ANNEXURE E

DRAFT MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2013

1. PURPOSE OF BILL

The Bill amends administrative provisions of the Income Tax Act, 1962 (Act No. 58 of 1962), the Customs and Excise Act, 1964 (Act No. 91 of 1964), the Skills Development Levies Act, 1999 (Act No. 9 of 1999), the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002), the Mineral and Petroleum Resources Royalty (Administration) Act, 2008 (Act No. 29 of 2008) and the Tax Administration Act, 2011 (Act No. 28 of 2011).

2. OBJECTS OF BILL

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

The proposed amendment is consequential to the deletion in the Taxation Laws Amendment Act, 2012, of paragraph 12(5) of the Eight Schedule to the Income Tax Act, 1962.

2.2. Income Tax Act, 1962: Amendment of section 6quin

The term “return” is defined in the Tax Administration Act, 2011, to include a declaration. The proposed amendment ensures consistency between the Income Tax Act and the Tax Administration Act, 2011, so as to only use the defined term of “return” where mention is made of any document to be submitted to SARS that forms a basis of an assessment.

2.3. Income Tax Act, 1962: Amendment of section 64K

The proposed amendment clarifies the date of submission of returns for purposes of dividends tax and further provides for returns to be submitted by persons that receive exempt dividends as specified.

2.4. Income Tax Act, 1962: Amendment of section 64N

The proposed amendment is of a textual nature.

2.5. Income Tax Act, 1962: Amendment of paragraph 11B of Fourth Schedule

Paragraph 11B(6) requires a written declaration by the employee to show that he or she will be over 65 years of age on the last day of the year of assessment, before the rebate in terms of section 6(2)*(b)* will be allowed. In practice, employers use the employee’s identity document or other form of identification to determine this fact. The proposed amendment aligns legislation with this practice.

2.6. Income Tax Act, 1962: Amendment of paragraph 11C of Fourth Schedule

Paragraph 11C(5) states that a tax certificate can be withheld by the employer until such time as PAYE paid by the employer on behalf of a director, has been repaid to the employer by the director. The EMP501 reconciliation process requires the director’s tax certificate to be reconciled and submitted to SARS along with all the other employees’ tax certificates. The

tax certificate is then pre-populated in the director's annual return, allowing assessment to take place (which could include a refund). Hence, as a result of the pre-population of IRP5 certificates in individuals' returns, the withholding of the issue of the tax certificates to the directors is no longer required and this provision is now obsolete and can be deleted.

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

Paragraph 13(7) provides for a tax certificate to be delivered to an employee either directly or by registered post. Reference to "registered post" seems to exclude other delivery methods (specifically delivery at an electronic address) and can be deleted.

2.8. Income Tax Act, 1962: Paragraph 11 of Sixth Schedule

Paragraphs (a) and (b): In 2012, the legislative framework governing the taxation of micro businesses was changed to make provision for the payment of PAYE and VAT on a 6 monthly basis, as opposed to the normal monthly or bi-monthly regime. These measures form part of reducing the compliance burden and costs of micro businesses by simplifying and improving requirements, processes and systems used to service the small business segment. This legislative framework is now extended to include skills development levies and unemployment insurance contributions. Consistency is also ensured with regard to the due date for payment of employees' tax, as per paragraph 11(4A) of the Sixth Schedule, with regard to the seven day period after the end of the relevant tax period.

2.9. Customs and Excise Act, 1964: Amendment of section 4

Section 4 is being amended pursuant to a judgment of the Western Cape High Court *(Patrick Lorenz Martin Gaertner vs The South African Revenue Service (12632/12))* in terms of which subsections 4(4)*(a)*(i) and (ii); 4(4)*(b)*; 4(5) and 4(6) of the Customs and Excise Act, 1964, were declared unconstitutional. These provisions of the Act afford very wide powers to officers to search any premises whatsoever at any time, without the requirement of a warrant. The Court suspended the effect of the order to afford Parliament an opportunity to amend section 4 to correct the constitutional defect.

