EXPLANATORY MEMORANDUM ON THE

TAXATION LAWS AMENDMENT BILL, 1997

The Taxation Laws Amendment Bill, 1997, introduces amendments to the Marketable Securities Tax Act, 1948, the Transfer Duty Act, 1949, the Estate Duty Act, 1955, the Customs and Excise Act, 1964, the Stamp Duties Act, 1968, the Customs and Excise Amendment Act, 1990, the Value-Added Tax Act, 1991, the Income Tax Act, 1993, the Taxation Laws Amendment Act, 1994, and the Tax on Retirement Funds Act, 1996.

CLAUSE 1

Marketable securities tax: Amendment of section 2 of the Marketable Securities Tax Act, 1948

The amendment gives effect to the proposal of the Minister of Finance in his Budget Speech to reduce the rate of marketable securities tax on the acquisition of marketable securities from 0,5 per cent to 0.25 per cent with effect from 1 April 1997. This is part of Government's commitment to improve South Africa's competitiveness in the international investment environment.

CLAUSE 2

Marketable securities tax: Amendment of section 3 of the Marketable Securities Tax Act, 1948

The Minister of Finance announced in his Budget Speech that Government is concerned with the extent to which the exemption from stamp duty in terms of Item 15(3)(nA) of Schedule 1 to the Stamp Duties Act, 1968, in respect of arbitrage transactions in respect of the registration of transfer of marketable securities is being abused. It was therefore proposed that the relevant exemption be deleted from the Stamp Duties Act. In consequence thereof it was also announced that the exemption contained in the Marketable Securities Tax Act in relation to the purchase of shares by non-residents be deleted. This amendment gives effect to the lastmentioned proposal. The effect thereof would be, that non-residents will with effect from 1 July 1997 pay marketable securities tax on their share transactions through the assistance of a broker.

CLAUSE 3

Transfer Duty: Amendment of section 18 of the Transfer Duty Act, 1949

The amendments to this section are of a textual nature.

CLAUSE 4

Transfer Duty: Amendment of section 19 of the Transfer Duty Act, 1949

The amendments to this section are of a textual nature.

CLAUSE 5

Estate Duty: Amendment of section 1 of the Estate Duty Act, 1955

The amendment to this section is of a textual nature.

CLAUSE 6

Estate Duty: Amendment of section 3 of the Estate Duty Act, 1955

Section 3(a)bis of the Estate Duty Act, 1955, deems so much of any benefit which is due and payable by any fund as a result of the death of the deceased, as exceeds the contributions or consideration paid by the beneficiary, to be property of the estate of the deceased person. The proviso to that paragraph provides that the annuities payable by a pension fund or a retirement annuity fund (excluding the commutation of any annuity payable by such fund) will not be so included. The exclusion to this paragraph does not provide for the situation where the fund purchases the annuity from a registered insurer in the name of a member who is retiring from employment. Such an amount would therefore be included in the property of the deceased. It is therefore proposed that the reference to 'payable' be substituted by 'provided' to extend the scope of the exclusion contained in that paragraph.

CLAUSE 7

Estate Duty: Amendment of section 4 of the Estate Duty Act, 1955

This amendment deletes an obsolete provision.

CLAUSE 8

Estate Duty: Amendment of section 24 of the Estate Duty Act, 1955

This amendment is of a textual nature and is consequential upon the promulgation of the Constitution of the Republic of South Africa, 1996.

CLAUSE 9

Estate Duty: Amendment of section 26 of the Estate Duty Act, 1955

This section deals with the conclusion of agreements for the prevention of double taxation and certain procedures in relation thereto. The amendment proposed in terms of this clause is to bring the provisions of section 26 in line with the Constitution.

CLAUSE 10

Estate Duty: Amendment of section 27 of the Estate Duty Act, 1955

The amendments to this section are of a textual nature.

CLAUSE 11

Customs and Excise: Repeal of section 47B of the Customs and Excise Act, 1964

Section 47B of the Customs and Excise Act, 1964, makes provision for-

(a) monthly payments by the Commissioner to Regional Services Councils and Joint Services Boards of a certain amount of the fuel levy collected, and

(b) the disposal by the Commissioner of other amounts of fuel levy collected as may be determined jointly by the Minister of Finance and any other Minister who may lay claim to such payments in terms of any other laws.

The Department of Finance has now requested SARS to delete paragraph (a) of this section as the said payments will now be administered by the Department of Transport through their normal budgetary process.

The Departments of Finance and Transport have consulted in this regard with the Department of State Expenditure, the South African Local Government Association and the major Metropolitan Councils.

As the budgetary year of local governments ends on 30 June, the section is repealed from 1 July 1997. The last payments in terms of the existing provision will be made by the Commissioner in June 1997.

Paragraph (b) of this section was originally enacted in 1987 to accommodate payments by the Commissioner to certain statutory funds such as the Road Fund and the Central Energy Fund. As these payments have for some years not been made by the Commissioner it is proposed that this paragraph should also be deleted.

CLAUSES 12 AND 13

Customs and Excise: Amendment of sections 49 and 51 of the Customs and Excise Act, 1964

Section 231 of the Constitution of the Republic of South Africa, 1996, provides for the negotiation and signing of international agreements by the National Executive. Sections 49 and 51 of the Customs and Excise Act, 1964, are amended to give effect thereto.

Section 51(2) of the same Act is also amended to substitute "National Revenue Fund" for "State Revenue Fund".

CLAUSE 14

Customs and Excise: Amendment of section 58 of the Customs and Excise Act, 1964

The amendment to this section is of a textual nature.

