has been developed for exempt organisations.

#### **Develop written criteria for determining when there is “good cause” to exempt an organisation from registration in terms of the NPO Act.** (SACC)

Accepted. Criteria will be developed in consultation with the Director of

Non-Profit Organisations.

**Amend definition of “public benefit organisation” to allow for those organisations to also carry on activities in any SADC country.**

(SAICA)

Not accepted. As a matter of principle it is not acceptable to grant tax free status to South African public benefit organisations where the benefits accrue to persons who are not residents. This is so because it is the South African tax base that is impacted on in two ways-

- the tax exempt status of the public benefit organisation; and
- tax deductible donations.

This need to secure the South African tax base has, however, been tempered by the provisions that permit a PBO to conduct –

- up to 15% of its activities outside the Republic without seeking approval; or
- 15% or more of its activities outside the Republic with the approval of the Minister, after he has considered the circumstances of the specific case,

without jeopardising its exempt status.

**Establish a clearer test for determining what proportion of an organisation’s activities occur outside of the Republic.**

(SACC)

**Eliminate the constraint on cross-border philanthropy. If the principle is retained a single test based upon direct cost or expenditure should be applied without reference to time.**

(NPP)

The test will be changed to focus on who benefits from the activities of the organisation, but still taking into account the cost or period during which benefits are granted.

**The Commissioner must clarify what criteria will be used in determining whether a particular group of organisations will qualify for approval.**

(SAICA)

The steps to be taken will be explained in a Guide to be issued by SARS.

**Require that an organisation must be at least 85 per cent funded by donations, grants from any organ of state or grants from any foreign state in order to qualify as a public benefit organisation.**

(SACC)

Not accepted. Many deserving organisations which currently qualify as public benefit organisations will not be able to meet this requirement.

**Amend the legislation to allow for the signature of a written**

**undertaking of compliance with the provisions of section 30 instead of requiring specific terms to be incorporated into constituting documents.**  
(NPP)

Not accepted. The proposal has a number of shortcomings. As an example, the trustees, office bearers or directors who sign the undertaking may change and the new appointees may not consider themselves bound by the undertaking which was not signed by them. The best way to bind an organisation is to require conditions to be incorporated in the founding documents. This has been a longstanding practice and is well understood by now.

**Until such time as the person responsible in a fiduciary capacity for an organisation, which previously enjoyed tax exempt status, submits a written undertaking before 31 December 2003 that the organisation will be administered in compliance with the provisions of section 30, it is unclear which conditions apply.**  
(NPP)

The new conditions apply from 15 July 2001. However, if differences exist between the old and the new conditions it will be addressed administratively and the Commissioner's office will be reasonable in applying the conditions for the interim period until 31 December 2003.

**PBO's whose activities include funding other PBO's there is going to be a quite long period during which these other PBO's have not yet been approved under the new rules. Clarify how the funding PBO should deal with this in practice to determine whether the other PBO's qualify as public benefit organisations or for section 18A?**  
(Jeremy Ractliffe)

Until such time as the public benefit organisation has been approved for purposes of section 18A and section 30 the previous status of the public benefit organisation in terms of the previous rules should be taken into account.

**Organisations who engage in both section 18A activities and non-section 18A activities are complicating factors as it was intimated that section 18A activities must be conducted in a dedicated entity. Operations may have to be fragmented and this has cost implications and imposes demands upon SARS's oversight.**  
(NPP)

**Allow PBO's which undertake activities covering both Part I and II of the Ninth Schedule should get the benefit of section 18A and be required to keep separate books of account and vouchers in respect of activities falling into the two categories.**  
(Jeremy Ractliffe)

It is accepted that there could be a mixture of section 18A and other section 30 activities in a public benefit organisation. SARS will, having regard to the

circumstances of the matter, accept the joint conducting of the activities. SARS will, however, require that the section 18A activities and the funding thereof be ringfenced which must be certified by a properly qualified accountant.

**The prohibition of an activity that promotes the economic self interest of employees is unrealistic and should not apply to the extent that reasonable and legitimate remuneration is paid.**

(NPP)

Accepted.