The proposed amendment aims to achieve this in the following way:

- The broad principle embodied in the proposed provision is that an officer may only enter premises on authority of a warrant.
- There are however exceptions to this general rule and certain premises may be entered without a warrant: premises licensed or registered in terms of the Act; business premises of licensed or registered persons; premises managed or operated by the State or an organ of state as part of a port, airport, railway station or land border post; and premises entered with the consent of the owner or person in physical control of the premises.
- Warrantless entry to premises for which a warrant is ordinarily required is furthermore allowed in circumstances where an officer believes that a warrant would have been issued if applied for, but that the delay in obtaining a warrant is likely to defeat the purpose for which entry is sought.
- Requirements are provided for the conduct of officers when they enter and search premises in these circumstances.

2.10. Customs and Excise Act, 1964: Insertion of section 4D

It is proposed that clause 4D be inserted in the Act to clarify officers' powers relating to criminal investigations. The proposed provision affords officers the power to investigate for purposes of criminal prosecution whether an offence in terms of the Act has been committed, to lay criminal charges for the prosecution of such offence and to provide assistance to the prosecuting authority as may be required for the prosecution of such offence.

2.11. Customs and Excise Act, 1964: Amendment of section 21A

Section 21A currently provides for Customs Controlled Areas (CCA) situated in an industrial development zone (IDZ) in giving effect to provisions of the Manufacturing Development Act, 1993 (Act No. 187 of 1993) and the regulations made in terms of that Act. IDZ operators and enterprises in the CCA may import goods under rebate of duty and on which VAT is exempt.

The Special Economic Zones Act, 2013, provides in section 39 that the existing industrial development zones will continue, but the operator must comply with the framework regulating Special Economic Zones in terms of that Act within three years of its commencement.

In order to provide for customs controlled areas as contemplated in section 34(1)*(b)* of the Special Economic Zones Act, 2013, it is proposed that a new subsection is inserted in section 21A to enable the Commissioner to designate a customs controlled area in a Special Economic Zone after consultation with any person or authority administering any activity in a special economic zone. The Commissioner is further empowered to make rules for administering the customs controlled area. It is further proposed that the provisions of section 21A, with the necessary changes, are also made applicable to customs controlled areas designated for the purposes of that Act, which will enable that the duty and VAT concessions of the CCA may be extended to the customs controlled area of the Special Economic Zone.

It is proposed that the subsection will come into operation on the date the Special Economic Zones Act, 2013, comes into operation.

2.12. Customs and Excise Act, 1964: Amendment of section 64E

Section 64E provides for the conferral of accredited client status and requires that applicants meet certain criteria. The proposed amendment extends the current criteria applicable to customs laws and procedures to cover excise laws and procedures. It also allows the Commissioner to determine separate criteria for customs or excise clients as may be prescribed by rule. The proposed amendment promotes the SARS strategic intent of modernising excise to a risk management and segmentation approach. This will enable SARS to concentrate their resources on higher risk areas while still having control over low risk clients.

2.13. Customs and Excise Act, 1964: Amendment of section 72

Section 72 provides for the value of goods exported, but does not state how that value is to be converted if in a foreign currency. The proposed amendment provides that if the value is

expressed in a foreign currency it must be converted into South African Rand in accordance with section 73.

2.14. Customs and Excise Act, 1964: Amendment of section 73

Currently, section 73 regulates currency conversion for imported goods. The proposed amendment extends currency conversion to the value of goods exported if that value is expressed in a foreign currency. Because an entry can be prepared and submitted prior to the date the applicable conversion rates are published, it is proposed that the conversion rates published by the Commissioner for each Wednesday be applicable from the following Wednesday for an entire week. The Commissioner must publish on the SARS website, in respect of each Wednesday, the selling rates to be used for conversion of the foreign currency of imported goods and buying rates to be used for conversion of the foreign currency of exported goods of each of the major currencies for conversion into Rand, as provided to the Commissioner by the South African Reserve Bank for that Wednesday. This rate will be applicable for the week commencing the following Wednesday. In effect the rates are available a week in advance and fixed for that period. The applicable date for a currency conversion in respect of goods imported (which is currently the date of shipment of the goods) into or exported from the Republic is the date of entry of the goods for any purpose in terms of the Act.