CLAUSE 15

Customs and Excise: Amendment of Schedule No. 1 to the Customs and Excise Act, 1964

Provision is made in this clause for the amendment of Schedule No. 1 and the date of commencement thereof. Such amendments are reflected in the Schedule to this Bill and arise from the taxation proposals which were tabled by the Minister of Finance during his Budget Speech.

CLAUSE 16

Stamp Duty: Amendment of section 1 of the Stamp Duties Act, 1968

The amendments to this section are of a textual nature.

CLAUSE 17

Stamp Duty: Amendment of section 4 of the Stamp Duties Act, 1968

This amendment deletes an obsolete provision.

CLAUSE 18

Stamp Duty: Amendment of section 5 of the Stamp Duties Act, 1968

The general rule in terms of the Stamp Duties Act is that the payment of stamp duty is denoted by way of adhesive stamps affixed to the relevant instrument. Section 5 of the Stamp Duties Act, 1968, however, provides that the Commissioner may approve the payment of the duty on declaration in respect of *inter alia* the original issue of marketable securities or any instrument of transfer in respect of the registration of transfer of any marketable security. It is proposed that these provisions be extended to all instruments in respect of which stamp duty is payable.

CLAUSE 19

Stamp Duty: Amendment of section 23 of the Stamp Duties Act, 1968

The amendments introduced in terms of this clause are consequential upon the deletion of the arbitrage exemption in terms of clause 21(c).

CLAUSE 20

Stamp Duty: Amendment of section 30 of the Stamp Duties Act, 1968

The amendments to this section are of a textual nature.

CLAUSE 21

Stamp Duty: Amendment of Item 15 of Schedule 1 to the Stamp Duties Act, 1968

Stamp duty at the rate of 0,5 per cent (i.e. 5 cents for every R10 of the consideration, or part thereof) is payable under Item 15(3) of Schedule 1 in respect of the registration of transfer of any marketable security.

The Minister of Finance proposed in his Budget Speech that the duty be decreased to 0,25 per cent (i.e. 2,5 cents for every R10 of the consideration, or part thereof) with effect from 1 April 1997. The stamp duty payable under Item 15(4) (cancellations and redemptions) and Item 15(5) (acquisitions where nominees are involved) of Schedule 1 is similarly decreased. The amendments introduced by *subclauses (a), (b), (d) and (e)* give effect to this proposal.

Subclause (c) : In his Budget Speech the Minister of Finance expressed his concern regarding the extent to which the exemption from stamp duty in terms of Item 15(3)(nA) of Schedule 1 to the Stamp Duties Act in respect of arbitrage transactions is being abused. Notice of this concern was already expressed on 18 October 1995 when SARS issued a Practice Note in this regard stating that a practice had developed in the market whereby instruments of transfer are endorsed as being exempt from stamp duty in cases where a resident of the Republic sells marketable securities through the Johannesburg Stock Exchange to a foreign broker who acts on behalf of a non-resident, notwithstanding the fact that such a registration of transfer does not take place in consequence of a *bona fide* arbitrage transaction. The Minister of Finance therefore proposed that the exemption in the light of the aforementioned, as well as the fact that the rate of duty has been reduced, be withdrawn with effect from 1 July 1997. This amendment gives effect to this proposal.

CLAUSE 22

Customs and Excise: Repeal of section 44 of the Customs and Excise Amendment Act, 1990

In terms of this clause section 44 of the Customs and Excise Amendment Act, 1990, is repealed. This section was enacted in 1990, with effect from 21 March 1990, to make provision for the free movement of goods, which were duly entered, between Namibia and the common customs area without entry as if Namibia were a partner to the Customs Union.

Namibia obtained independence on 21 March 1990 and became a partner of the Customs Union on 10 July 1990. The section became obsolete from the date on which

Namibia became a partner to the Customs Union and is repealed with retrospective effect to that date.

CLAUSE 23

Definitions: Amendments to section 1 of the Value-Added Tax Act, 1991

Subclause (1)(a): The amendment to the first part of paragraph (b) of the definition of "association not for gain" is consequential upon the amendment introduced by subclause (b). In terms of the first amendment to paragraph (b)(ii) of the definition, the rules of the society, association or organisation which govern the activities thereof must be in *writing* for the society, association or organisation to qualify as an association not for gain. The insertion of subparagraphs (aa), (bb) and (cc) in subparagraph (ii) is of a textual nature.

Subclause (1)(b): To qualify as an association not for gain for VAT purposes, an organisation or institution must meet the requirements set out in the definition of "association not for gain" in section 1. One of the requirements is that any society, association or organisation's memorandum, articles of association, rules or other document constituting or governing its activities must provide that it will, upon its winding-up or liquidation, be obliged to give or transfer its assets remaining after the satisfaction of its liabilities to some other society, association or organisation with objects similar to its objects.

This requirement creates an anomaly in the case of educational institutions as such institutions are normally under no such obligation in terms of their governing Acts. They can, therefore, not qualify as associations not for gain and enjoy the benefits available to associations not for gain in terms of the Act, for example with regard to unconditional gifts (refer to the definitions of "unconditional gift" and "consideration" in section 1), donated goods or services (refer to section 12(b)), separate registration of divisions (refer to section 23(5)) and the exemption in respect of the importation of donated goods (refer to paragraph 5 of PART A of Schedule 1).