**Provision should be made for grants from international organisations such as the European Union and the United Nations Development Programme to be included in the 85 percent test.**

(NPP)

Accepted. Foreign grants will be added.

**It would be anomalous to only provide an ongoing exemption to will trusts of persons who died prior to 31 December 2003. Grant the power to the Minister or the Commissioner to waive the requirement on good cause shown irrespective of the date of death.**

(NPP)

Not accepted. The transitional period provides time for wills to be amended to comply with the new requirements and should not be left open ended in the interests of certainty.

**On dissolution a public benefit organisation should be able to transfer its assets to local government or other organs of state.**

(NPP)

Partially accepted. The provisions have been widened to include add departments or administration in the local sphere of government.

Other organs of state had not been included as the scope of the benefit would be too wide. Entities such as Armscor and Transnet would be able to benefit.

**Particular requirements of the Nonprofit Organisations Act frequently result in the rejection of applications for registration. The NPO Act should be reviewed jointly by the NPO Directorate and SARS in order to promote harmony between the statutes.**

(NPP)

Discussions between the Director of Nonprofit Organisations and SARS will be facilitated. The draft legislation now provides that registration under the NPO Act will not be required where the Commissioner, in consultation with the Director, so directs.

**The power to backdate the approval of a particular organisation should apply to section 30 organisations.**

(NPP)

Accepted. The words “with retrospective effect” will be added.

**Proposed alternative wording where the Commissioner withdraws the approval of a group of public benefit organisations where the regulating or co-ordinating body fails to take steps or to notify.**

(NPP)

Accepted.

### **3.1.11 Section 56 – Donations tax exemptions**

**A donation should be exempt if the beneficiary is a registered non-profit organisation and the proceeds are applied for the purpose of an approved public benefit activity. An exemption in terms of section 10(1)(cN) should not be a requirement.**

(NPP)

Not accepted. The proposed system will be very difficult to control and create scope for abuse. (See discussion in 3.1.10 above).

### **3.1.12 Section 78 – estimated assessments**

**Introduce an exchange control amnesty to encourage persons who have unlawfully removed funds from South Africa to legitimise those funds and also encourage those persons to disclose the income derived on those funds.**

(SAICA; SACOB)

This is firstly an exchange control issue. Secondly, the tax consequences arising from such a step will require tax policy decisions. Accordingly this proposal requires a policy decision by the Minister that is beyond the scope of this Bill.

The Commissioner is entitled to estimate an amount of taxable income on any undisclosed foreign funds or assets irrespective of the source of those funds or assets.

**The proposed amendment does not appear to take the existing powers available to SARS, under the present section 78, any further.**

(SACOB)



Although estimates could be dealt with in terms of the existing section 78, it is proposed that clearer and objective rules be provided to avoid arguments around the determination of the quantum of the amount to be included in taxable income.

**The utilisation of the “official rate of interest” to estimate taxable income is unreasonable in that it bears no relation to the likely rate of return on assets held abroad taking into account the income earning capacity, nature and location of the undisclosed foreign assets.**  
(SAICA; SACOB)

The view is held that the official rate of interest is appropriate under the circumstances. Rational taxpayers will seek a total rate of return on foreign investments that will equal or exceed that available in South Africa.

From a practical perspective the Commissioner may have details of the funds or assets transferred offshore or of amounts and profits derived off-shore but may not be aware of the current nature, return on or location of the assets.

In any event a taxpayer need merely disclose his/her foreign assets and the actual income derived in the annual tax return in order to avoid the application of the provisions.

### **3.1.13 Section 79A – reduced assessments**

**An assessment may be reduced where an amount should not have been taken into account or was not taken into account if that assessment was issued by the Commissioner based on information provided in the taxpayer’s return for the current or any prior year of assessment.**  
(SAICA)

Accepted. It will be incorporated in the amendment to the section.