The proposed amendment of the section also includes provisions regarding the rate to be used for a foreign currency not published (subclause (7)) and the circumstances in which a fixed conversion rate may be applied (subclause (8)). Subclause (9) provides that a fixed exchange rate negotiated between buyers and sellers related within the meaning of section 66(2) may not be accepted unless it is proved that the relationship did not affect the rate. Subclause (10) contains transitional provisions.

This section will come into operation on a date to be determined by the Minister of Finance by notice in the *Gazette*.

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

See the discussion in paragraph 2.8 above.

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

Paragraphs (a) and (b): See the discussion in paragraph 2.8 above.

2.17. Unemployment Insurance Contributions Act, 2002: Amendment of section 13

See the discussion in paragraph 2.8 above.

2.18. Mineral and Petroleum Resource Royalty (Administration) Act, 2008: Amendment of section 6

As the payment of royalties in terms of the Act is a deductible expense for normal income tax purposes, the finalisation of the income tax return (ITR14) is dependent upon the annual royalty return (MPR3). The proposed amendment brings into line the dates of submission of the two returns i.e. 12 months after financial year end.

2.19. Tax Administration Act, 2011: Amendment of Arrangement of Sections

The proposed amendment is consequential to the proposed amendment to section 11.

2.20. Tax Administration Act, 2011: Amendment of Arrangement of Sections

The proposed amendment is consequential to the proposed amendment to section 224.

2.21. Tax Administration Act, 2011: Amendment of section 1

Paragraph (a) and (c): The insertion of the definition of "outstanding tax debt" and proposed amendment to the definition of "tax debt" aims to clarify what is regarded as a "tax debt" and what is an "outstanding tax debt" recoverable under the Act.

Paragraph *(b)*: The proposed amendment clarifies that a return only needs to constitute *a basis* on which an assessment by SARS is based and not *the basis*. Particularly in the context of third party returns, which are generally used to verify the correctness of taxpayers' returns, an ensuing assessment will only be partially based on such return.

2.22. Tax Administration Act, 2011: Amendment of section 3

The proposed amendment is a technical correction.

2.23. Tax Administration Act, 2011: Amendment of section 10

The proposed amendment is to clarify that a delegation to a specific individual only becomes effective when signed by the individual and that this requirement does not apply if the delegation is made to the incumbent of a specific post given the impracticalities thereof.

2.24. Tax Administration Act, 2011: Amendment of section 11

Paragraph (a): The proposed amendment is consequential to the further proposed amendments to section 11.

Paragraph (b): The proposed amendment aims to clarify that this provision overrides the requirement under the State Attorneys Act, 1957, that such legal costs "must" be paid into the National Revenue Fund if recovered by the State Attorney in matters involving SARS. Legal costs are incurred by SARS from its own account and moneys recovered under an order for legal costs in favour of SARS, constitute funds of SARS and must be paid to SARS.

Paragraph (c): The proposed amendments aim to regulate High Court applications involving the Commissioner for SARS. In the light of the establishment of SARS under the South African Revenue Service Act, 1997, as an institution outside the public service, SARS is not a national department and not included as "an organ of state" for purposes of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002. Given SARS's mandate and organisational size, it clearly requires similar protection afforded to national departments under that Act.
In practice, applications have been served on SARS branch offices or State Attorney Offices instead of at the SARS Head Office where the Commissioner is located, resulting in

difficulties to timeously bring the applications to the attention of the appropriate SARS officials. As a result, judgments have been given against SARS in the High Court due to its failure to oppose or appear. Given the potential revenue losses resulting from adverse judgments, it is critical that the Commissioner receives the applications and assigns them to the appropriate person to deal with within the prescribed time periods and to manage the litigation strategy to ensure that both the fiscal (in taxation matters) and SARS's policy (in administrative matters) are given effect to.

For purposes of High Court applications, the proposed amendment will require prior notice of at least 72 hours to the Commissioner of an intended application. The proposed amendment does provide that the High Court may direct that this requirement need not be complied with in urgent matters. Furthermore, the proposed amendment requires the service of the notice and the application at the address specified by the Commissioner by public notice for this purpose.