The amendment to the definition of "association not for gain" whereby a new paragraph (c) is added, ensures that educational institutions of a public character qualify as associations not for gain and can thus also enjoy such benefits. In terms of the new paragraph (c), an educational institution of a public character -

• which is carried on otherwise than for the purposes of profit or gain to any proprietor, member or shareholder, and

•. which is in terms of its memorandum, articles of association, written rules or other document constituting or governing its activities -

- required to utilise any property or income solely in the furtherance of its aims and objects, and

- is prohibited from transferring any portion thereof in any manner so as to profit any person other than by way of payment in good faith of reasonable remuneration to an officer or employee of an association not for gain,

is regarded as an association not for gain. The effect hereof is that where any Act regulates the activities of a school, technikon or university in accordance with the requirements of the new paragraph (c), it will be an association not for gain for VAT purposes.

Subclause (1)(c): This amendment is of a textual nature.

Subclause (1)(d): The provision or transfer of ownership of an interest in a superannuation scheme is in terms of section 12(a), read with section 2(1)(j), exempt from VAT. A "superannuation scheme" is defined in section 2(2)(vii) as a scheme whereby provision is made for the payment or granting of benefits by a benefit fund, pension fund, provident fund or retirement annuity fund as defined in section 1 of the Income Tax Act, 1962. The management of superannuation schemes are subject to VAT at the standard rate with effect from 1 October 1996.

The effect hereof is that a superannuation scheme cannot be registered as a vendor in respect of services provided by it and contributions received by it. When any management services are rendered to it, the superannuation scheme will pay VAT on such supplies and will not be able to claim any input tax deduction in respect thereof. The VAT cost will thus be borne by the superannuation scheme.

In practice, many such schemes are managed by the employer of its members and often no or only a nominal fee is charged by the employer to the scheme. Where the employer is a vendor, it means that it claims all tax paid by it in the course of rendering such services as input tax deductions but does not charge the scheme the full amount of VAT which would have been a cost to the scheme, were the management services rendered by someone else. Such schemes which are managed by their members' employers are thus in a better position than schemes managed by third parties as a result of the saving of the VAT cost.

If the parties involved were connected persons, such services supplied for a charge which is less than the open market value of the supply would in terms of section 10(4) be deemed to be supplied at the open market value and the scheme would bear the VAT on the supply to it. Such a superannuation scheme and employer are, however, not connected persons in terms of the definition of "connected persons" in section 1.

A new paragraph (g) is, therefore, added to the definition of "connected persons" by this subclause in terms of which any person and any superannuation scheme the members of which are mainly the employees or office holders of that person, are connected persons. The effect of the amendment is that any management services rendered to a superannuation scheme by the employer or former employer of most of the scheme's members, will be deemed to be made at the open market value in terms of section 10(4). The employer will thus have to account for VAT calculated as the tax fraction (14/114) of the open market value of the services.

Furthermore, it sometimes happens that management or similar services are rendered by a third party for the benefit of a superannuation scheme but paid for by the employer or former employer of most of the scheme's members in terms of a contract between such third party and the employer. Although the employer then makes a supply of such services to the scheme, the employer often does not on-charge the cost of such services to the scheme. Where the scheme and the employer are, as a result of the amendment, connected persons, such services will also in terms of section 10(4) be deemed to be made at the open market value.

Subclause (1)(e): Where a person who is not a vendor or is a partially exempt vendor, makes use of, for example, so-called "call back" telecommunication services in the Republic, instead of using local telecommunication services, an imported service is in terms of section 7(1)(c) deemed to be supplied to him. He must then in terms of section 14 account for VAT on a declaration and pay the VAT to the Receiver of Revenue within 30 days of the issuing of an invoice for such services rendered, or any payment in respect of such services.

As such services are used on a large scale in the Republic and VAT is seldom paid in respect of the imported services by the users concerned, other measures have to be introduced to ensure the payment of VAT in respect of such services. This subclause, therefore, introduces a new subparagraph (b)(iv) to the definition of "enterprise" in section 1 in terms of which the activities of any person who continuously or regularly supplies telecommunication services to any person who utilises such services in the Republic, constitute an enterprise.

The effect of the amendment is that the provider of any such call back services, or any other telecommunication services to users in the Republic, must register as a vendor in the Republic. The scope of the definition of "enterprise" is thus broadened by specifically including activities which could otherwise be argued do not constitute an enterprise in the Republic as the equipment facilitating, for example, such call back services is not situated in the Republic. This principle is in line with the International Telecommunication Regulations, in terms of which telecommunication services are taxed in the country where the services are used.

To ensure that the supply of the services will be subject to VAT at the standard rate, an amendment to section 11(2)(k) is introduced by *clause 28(c)* which provides that such telecommunication services supplied to a person who utilises such services in the Republic will not be subject to VAT at the zero rate.

While VAT will in terms of the amendment be charged specifically on, for example, call back services, the net effect on the tax base will remain the same. This is so as vendors, who currently do not have to pay VAT on imported services will deduct any VAT paid to, for example, the call back operator as input tax. Users who are not vendors, will pay the same amount of VAT as they are currently liable for in respect of the imported services. The only difference will thus be better control over the collection of the tax already included in the tax base.

In terms of subclause (2), this amendment shall come into operation on a date to be fixed by the President in the *Gazette*. It should be borne in mind that once the supply of the services is subject to VAT in terms of section 7(1)(a) due to the fact that the provider thereof is a vendor in the Republic, the services are in terms of section 14(5) deemed not to be imported services any more.

This amendment should be read with the amendment discussed in the portion of this Memorandum dealing with *clause 28(c)*.

Subclause (1)(f): A deduction of notional input tax may in certain circumstances be made by a vendor in respect of the acquisition of second-hand goods. The amount of the deduction is in terms of paragraph (b) of the definition of "input tax" in section 1 an amount equal to the tax fraction (applicable at the time of payment) of the lesser of the consideration in money given by the vendor for the supply and the open market value thereof.