### **3.1.14 Section 83 – concession of appeal**

**Amend legislation to allow for the Commissioner to be liable for costs if the appeal is conceded just prior to the hearing.**  
(SAICA)

This aspect has already been provided for in section 83(17)(e) of the IT Act. It provides that where an appeal has been withdrawn or conceded by one of the parties after a date of hearing has been allocated by the registrar, the tax court may, on application by the aggrieved party, grant an order for costs in favour of that aggrieved party.

3.1.15 **Section 102(3)** – Refunds and set off

**Amend section to cater for a situation where a refund is withheld because tax is shown to be owing to SARS due to an administrative error.**

(SAICA)

This is an administrative issue as SARS will correct the error and an appropriate refund will then be made.

3.1.16 **Section 107B** – settlement of dispute

**The circumstances to be prescribed by the Minister of Finance should be set forth in the Bill rather than being left to a regulation.**

(SACOB)

The Act already provides that the provisions contained in the regulations must be incorporated into the IT Act within a specified period.

3.1.17 **Ninth Schedule to the IT Act** – public benefit activities qualifying for deductions

**Extend the provision of legal services to the general public.**

(NPP)

Not accepted. The scope would then be too wide.

**Add the provision of facilities for the protection and care of children under school going age of poor and needy parents.**

(NPP)

Accepted.

**Provide that the provision of health care services to poor and needy persons could also be for the benefit of the general public.**

(NPP)

Not accepted. The scope would then be too wide. This activity also qualifies for section 18A deductions and a stricter approach is required.

**In the activity dealing with the care and counseling of terminally ill persons add chronically ill persons.**

(NPP)

Not accepted. The scope would be widened to include persons with illnesses which are not very serious, for example someone suffering from chronic sinusitis.

**Add therapeutic programmes to programmes relating to HIV/AIDS.**  
(NPP)

This aspect is already covered under the activity dealing with the care, counseling or treatment of persons afflicted with HIV/AIDS.

**Add “other facilities and amenities” to building and equipping of communities centres, clinics, sport facilities for the benefit of the poor and needy.**  
(NPP)

Accepted, with the qualification that they must be of a similar nature.

**The requirement that school buildings or equipment be located on land owned by the State or PBO’s does not cover the situation of farm schools.**  
(NPP)

Accepted. The concept of public schools will be added to paragraph 4(j).

**The activity referring to the promotion and/or practice of a belief should be changed to refer to a belief directed to promoting the ethical, spiritual, emotional or physical wellbeing of the community.**  
(NPP)

Not accepted. The current wording is in line with the terminology used in the Constitution.

**Add the promotion, establishment, protection, preservation or maintenance of areas, collections or buildings of aesthetic or cultural interest.**  
(NPP)

Partially accepted. The reference to cultural interest has been included. The concept of aesthetic interest has not been incorporated as it is considered over-broad.

**The provision of youth leadership or development programmes should qualify.**  
(NPP)  
Accepted.

**The condition that participants should take part in sport or recreation “as a pastime” should be removed.**  
(NPP)

Not accepted. This concept assists in differentiating between amateur and professional involvement in sporting activities. The dictionary meaning of amateur status refers to the concept of “as a pastime”.

**Provide for the donation of rights and services *in specie*.**  
(NPP)

Accepted. The concept “other resources” already includes services, but the word “services” will be specifically referred to.

**Various organisations enter into contracts with the State involving a recoupment of costs and a reasonable overhead. Reference to “direct costs” is problematic.**  
(NPP)

Not accepted. Where an organisation provides the State with resources as part and parcel of another approved activity and recovers its costs and overheads in this regard, the transaction may be evaluated with reference to that other approved activity and the trading test. Where, however, the transaction with the State does not relate to another approved activity, a stricter standard must be set to ensure that the transaction is indeed of a benevolent nature and not directed at the establishment of a business at the expense of other enterprises transacting with the State. It is for this reason that direct costs have been specified and overheads excluded in respect of this activity. In any event, the recovery of direct costs plus an appropriate share of overheads is generally more complex from an accounting perspective than the recovery of direct costs alone.

**Provision of funds, assets or other resources to Local Government is omitted.**  
(NPP)

Accepted. Local Government will be included.