2.25. Tax Administration Act, 2011: Amendment of section 25

The proposed amendment aims to afford the Commissioner the power to require returns other than those specifically referred to in a tax Act. In practice, it often happens that returns other than those currently specifically required under the tax Acts are required for purposes of the administration of a tax Act. For example, SARS may need to obtain returns on specific information required for purposes of giving effect to the obligation of the Republic to provide assistance under an international tax agreement as referred to in section 3(2)*(i)*.

2.26. Tax Administration Act, 2011: Amendment of section 27

The proposed amendment ensures that the power exercised in terms of this section, given the impactful nature thereof, requires the approval of a senior SARS official specifically authorised by the Commissioner for this purpose.

2.27. Tax Administration Act, 2011: Amendment of section 34

The proposed amendment caters for the fact that companies may no longer use South Africa's Generally Accepted Accounting Practice (GAAP) for financial periods commencing on or after 1 December 2012.

2.28. Tax Administration Act, 2011: Amendment of section 46

The proposed amendment to section 46 enables SARS to direct that certain information required for purposes of a criminal investigation be provided in accordance with the requirements of certain provisions of the Criminal Procedure Act, 1977. This will ensure that documents obtained from certain third parties, for example bank statements from a bank, are obtained in a manner that renders them admissible as *prima facie* evidence of the facts contained therein thereby obviating the unnecessary calling of the third parties as witnesses.

2.29. Tax Administration Act, 2011: Amendment of section 54

The proposed amendment is stylistic.

2.30. Tax Administration Act, 2011: Amendment of section 68

Paragraphs (a) to (c): The proposed amendment is a technical correction. Given the clear prejudice to the effectiveness of SARS's audits or investigations should its examining or auditing procedures or methods be disclosed, such information should be included under "SARS confidential information". This mirrors the protection of such information *inter alia* afforded under section 44(2)*(a)* of the Promotion of Access to Information Act, 2000.

2.31. Tax Administration Act, 2011: Amendment of section 73

Paragraph (a): The proposed amendment is consequential to the further proposed amendments to section 73 discussed below.

Paragraph (b): The proposed amendment aims to avoid the problem that if taxpayer information obtained by SARS "relates to a third party", the information can in effect only be provided under the Promotion of Access of Information Act, 2000, ("PAIA") with the consent of such third party under section 42 of that Act. Particularly in the context of auditing transactions involving several taxpayers and third parties, this is a problem when SARS uses the information to assess one or more of the taxpayers involved.

The rationale for requiring the taxpayer to apply under PAIA for information obtained by SARS from other sources, is to afford SARS the protection under that Act in respect of premature requests that may prejudice the outcome of an audit or investigation, as well as to protect information obtained from informants, information regarding SARS's audit and investigative methods and information that could frustrate the deliberative process in SARS, for example. This typically occurs in the pre-assessment stage. However, once third party information is used to determine the tax liability of a taxpayer, SARS should be able to disclosure such information to the taxpayer in the performance of its duties without having to obtain the prior consent of third parties to whom the information also relates.

Paragraphs (c), (d) and (e): The proposed amendments are consequential to the proposed amendments to section 73 discussed above.

2.32. Tax Administration Act, 2011: Amendment of section 79

The proposed amendment is contextual to make use of the proposed defined term "outstanding tax debt".

2.33. Tax Administration Act, 2011: Amendment of section 93

The proposed amendment is a technical correction.

2.34. Tax Administration Act, 2011: Amendment of section 99

Paragraphs (a) to (c): The proposed amendments are consequential to the further proposed amendments to section 99 discussed below.

Paragraph (d): The proposed amendment to section 99 aims to enable SARS to issue a reduced assessment to address an error made by the taxpayer which is brought to SARS's attention timeously and is not disputed by SARS. Under the current wording of the Act,

SARS cannot issue the assessment after the expiry of the prescription period even where it does not dispute the error. Similar matters that arose before the commencement date of the Act are addressed in the proposed new section 270(9).

Paragraph (e): In complex matters such as transfer pricing and GAAR audits, for example, taxpayers may employ dilatory tactics in providing information to or cooperation with SARS to force a matter closer to the three year prescription period. This places SARS under pressure to issue assessments before proper finalisation of the audit and the audit findings reasoning and notification process. This may result in incorrect assessments, whether procedurally or otherwise.