In terms of the amendment introduced by this subclause, the tax fraction which must be applied is the tax fraction which was applicable at the time the supply is deemed to have taken place. A vendor claiming a notional input tax deduction upon payment after an increase in the VAT rate (where the supply took place before the change in rate) will, consequently, be in the same position as a vendor on the payments basis claiming a deduction of input tax upon payment made by him after a change in rate, in respect of a supply which took place before the change in rate.

Subclause (1)(g): This amendment is of a textual nature.

Subclause (1)(h): This amendment is consequential upon the amendment introduced by *clause 44*, in terms whereof the Commissioner may under certain circumstances deem separate persons carrying on the same enterprise to be a single person with effect from the date determined in a direction made by him.

CLAUSE 24

Financial services: Amendment to section 2 of the Value-Added Tax Act, 1991

Section 2(4)(a) is an anti-avoidance provision which ensures that the payment of VAT cannot be avoided by ceding, assigning or transferring the right to receive payment in relation to any taxable supply. If the result of such a cession, assignment or other form of transfer would be that no output tax is paid in relation to that taxable supply, the cession, assignment or other transfer is deemed not to be a financial service.

Where a vendor deregisters for VAT purposes, a supply is in terms of section 8(2) deemed to be made by him of all his assets, including any right capable of assignment, cession or surrender. If such vendor accounts for VAT on an invoice basis, output tax in respect of his trade debtors would already have been attributable to a tax period. Therefore the supply deemed to be made in terms of section 8(2) is exempt from VAT in terms of section 12(a) read with section 2(1)(c).

If, however, such a vendor accounts for VAT payable on a payments basis, it is important that such a deemed supply of the vendor's trade debtors be made as no output tax would have been accounted for yet. To ensure that such a supply deemed in terms of section 8(2) to be made by the vendor could not be regarded as the supply of an exempt financial service, the amendment introduced by this clause provides that any other form of supply of a right to receive payment in relation to a taxable supply is not a financial service where no output tax would be payable as a result of such supply.

CLAUSE 25

Certain supplies of goods or services deemed to be made or not made: Amendments to section 8 of the Value-Added Tax Act, 1991

In terms of this amendment a new section 8(20) is introduced which provides that a local agent (of a foreign principal) who is in terms of the amendment to section 54(2A) deemed to import goods, is deemed to make a taxable supply of such goods to the recipient of the supply by the foreign principal.

This amendment should be read with the amendments discussed in the portion of this Memorandum dealing with *clauses 26, 27(b) and 46*.

CLAUSE 26

Time of supply: Amendment to section 9 of the Value-Added Tax Act, 1991

The amendment introduced by this clause provides that the supply deemed in terms of the new section 8(20) to be made by the local agent of a foreign principal, to the recipient of the supply by that principal, is deemed to take place at the time the tax payable on importation of the goods is paid. The effect hereof is that the agent has to account for output tax in respect of the supply deemed to be made by him only once he has paid the tax on importation and is entitled to claim such tax as input tax.

This amendment should be read with the amendments discussed in the portion of this Memorandum dealing with *clauses 25, 27(b) and 46*.

CLAUSE 27

Value of supply of goods or services: Amendments to section 10 of the Value-Added Tax Act, 1991

Subclause (a): Section 10(9) contains the valuation provision for the output tax adjustment provided for in section 18(2). The amendment to section 10(9) are, therefore, consequential upon the amendments to section 18(2) introduced by *clause 34(b)*.

These amendments should be read with the amendments discussed in the portion of this Memorandum dealing with *clause 34*.

Subclause (b): The amendment introduced by this subclause provides that the consideration for the supply deemed in terms of the new section 8(20) to be made by the agent of a foreign principal to the recipient of the supply by that principal, is deemed to be the total amount of the value placed on the importation of the goods in terms of section 13(2) and the amount of tax levied on the importation in terms of section 7(1)(b).

The effect hereof is that the amount of VAT levied in respect of the supply deemed to be made by the agent, is the same as the amount of VAT paid by the agent on behalf of the foreign principal on importation.

This amendment should be read with the amendments discussed in the portion of this Memorandum dealing with *clauses 25, 26 and 46*.

CLAUSE 28

Zero-rating: Amendments to section 11 of the Value-Added Tax Act, 1991

Subclauses (a) and (b): These amendments are of a textual nature.

Subclause (c): In terms of the amendment introduced by *clause 23(1)(e)*, the activities of any person who continuously or regularly supplies telecommunication services to any person who utilises such services in the Republic, constitute an enterprise. Any person whose annual total value of taxable supplies in the course of carrying on such enterprise exceeds R150 000 will in terms of the amendment be obliged to register as a vendor and charge VAT on the supplies made by him.

In terms of section 11(2)(k), services physically rendered elsewhere than in the Republic are subject to VAT at the zero rate. The amendment introduced by this subclause is intended to ensure that the telecommunication services rendered to persons who utilise such services in the Republic are not zero-rated merely because the equipment facilitating such services is situated outside the Republic.

This amendment should be read with the amendment discussed in the portion of this Memorandum dealing with *clause 23(1)(e)*.

Subclause (d): When VAT was introduced, the intention was to levy VAT on consumption in the Republic. To achieve this, those supplies where consumption does not take place in the Republic and the benefit of the services are not derived in the Republic, are normally zero-rated. In this regard, section 11(2)(l) provides that services supplied for and to a person who is not a resident of the Republic and who is outside the Republic at the time the services are rendered are zero-rated, except in certain circumstances specified in that section.