**Add the following activities to Part One of the Ninth Schedule:**

- **Religion, Belief or Philosophy: The promotion and/or practice of religion which encompasses acts of teaching.**  
(SACC)

Accepted. The word “teaching” will be added.

- **Research and consumer rights: Information services: The compilation and distribution of news, information and analysis by non-profit organisations such as community media and the facilitation of access to information held by a public or private body in terms of section 32 of the Constitution.**  
(SACC)

Not accepted. The activities will qualify to the extent that they form part and parcel of the other approved activities conducted by the public benefit organisation.

- **General: Advocacy - the promotion of policies for or actions by public or private sector institutions intended to enhance the frequency, capacity or effectiveness of one or more of the public benefit activities contemplated in this part.**  
(SACC)

Accepted. Paragraph 1(i) of Part I will be amended. It may also qualify under the current wording of General Activities: paragraph 11(a).

- **General: The supply, building, the equipping, the installing, or maintaining of plant, equipment, structures, facilities or amenities for the benefit of any public benefit organisation contemplated in section 30 of the IT Act.**  
(Jeremy Ractliffe)

This is already covered by paragraph 10.

### **3.1.18 Taxation Laws Amendment Act, 2000 – continuation of exemption**

**Amend section 21 of that Act to confirm that organisations contemplated in section 10(1)(d)(iv) will also enjoy tax exemption until 31 December 2003.**  
(SAICA)

Accepted.

## **3.2 CUSTOMS AND EXCISE ACT NO 91 OF 1964**

### **3.2.1 Section 3 – Delegation of powers**

**It is considered necessary that any officer given power should be adequately qualified to carry out any duties or activities conferred by the power.**  
(SACOB)

Noted.

### **3.2.2 Section 21 – Special customs and excise warehouses**

**Contends that administration of warehouses is a normal business activity that does not need to be subject to rules prescribed by the Commissioner.**  
(SACOB)

The proposal provides for the prescription of rules to apply to special customs and excise warehouses within which imported and locally produced goods will for example be consolidated for export. It is important to ensure proper control over such goods to ensure no loss of revenue to the fiscus.

### 3.2.3 Section 60 – Security

**Believes that there should be parameters according to which security requirements are determined and changes to security should be related to the performance of the operator or to conditions.**

(SACOB)

A reasonableness test will be incorporated.

### 3.2.4 Sections 64D and 93A – Amendments

**In principle opposed to the retroactive coming into force of legislation and regulations. Does not support the implementation of these amendments with retroactive effect.**

(SACOB)

These amendments are for the benefit of persons doing customs business.

### 3.2.5 Section 113A – Counterfeit goods

**Goods should not be detained unless there is reasonable evidence to suggest that they may be counterfeit.**

(SACOB)

The power to detain already exists in the Counterfeit Goods Act. The purpose of the provision is to provide greater clarity as to the operation of the provisions.

## 3.3 GENERAL

### 3.3.1 Timing

**The Bill was received on 27 May 2002 and SAICA became aware on 29 May that written submissions should be forwarded by 3 June 2002. Ten clear days are required to consult broadly with members.**

(SAICA)

Two batches of legislation were made available to SAICA on 8 April and 9 May 2002 in order to enable members of the tax committee to comment on the draft legislation. Those drafts were updated taking into account comments received, the changes to the PBO legislation and the updated lists of activities agreed with the public benefit sector as well as a number of minor issues. The draft Bill was placed on SARS's and National Treasury's websites on the evening of Friday 24 May 2002.

SAICA was informed on 24 May 2002 that the draft Bill was available on the websites. Under the circumstances and taking into account that the Bill mainly deals with matters announced in the 2002 Budget, SAICA was given sufficient opportunity to comment on the matters of principle contained in the Bill.