The proposed amendment to section 99 in effect provides for an extension of the prescription periods equal to the periods that taxpayers do not provide the information requested by SARS without just cause. Extension of prescription periods in complex matters or matters resulting from reporting failures is a common practice in comparative tax jurisdictions.

2.35. Tax Administration Act, 2011: Amendment of section 103

The proposed amendment enables the Commissioner to prescribe the form and manner of delivery of documents required to be completed or delivered under the dispute resolution rules.

2.36. Tax Administration Act, 2011: Amendment of section 110

The proposed amendment is a technical correction. The decisions a tax board may make in deciding a tax appeal are similar to those of the tax court under section 129.

2.37. Tax Administration Act, 2011: Amendment of section 117

Paragraph (a): The proposed amendment affords the tax court jurisdiction to hear and decide procedural matters instituted under the dispute resolution rules. It also aims to clarify the difference between interlocutory applications and applications in a procedural matter relating to a dispute under Chapter 9 of the Act.

Paragraph (b): Under the common law, the tax court was able to deal with decisions of SARS that are not subject to objection and appeal on a review basis – refer *inter alia KBI v Transvaalse Suikerkorporasie Bpk*, 47 SATC 34. However, under the Promotion of Administrative Justice Act, 2000 (“PAJA"), only a High Court or Magistrate’s Court has jurisdiction to deal with PAJA applications. There is a constant demand for a more cost effective and accessible remedy to taxpayers in respect of administrative decisions by SARS. The proposed amendment will enable the tax court to deal holistically with tax matters and will afford the same court that deals with tax appeals the jurisdiction to also deal with judicial reviews related to tax appeals.

2.38. Tax Administration Act, 2011: Amendment of section 118

Paragraph (a): The proposed amendment is stylistic.

Paragraph (b): In practice, problems are experienced in appointing mining engineers as members of the tax court. The amendment proposes that a registered engineer with

experience in the field of mining may be appointed instead, as they are more readily available.

Paragraph (c): The proposed amendment enables the president of the tax court sitting alone to deal with interlocutory and procedural matters instituted under the dispute resolution rules.

2.39. Tax Administration Act, 2011: Amendment of section 129

Paragraph (a): The proposed amendment affords the tax court the jurisdiction to decide procedural matters instituted under the dispute resolution rules.

Paragraph (b): The proposed amendment clarifies that the tax court, in dealing with an appeal against the imposition of an understatement penalty, is not limited to the behavioural category in the Understatement Penalty Table initially chosen by SARS. The tax court may decide, based on the evidence, that another behavioural category in the Table is more appropriate and reduce or increase the penalty accordingly.

Paragraph (c): The proposed amendment clarifies what is the effect of the decision of the tax court in a test case designated under section 104(6).

2.40. Tax Administration Act, 2011: Amendment of section 130

Paragraph (a): The proposed amendment is consequential to the further proposed amendments to section 130 discussed below.

Paragraph (b): The proposed amendment enables the tax court to award costs as provided for in the dispute resolution rules in a test case, interlocutory application or application in a procedural matter instituted under the rules.

2.41. Tax Administration Act, 2011: Amendment of section 133

The proposed amendment is a technical correction.

2.42. Tax Administration Act, 2011: Amendment of section 160

Paragraphs (a) and (b): The proposed amendments aim to protect a third party compelled under section 179 to pay amounts owed to or held on behalf of a tax debtor to SARS, from recovery actions by the tax debtor on this basis. It aims to ensure parity between third parties obliged to pay amounts to SARS solely under compulsion of law where the payment does not originate from wrongful conduct or from being a party to or beneficiary of dissipating actions by the tax debtor.

2.43. Tax Administration Act, 2011: Amendment of section 161

The proposed amendment clarifies that the "tax debt" in this context is an "outstanding tax debt" in respect of which SARS may initiate recovery proceedings under the Act.

2.44. Tax Administration Act, 2011: Amendment of section 163

Paragraph (a): The proposed amendment clarifies what the purpose of a preservation order is, namely to deal with both the situation where a taxpayer subject to an audit takes steps to transfer assets to avoid payment of the tax properly chargeable and where the taxpayer takes such steps once there is a quantified tax liability. The proposed amendment also clarifies that the "other person" from whom assets may be seized or subjected to a preservation order, only includes a person that may be liable for payment of amounts in satisfaction of the tax under the Act, for example under sections 179 to 183.