To eliminate any doubt as to the scope of this zero-rating provision, the amendment introduced by this subclause provides that the zero rate will apply only where the services are supplied *for the benefit of and contractually to* a person who is not a resident of the Republic and who is outside the Republic at the time the services are rendered. The zero rate will thus not apply where the services are supplied-

•. for the benefit of a resident of the Republic,

•. for the benefit of a non-resident who is in the Republic when the services are rendered,

•. contractually to a resident of the Republic, or

•. contractually to a non-resident who is inside the Republic when the services are rendered.

CLAUSE 29

Exempt supplies: Amendment to section 12 of the Value-Added Tax Act, 1991

In terms of section 12(g), the transportation of fare-paying passengers by road or railway is exempt from VAT. The Value-Added Tax Committee ("VATCOM") which was appointed by the Minister of Finance in 1991 to make recommendations relating to the introduction of VAT, recommended that passenger transport in buses, trains and taxis be exempted from VAT as such transport is used primarily by low income consumers and is extremely price sensitive. VATCOM recommended that while such an exemption would also include so-called luxury transport in these forms of transport, it would be preferable to identify luxury transport and apportion inputs accordingly.

As the reasons for exempting transport of passengers by road or railway are not applicable to transport by a funicular railway (which are used to transport local an foreign tourists) and no identification or apportionment difficulties exist in such case, the amendment introduced by this clause excludes transport by a funicular railway from the ambit of the exemption.

CLAUSE 30

Collection of tax on importation of goods, determination of value thereof and exemptions from tax: Amendments to section 13 of the Value-Added Tax Act, 1991

Subclause (a): The amendments to section 13(1) are of a textual nature.

Subclause (b) - (e): In the past the lack of control over our borders has had a devastating effect on revenue collections, economic policy and crime levels. The Cabinet recently adopted recommendations resulting from the National Crime Prevention Strategy that will significantly tighten border control in South Africa. The amendments introduced by subclauses (b) to (e) are aimed at ensuring that the objectives of tighter border control will be met as far as the levying of VAT on importation is concerned.

VAT is, in terms of section 7(1)(b), payable on any importation of goods, subject to certain exemptions set out in Schedule 1 to the Act. In terms of arrangements which have been made under section 13(5), VAT payable on the importation of goods is collected by Customs and Excise. *Subclause (e)* introduces an amendment to section 13(6) which is intended to make it clear that, in collecting such VAT, all the provisions of the Customs and Excise Act, 1964, apply *mutatis mutandis* as if those provisions have been enacted in the Value-Added Tax Act. The provisions of the Customs and Excise Act relating to, for example, penalties and interest as well as steps to be taken to collect customs duties are thus also applicable to the collection of VAT on importation. The only provisions of the VAT Act which will apply relating to imports, are the charging section (section 7(1)(b)) and section 13 which regulates the manner of collection, valuations etc).

The customs provisions apply even where no customs duty is levied on importation of the goods, for example where a customs duty exemption applies or because of the Customs Union Agreement with Botswana, Lesotho, Swaziland and Namibia. In order to regulate the collection of VAT on importation of goods from those countries, paragraph (iii) of the proviso to section 13(1) (as amended by *subclause (a))* provides that the

Commissioner may designate the place where and the official to whom such VAT must be paid. As no customs duty is levied on the importation of goods from those countries, the border posts are currently seldom manned by customs officials. According to a statement by the Minister for Safety and Security, F S Mufamadi on 30 April 1997, the number of land border posts through which goods may be imported or exported will be reduced from 52 to 19 and be fully staffed. This will ensure adequate control for the collection of VAT on importation at the border posts.

Section 13(4) provides that where tax is payable on the importation of goods but such goods are not entered and will not require to be entered for home consumption in terms of the Customs and Excise Act, and the goods are not imported by a person for the purposes of making taxable supplies in the Republic, he must within 30 days after the importation furnish the Commissioner for Inland Revenue with a declaration and pay the tax to him.

In terms of the amendment introduced by *subclause (b)* VAT must be paid on such a declaration within 30 days after importation only where the VAT payable on importation has not been paid and the goods are neither entered or required to be entered for home consumption nor declared or required to be declared. In other words, where the goods must as a result of the new border control measures be declared on importation from a neighbouring country, VAT must be paid at the border and not on such a declaration.

In terms of the proviso to section 13(4), where the VAT payable by a vendor on importation would be allowable as an input tax deduction, he does not have to pay such tax on importation on a declaration. In terms of the amendment introduced by *subclause (d)*, the proviso does not apply to the importation of motor vehicles. This provision is in line with the new section 67B introduced by clause 50 in terms of which no imported motor vehicle may be registered in the Republic unless VAT has been paid on importation.

To prevent complicated valuation problems at the border posts when, for example, livestock to be sold at an auction is imported from the neighbouring countries, *subclause (b)* introduces a proviso to section 13(2) which deals with the valuation of goods on importation. The effect of the proviso is that where the Minister has made a regulation determining the value of any goods for the purposes of levying VAT on importation, the greater of such determined value or any value declared by the importer will be used instead of the valuation provisions of the Customs and Excise Act.

CLAUSE 31

Accounting basis: Amendments to section 15 of the Value-Added Tax Act, 1991

Subclause (a): The amendment whereby a reference to subsection (2A) is inserted is consequential upon the amendment introduced by *subclause (b)*.

The second amendment to section 15(2)(a) is of a textual nature.