### 3.3.2 Regulations

#### **A number of regulations have not been issued thereby resulting in uncertainty for taxpayers.**

(SAICA)

These regulations do not form part of the Bill under consideration. The current status of the regulations listed by SAICA is follows:

- **Section 9E(8) – designated countries**  
(also raised by SACOB)  
The Minister of Finance designated a number of countries on 1 September 2000. National Treasury is in the process of reviewing the criteria for designation. Any change to the list of designated countries will apply on a prospective basis.
- **Section 10(1)(d) – Ministerial conditions for approval**  
The Minister has not yet prescribed conditions by way of regulation. The process of consultation on the requirements has commenced. No exemptions in terms of section 10(1)(d)(iii) or (iv) are presently being approved. Where an organisation is exempt in terms of the repealed provisions the old exemption will apply until such time as the Commissioner informs the organisation of his decision in terms of the new legislation.
- **Section 30(3)(a) – Ministerial conditions for approval**  
The Minister has already prescribed conditions in the legislation (see section 30(3)(b)). The Minister is not obliged to prescribe further conditions, but has the right should he wish to do so.
- **Section 30(3)(e) – reporting requirements may be determined by the Commissioner**  
Provision for reporting requirements will be contained in the Income Tax Return for Exempt Organisations. This is a separate income tax return developed specifically for exempt organisations.
- **Section 41(3) – the Minister may prescribe circumstances for prior approval by the Commissioner in respect of the corporate rules**  
The Minister is not obliged to prescribe further conditions, but has the right should he wish to do so.
- **Sections 46(6) and 64B(5)(c) – steps prescribed by the Minister to be taken within a period to liquidate, wind up or deregister**  
The draft regulations have been circulated for comment and the revised regulations will be issued shortly. The regulations will apply on a prospective basis.
- **Section 107A – the Minister may prescribe procedures for objections, appeals and hearings before a tax court**

The amendment to section 107A has not yet been promulgated. The draft rules have been circulated for comment and the revised rules will again be circulated for comment. It is envisaged that this will be published in the second half of the year.

- **Section 107B – Minister may by regulation prescribe circumstances under which the Commissioner may waive any claims**

. The amendment to section 107B has not yet been promulgated. The draft rules have been prepared and will be circulated for comment

- **Eighth Schedule paragraph 84 – the Minister must issue regulations to determine foreign currency gains and losses**

The draft regulations have been circulated for comment and the revised regulations will be issued shortly. The regulations will specifically address the issue of acquisitions and disposals of the relevant assets from 1 October 2001 until the regulations are issued.

### 3.3.3 Sunset provision for long outstanding disputes

**There are long outstanding disputes between SARS and taxpayers, many of which have remained unresolved for years. Consideration should be given to introduce a sunset clause to the effect that after a predetermined period the party at fault must be deemed to have conceded the matter.**

(SACOB)

The introduction of a “sunset” clause is not supported and a different approach is recommended, i.e.-

- Backlogs of existing unresolved disputes: Special teams will concentrate on eliminating these backlogs.
- Future disputes: New court rules are being developed to streamline the dispute resolution process and/or facilitate the resolution of disputes outside the formal litigation process.

### 3.3.4 Charter

**Recommends that focused attention be given to drafting a detailed taxpayer/SARS charter setting out the aspirations and expectations of both parties.**

(SACOB)

**Taxpayer’s Charter should be reviewed and revised and taxpayer’s rights should be more effectively enforced**

(SAICA)

Noted.

### 3.3.5 Budget announcements not in the Bill

- **Regulation of tax advisors is in principle supported**  
(SAICA)



**In principle not unsupportive of such regulation, but fiscus should remain mindful of taxpayer's rights to legally plan their affairs within the parameters set by the Act. Tax avoidance should not be confused with tax evasion.**

(SACOB)

The matter is being investigated at present. This includes international research to determine how other jurisdictions has dealt with the matter. Once the research has been completed formal proposals will be developed and the necessary enabling legislation prepared to facilitate implementation.

- **Establishment of a complaints office is supported**

(SAICA)

Noted.

- **Retirement industry review is welcomed**

(SAICA)

Noted.

- **Active steps are required to reduce the tax gap and a formal process needs to be introduced for taxpayers who want to regularise their tax affairs.**

(SAICA)

Noted.

The relevant issues are currently being researched and discussions will be held with representative organisations and interested parties.

**Prepared by the South African Revenue Service**