Paragraph (b): The proposed amendment is consequential to the other proposed amendments to section 163.

Paragraph (c): The proposed amendment clarifies that "tax" in the context here means the tax that is or may be due or payable referred to in subsection (1).

Paragraph (d): The proposed amendment clarifies that the "tax debt" in this context is an "outstanding tax debt" in respect of which SARS may initiate recovery proceedings under the Act.

2.45. Tax Administration Act, 2011: Amendment of section 164

Paragraph (a): The proposed amendment clarifies that SARS may suspend the whole or a portion of the disputed tax as opposed to a whole or nothing approach.

Paragraph (b): The proposed amendment is a technical correction to clarify that this subsection caters for both scenarios for suspension envisaged under subsection (2) i.e. where the taxpayer intends to object but is waiting, for example, for reasons requested under the rules or needs more time to formulate the grounds of objection, and where the taxpayer has already lodged an objection.

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

2.46. Tax Administration Act, 2011: Amendment of section 165

Paragraphs (a) to (c): The proposed amendments aim to introduce more neutral terms to avoid confusion between tax liability and tax due or owed.

2.47. Tax Administration Act, 2011: Amendment of section 166

The proposed amendment is contextual to make use of the defined term "tax debt".

2.48. Tax Administration Act, 2011: Amendment of section 169

Paragraph (a): The proposed amendment is contextual to make use of the defined term "tax debt".

Paragraph (b):
Amendment to subsection (3): The proposed amendment is a technical correction in view of the fact that an agreement under section 4(1)*(a)*(ii) of the SARS Act, 1997, is included as a "tax Act" for purposes of the definition of "tax debt".

Amendment to subsection (4): The proposed amendment clarifies that the amount in this context is a "tax debt".

2.49. Tax Administration Act, 2011: Amendment of section 172

The proposed amendment clarifies that recovery proceedings under this section may only be instituted in respect of an "outstanding tax debt".

2.50. Tax Administration Act, 2011: Amendment of section 175

The proposed amendment is contextual to make use of the defined term "tax debt".

2.51. Tax Administration Act, 2011: Amendment of section 176

Paragraph (a): The proposed amendment is contextual to make use of the defined term "tax debt" and to clarify that the new statement may include an amount of the tax debt that differs from the amount in the withdrawn statement.

Paragraph (b): The proposed amendment obliges SARS to withdraw a judgment if the relevant tax debt is satisfied, in order to assists taxpayer in restoring financial credibility. A taxpayer must submit a withdrawal request in the prescribed form and manner and a senior SARS official must be satisfied that the tax debt has been paid in full and that there are no other "outstanding tax debts".

2.52. Tax Administration Act, 2011: Amendment of section 177

Paragraph (a): The proposed amendment clarifies that recovery proceedings under this section may only be instituted in respect of an "outstanding tax debt" as defined.

Paragraph (b): The proposed amendment clarifies that a separate application by SARS is not required before it may institute recovery proceedings under this section in respect of a disputed tax debt for which no suspension under section 164 was requested or exists. The same court before which the proceedings are instituted decides whether leave should be given to SARS to pursue such proceedings.

2.53. Tax Administration Act, 2011: Amendment of section 179

The proposed amendment clarifies that recovery proceedings under this section may only be instituted in respect of an "outstanding tax debt" as defined.

2.54. Tax Administration Act, 2011: Amendment of section 180

The proposed amendment clarifies that an "outstanding tax debt" is contemplated here.

2.55. Tax Administration Act, 2011: Amendment of section 181

Paragraph (a): The proposed amendment clarifies that an “outstanding tax debt” is contemplated here.

Paragraph (b): The proposed amendment is contextual to make use of the defined term “tax debt”.

Paragraph (c): The proposed amendment is contextual to make use of the defined term “tax debt”.

2.56. Tax Administration Act, 2011: Amendment of section 182

The proposed amendment clarifies that an “outstanding tax debt” is contemplated here.

2.57. Tax Administration Act, 2011: Amendment of section 186

The proposed amendment clarifies that an “outstanding tax debt” is contemplated here.