Subclause (b): The amendment introduced by this subclause is, in essence, an anti-avoidance measure aimed at preventing mismatching of input tax and output tax as a result of the application of the two bases for accounting for VAT, namely the payments basis and the invoice basis. The general rule is that a vendor who accounts for VAT on the payments basis only accounts for VAT and claims VAT as input tax once payment has been made, while a vendor who accounts for VAT on the invoice basis accounts for VAT and claims input tax upon the earlier of the issuing of an invoice or any payment. (It should be borne in mind that whether the vendor accounts for VAT on the invoice or payments basis, he may deduct input tax only once he is in possession of a tax invoice.)

A number of cases have been identified where goods or services were supplied by a vendor accounting for VAT on the payments basis to a purchaser accounting for VAT on the invoice basis. A VAT benefit is derived in those cases where the purchaser immediately claims the full amount of VAT in respect of the transaction as input tax, while no VAT is accounted for by the seller as no payment has been received by him. It is often clear that the parties do not intend the purchase price to be paid in full and that the transactions have been planned in this manner merely to obtain an undue VAT refund or input tax deduction.

In order to combat such schemes, the new section 15(2A) introduced by this subclause provides that where a vendor who accounts for VAT on the payments basis makes any supply of goods or services (excluding any fixed property) on or after the date of tabling of the Taxation Laws Amendment Bill, i.e. 5 June 1997, for a consideration of R100 000 or more, he must account for VAT on the invoice basis in respect of that specific supply. The intention is that he may still account for VAT on the payments basis in respect of his usual day to day supplies, but where he makes high value supplies, he must (normally) account for VAT when the invoice is issued, even though he has not yet received payment.

Subclause (c): Section 15(3) provides that the accounting basis of a vendor accounting for VAT on the payments basis is, or may be, changed in certain circumstances to the invoice basis with effect from a future tax period. It often happens that a vendor does not notify the Commissioner for Inland Revenue in terms of section 25(c) that his total annual value of taxable supplies has exceeded, or is likely to exceed, R2,5m. In terms of the amendment introduced by this subclause, the Commissioner may in such circumstances change a vendor's accounting basis to the invoice basis with effect from either a past or future tax period.

Subclause (d): In terms of section 15(5), a vendor whose accounting basis has been changed must calculate the tax payable by him as a result of the changeover and pay such tax in respect of the changeover period, i.e. the tax period following upon the tax period during which the Commissioner directs that the change in accounting basis take place.

As vendors tend to forget to do the calculation and pay the tax in the tax period after the one in which the direction was given, this subclause amends section 15(5) by providing that the tax must be calculated and paid on the VAT return for the tax period during which the direction is given, in other words, the tax period immediately preceding the changeover period.

CLAUSE 32

Calculation of tax payable: Amendments to section 16 of the Value-Added Tax Act, 1991

Subclause (a): *Subclause (a)* introduces amendments to section 16(3)(a)(ii) and (iiA). Section 16(3)(a)(ii) provides that a vendor who accounts for VAT on the invoice basis can make a deduction of notional input tax in respect of second-hand goods acquired under a sale which does not constitute a taxable supply, but only to the extent that payment of the consideration has been made. In terms of the proviso to that section, where such second-hand goods consist of fixed property, the deduction (which is in terms of paragraph (b) of the definition of "input tax" in section 1 limited to the amount of transfer duty or stamp duty payable, as the case may be) may be made only after such transfer duty or stamp duty has been paid.

The payment requirement in the case of second-hand goods purchased by vendors on the invoice basis was intended to prevent input tax claims in respect of simulated transactions. Since the amount of the input tax deduction has with effect from 25 November 1994 been restricted to the amount of transfer duty or stamp duty payable, the incentive for entering into simulated transactions has been eliminated and the previous anti-avoidance provision has become superfluous as far as fixed property is concerned.

In terms of the first amendment introduced by this subclause, section 16(3)(a)(ii) is divided into two subparagraphs. The existing section is numbered subparagraph (aa). The amendments to the wording of that new paragraph are consequential upon the introduction of the new subparagraph (bb). Subparagraph (bb) deals specifically with second-hand fixed property and provides that notional input tax, calculated in accordance with paragraph (b) of the definition of "input tax", may be deducted in the tax period during which the full or, where a portion has already been paid, the final amount of transfer duty or stamp duty has been paid. The deduction may thus be made whether or not any payment of the purchase price has been made to the supplier.

In terms of section 16(4)(a)(ii) any vendor who supplies fixed property by way of a sale on or after 6 June 1996 only has to account for output tax to the extent that he has received *payment* in respect thereof. Similarly, in terms of section 16(3)(a)(iia) any vendor acquiring fixed property under a taxable supply resulting from a sale on or after that date may make a deduction of input tax only to the extent that he has made payment. Fixed property sales made by vendors are thus, effectively, accounted for on a payments basis.

Where such a supply of fixed property is made by a vendor to a connected person for no consideration or for a consideration which is less than the open market value thereof, the consideration for the supply is in terms of section 10(4) deemed to be the open market value thereof. But as no, or not full, payment is received by the vendor making the supply, no output tax is payable in terms of section 16(4)(a)(ii), with the result that section 10(4) will, in effect, not apply in the case of fixed property supplied to a connected person.

In terms of the amendments to section 16(3)(a)(iia) and (4)(a)(ii), the principle that VAT in respect of taxable fixed property supplies must be accounted for and claimed on a payments basis, does not apply to supplies in respect of which the provisions of section 10(4) apply. In other words, if a vendor donates fixed property to a connected person, he must account for output tax on the open market value of the supply even though he has not received any payment.

Subclause (b): This amendment is consequential upon the amendment introduced by *clause 36.*

Subclause (c): An arrangement was made in 1991 in terms of section 72 whereby banks and other financial institutions were entitled to a deduction of notional input tax in respect of fixed properties (so-called "properties in possession") sold by them, to ensure that only the value added by them is subject to VAT. To eliminate any confusion regarding the amount deductible and the circumstances under which it is deductible, this subclause introduces a new paragraph (j)

Subparagraph (ii) of the new paragraph (j) defines the terms "property in possession" and unrecovered loan balance". A "property in possession" is fixed property-

• acquired by any vendor at a sale in execution as a result of default by any person (other than a person who held or applied such fixed property for the purpose of making taxable supplies immediately before such sale in execution) in respect of an unrecovered loan balance due to the vendor in terms of a credit agreement, or

• acquired by the vendor as a result of an abandonment authorised by the Master of the High Court where such person has defaulted in respect of such an unrecovered loan balance or gone insolvent.

In essence, a property in possession is a fixed property acquired by, say, a bank at a sale in execution as a result of default of the bank's home loan debtor in respect of his home loan instalments and other accumulated costs incurred by the bank as a result of the default.

An "unrecovered loan balance" is the amount of capital, interest and administrative holding costs outstanding in terms of a credit agreement (for example a home loan) at the date of sale in execution or the date of authorisation of abandonment by the Master of the High Court.

The effect of the new paragraph can best be explained by way of an example:

Mr A is a home loan debtor of Bank Z. Mr A defaults in respect of his monthly home loan instalments and, due to steps taken by Bank Z, the house is sold at a sale in execution. Mr A is not registered as a vendor and the unrecovered loan balance of his home loan is R100 000.

Due to a lack of interest at the auction, Bank Z buys the house for R100. As this constitutes an acquisition of second-hand fixed property under a sale which is not a taxable supply, Bank Z may make a deduction of notional input tax, limited to the amount of transfer duty payable (refer to section 16(3)(a)(ii)).

In terms of the new section 16(3)(j) introduced by this subclause, Bank Z is entitled to a further deduction in the tax period during which the house is sold. The amount of the deduction is calculated by applying the tax fraction to the lesser of the-

•. selling price of the house (excluding VAT and any amount paid by Bank Z in respect of the acquisition of the house), and

•. the amount of the unrecovered loan balance less any amount paid by Bank Z in respect of the acquisition of the house.

(a) Bank Z sells the house for R79 800. As the selling price is less than the unrecovered loan balance, the tax fraction of the selling price may be deducted:

14/114 x (R79 800 - R9 800 - R100) = R8 584,21

•. The amount of VAT charged on the supply by Bank Z is excluded, as the intention is to allow a deduction in respect of the amount credited by Bank Z to Mr A's home loan account. As the VAT is paid to the Receiver and not credited to the home loan account, it must be excluded from the calculation.

•. The amount originally paid by Bank Z is excluded, otherwise a deduction in respect thereof will be allowed twice.

(b) Bank Z sells the house for R136 800. As the unrecovered loan balance is less than the selling price, the tax fraction of the amount of the unrecovered loan balance may be deducted:

14/114 x (R100 000 - R100) = R12 268,42

Bank Z will not be entitled to the said deduction if it holds or will hold Mr A liable for the amount of R69 900 in the case of example (a) or R99 900 in the case of example (b).

Subclause (d): The amendment introduces by this subclause is similar to the amendment introduced by *subclause (a)* to section 16(3)(iia) and should be read with the portion of this Memorandum dealing with *subclause (a)*.

CLAUSE 33

Permissible deductions in respect of input tax: Amendments to section 17 of the Value-Added Tax Act, 1991

Subclause (a): This *subclause* introduces amendments to paragraphs (i) and (ii) of the proviso to section 17(2)(a). In terms of section 17(2)(a) a vendor cannot make a deduction of input tax in respect of goods or services acquired for the purposes of entertainment, even if the goods or services are acquired for purposes of making taxable supplies. The term "entertainment" is defined in section 1 as the provision of any food, beverages, accommodation, entertainment, amusement recreation or hospitality of any kind by a vendor directly or indirectly by anyone in connection with an enterprise carried on by him.

The proviso to section 17(2)(a) provides for certain circumstances where an input tax deduction may be made, even though the goods or services are acquired for the purpose of entertainment.

Paragraph (i) of the proviso was intended to allow an input tax deduction to vendors whose *bona fide* businesses involve the supply of entertainment with a view to making a profit, for example a grocery store, hotel or restaurant. Any supply of entertainment to, for example, employees or connected persons where the vendor does not recover his cost, was not intended to qualify for input tax credits.

The amendment introduced by this subclause is aimed at ensuring that a vendor in the "entertainment" industry (for example a restaurant, hotel or grocery store) and a vendor in any other industry (for example a mine) is treated the same as far as the supply of entertainment (for example meals) to employees is concerned. To qualify for input tax credits, the goods or services must be acquired for the purpose of making taxable supplies of entertainment either to clients or customers at cost or the open market value, or to employees, office holders or connected persons in relation to the vendor at cost.

Where the vendor makes a taxable supply of entertainment to an employee, office holder or any connected person, he must charge him an amount which covers all direct and indirect costs of such entertainment before the vendor may make input tax deductions (refer to the new paragraph (bb)).

Example:

ABC Groceries Store supplies groceries to its staff at a price far below cost. No input tax deduction may be made, as a charge which covers all direct and indirect cost is not made.

In any other case, a charge which covers all direct and indirect costs, or a charge equal to the open market value of such supply must be made for the vendor to be entitled to input tax deductions. The intention is that all costs in relation to the supply must be recovered. Where that is not possible, because of the costs involved in, for example setting up a new restaurant or hotel, an amount which would normally be charged by a business for such a supply of entertainment must be charged.