2.58. Tax Administration Act, 2011: Amendment of section 190

The proposed amendment clarifies that an amount erroneously paid by SARS as a refund is regarded as an “outstanding tax debt” and recoverable by SARS as such.

2.59. Tax Administration Act, 2011: Amendment of section 191

The proposed amendment clarifies that a refund may only be set off against a tax debt if no suspension request of the debt under section 164 is pending or if no suspension exists.

2.60. Tax Administration Act, 2011: Amendment to section 192

Paragraph (a): The proposed amendment clarifies that a “tax debt” is contemplated here.

Paragraph (b): The proposed amendment clarifies that an “outstanding tax debt” is contemplated here.

2.61. Tax Administration Act, 2011: Amendment of section 221

The proposed amendment clarifies that the tax period is relevant to calculating the shortfall under section 222(3) and (4) and not *whether* there is prejudice to SARS or the *fiscus* as referred to in the definition of “understatement”.

2.62. Tax Administration Act, 2011: Amendment of section 222

Paragraph (a): The proposed amendment clarifies when an “understatement” will not result in a penalty by excluding *bona fide* inadvertent errors. This gives effect to the announcement in this regard in the 2013 Budget Review.

In determining if the 'understatement' results from a *bona fide* inadvertent error, a SARS official will generally have regard to the circumstances in which the error was made as well as other factors, for example:

- In the context of factual errors—
  - if the standard of care taken by the taxpayer in completing the return is commensurate with the taxpayer's knowledge, education, experience and skill and the care a reasonable person in the same circumstances would have exercised;
  - the size or quantum, nature and frequency of the error;
  - whether a similar error was made in a return submitted during the preceding years; or
  - in the case of a arithmetical error, whether the taxpayer had procedures in place to detect arithmetical errors.
- In the case of a legal interpretive error, whether—
  - the relevant provision of a tax Act is generally regarded as complex;
  - the taxpayer took steps to understand it including following available explanatory material or making reasonable enquiries; or
  - the taxpayer relied on information that, although incorrect or misleading, came from reputable sources and a reasonable person in the same circumstances would be likely to find the relevant information complex.

Paragraph (b): The proposed amendment clarifies that where more than one "understatement" was made in the same return, the applicable understatement percentage must be applied to each shortfall to determine the net shortfall.

Paragraph (c): See the discussion in paragraph 2.61 above.

Paragraph (d):
Amendment of subsection (4): The proposed amendment removes the unnecessary and arguably circular reference to "understatement" in the subsection.

Amendment of subsection (5): The proposed amendment is contextual to clarify which tax rate is contemplated here.

2.63. Tax Administration Act, 2011: Amendment of section 223

Paragraph (a): The proposed amendment reduces the applicable percentages of the penalty in the case of "substantial understatements", "reasonable care not taken" or "no reasonable grounds for tax position taken". The percentages are now more aligned with comparative tax jurisdictions where largely similar penalty regimes apply. The applicable percentages for gross negligence or intentional tax evasion remain the same.

Paragraph (b): The proposed amendment clarifies that for purposes of a remittance request for a "substantial understatement penalty", the opinion in issue must have been given by a tax practitioner than is independent from the taxpayer. Opinions by, for example, in-house tax practitioners will not qualify given their potential vested interests in such matters.

2.64. Tax Administration Act, 2011: Amendment of section 224

The right to object and appeal against an understatement penalty, given effect to in an assessment, flows from the fact that if a taxpayer is aggrieved by the assessment, the taxpayer may object under section 104. However, as a result of uncertainty in this regard, the proposed

amendment clarifies that a taxpayer may object and appeal against the imposition of any understatement penalty and not only against the decision not to remit a "substantial understatement penalty".

2.65. Tax Administration Act, 2011: Amendment of section 230

The proposed amendment clarifies that a "tax debt" is contemplated here.

2.66. Tax Administration Act, 2011: Amendment of section 231

The proposed amendment clarifies that a "tax debt" is contemplated here.

2.67. Tax Administration Act, 2011: Amendment of section 235

The proposed amendment clarifies that this is not an enabling but a limitation provision. Any SARS official may in the performance of their duties lay criminal charges in respect of tax offences, but in the case of tax evasion under this section only a senior SARS official may do so given the serious nature of the charge and the potential sentence upon conviction.

2.68. Tax Administration Act, 2011: Amendment of section 240

Paragraphs (a) and (b): The proposed amendments regarding the use of the word "solely" in subsection (2), aims to allow combinations between the different scenarios referred to in section 240(2)*(a)* to *(d)*, for example a person who completes returns for no consideration under paragraph *(a)* may also complete such returns under paragraph *(d)*, without having to register as a tax practitioner.

Under the current wording persons who are under the *direct supervision* of a person who is a registered tax practitioner need not register as tax practitioners. However, the result of this according to the industry is that "intermediate managers" between trainees or articled clerks, for example, and a partner or director must also register as tax practitioners. In view of the arguable adverse practical implications thereof, an amendment to replace direct supervision with the concept of acceptance of accountability is proposed. This will require the partner or director who is a registered tax practitioner, to accept accountability for the actions of both the intermediate manager and the trainees or articled clerks, for example, for purposes of complaints by taxpayers or SARS to the relevant recognised controlling body.

2.69. Tax Administration Act, 2011: Amendment of section 240A

The proposed amendment caters for Recognised Controlling Bodies that have both tax practitioner members and other members. The requirements under section 240A(2)*(a)* will only apply to the tax practitioner members.

2.70. Tax Administration Act, 2011: Amendment of section 246

Paragraph (a): The public officer of a company must reside in South Africa is responsible for all acts, matters, or things that the public officer's company must do under a tax Act. Enforcement of these duties and obligations would be impossible if the public officer does not reside in the Republic. Section 246(2) affords SARS discretion to approve a suitable public officer based on such officer's position in the relevant company. The purpose is to

ensure that a suitably senior person is accountable for the tax obligations of the company, which obligations in SARS's view should preferably dealt with at the executive or board level of a company by an official who has a say at this level.

However, the current wording does not cater for non-resident companies who are obliged to register for tax in South Africa for VAT or income tax as a result of income sourced in the country. Often these companies do not have a physical presence or employees in South Africa. To address these problems an amendment is proposed under which SARS may approve a person as public officer who is *not* a senior official or even an employee of the company *if* the person is regarded as suitable for this purpose by a senior SARS official. The suitability of the person will determined by the seniority, status and influence of the person in the company at executive or board level. Examples are independent attorneys or accountants used or appointed by non-resident companies who have such seniority, status and influence.

Paragraph (b): The proposed amendment aims to align the terminology used in subsection (3) with that of the Companies Act, 2008.

2.71. Tax Administration Act, 2011: Amendment of section 256

The proposed amendment is contextual to make use of the term "outstanding tax debt" as defined.

2.72. Tax Administration Act, 2011: Amendment of section 270

Paragraph (a): The proposed amendment clarifies that if a taxpayer defaults in rendering a return or fails to pay the correct amount of tax if no return is required, omits something from a return or makes an incorrect statement in the return before commencement of the Act and cannot be subjected to an understatement penalty under this Act, the taxpayer will be subject to additional tax under the relevant tax Act.

Paragraph (b): The proposed amendment enables taxpayers seeking remittance of a "substantial understatement penalty" in respect of an understatement made before commencement, to use an opinion obtained after the relevant return was submitted.

Paragraphs (c) and (d): The proposed amendment is a technical correction as the Act, in the context of interest, uses the term "interest payable".

Paragraph (e): The proposed amendment enables SARS to issue a reduced assessment to address an error made by the taxpayer, not disputed by SARS, which was requested by the taxpayer within the three year prescription period under repealed law. This subsection deems a new request date for a reduced assessments of 1 October 2012, whether the three year period had expired before the repeal or not, in respect of all the requests that SARS had not dealt with under the repealed law before the expiry of the three year period.

2.73. Short title and commencement

Clause 72 provides for the name and commencement of the proposed Act.

3. CONSULTATION

The amendments proposed by this Bill will be published on the websites of National Treasury and SARS for public comment. Comments by interested parties will be considered. Accordingly, the general public and institutions at large will be consulted in preparing the Bill.