Examples:

•. XYZ Restaurant has just started operating. To cover all its direct and indirect costs, it would have to charge an amount for a meal which no one would be prepared to pay. As long as XYZ charges a market related price for the meal, it qualifies for input tax deductions.

•. XYZ advertises that, as an opening special, every twentieth customer's meal will be free of charge. As an open market value charge is for *bona fide* promotion purposes not made to its customers, XYZ may in terms of the new subparagraph (bb) deduct input tax.

•. XYZ provides free meals to its employees, therefore no deduction may be made to the extent that goods or services acquired by XYZ will be used for its employees' meals.

While this will necessitate the apportionment of input tax by XYZ, it achieves the objective that vendors in the entertainment industry should not be in a better position than other vendors as far as the VAT cost of, for example, staff meals are concerned.

•. After closing time of the restaurant, the employees of XYZ are allowed to take the surplus buffet food home. As the food was prepared for purposes of consumption in the course of making taxable supplies to customers, XYZ is entitled to input tax deductions (refer to subparagraph (aa)(ii)).

The amendment to paragraph (ii) of the proviso to section 17(2)(a) is of a textual nature.

Subclause (b): The amendment introduced by this subclause, is aimed at ensuring that a vendor does not deduct any amount, or any portion thereof, more than once in the calculation of the VAT payable by him. Therefore, if an amount, or any portion thereof, could qualify for a deduction in terms of more than one provision of the Act, it may be deducted only once. This applies to the calculation of VAT in a specific tax period, as well as the calculation of VAT in a tax period where the amount which could qualify for a deduction in that tax period has already been deducted in a previous tax period.

CLAUSE 34

Adjustments: Amendments to section 18 of the Value-Added Tax Act, 1991

Section 18(1) and (2) provide that adjustments must be made by accounting for output tax where goods or services which were acquired, manufactured, assembled, constructed or produced for the purpose of making taxable supplies are subsequently applied wholly or partly for other purposes.

Section 18(4) and (5) provide that adjustments may be made by making input tax deductions where goods or services which were acquired, manufactured, assembled, constructed or produced wholly or partly for purposes other than making taxable supplies, are subsequently applied for the purposes of making taxable supplies.

Where goods or services were acquired for the purposes of *entertainment* but the vendor was entitled to an input tax deduction as the proviso to section 17(2)(a) applied, the principles of section 18(1) and (2) should apply where such goods or services are subsequently used for purposes which are not covered by the proviso to section 17(2)(a) and for which a deduction would not have been allowed upon acquisition. Similarly, where the goods or services were acquired for purposes of entertainment which were not covered by the said proviso, an input tax deduction would have been denied. If the vendor subsequently applies the goods or services for purposes of entertainment covered by the said proviso, he should be entitled to an input tax deduction in line with the principles of section 18(4) and (5).

The amendments introduced by subclauses (a) to (i) ensure that the principles of section 18(1), (2), (4), and (5) also apply to goods or services acquired for the purposes of entertainment where a change in use occurs which affects the availability of an input tax deduction as contemplated in the proviso to section 17(2)(a).

The amendment to section 18(2) should be read with the amendment to section 10(9) (the valuation provision) discussed in the portion of this Memorandum dealing with *clause 27(a)*.

Subclause (j): Section 18(5) provides for a deduction in respect of an increase in taxable use of goods or services. Where second-hand fixed property is acquired under a non-taxable supply, the amount of the deduction is limited to the amount of transfer duty or stamp duty payable. The amendment introduced by this subclause ensures that where an increase in taxable use of such fixed property takes place, the amount of the deduction is also limited to the amount of transfer duty or stamp duty.

CLAUSE 35

Tax invoices: Amendment to section 20 of the Value-Added Tax Act, 1991

Where a vendor acquires second-hand goods under a non-taxable supply, he is entitled to a deduction of notional input tax, provided the requirements of section 16(3)(a)(ii) or (b)(i), as the case may be, are met.

To ensure that an audit trail exists to verify the sale giving rise to the deduction, section 16(2)(c) further provides that such a deduction of notional input tax may be made only if sufficient records are maintained as required by section 20(8). A number of fraudulent claims for notional input tax deductions where the particulars of fictitious people were furnished to substantiate the deduction, have been identified.

The amendment introduced by this subclause is aimed at eliminating such fraud. It provides that the vendor making the deduction must maintain a record of the name and identity number of the person making the supply to him. It is further provided that the vendor must verify the name and identity number with reference to the identity document of such person. If the vendor cannot obtain his seller's identity document to verify his name and identity number, he may not make such a deduction, as he has not met the record keeping requirements of section 16(2)(c).

The same principles apply where the supplier is not a natural person. The recipient must in such a case maintain a record of the name and identity number of the natural person representing the supplier (for example a member of a close corporation) as well as any legally allocated registration number. This would apply to, for example, a company, close corporation and trust. The name and identity number of any such person representing the supplier must be verified with reference to the person's identity document and the name and registration number of another supplier must be verified with reference to its letterhead or similar document, for example, order forms or invoices.

Further, where the value of any supply of second-hand goods is R1 000 or more, the recipient claiming an input tax deduction must also maintain a photocopy of any such name and identity number from the identity document or a copy of such letterhead or other document.

The insertion of subparagraphs (i) and (ii) are of a textual nature.

CLAUSE 36

Irrecoverable debts: Amendments to section 22 of the Value-Added Tax Act, 1991

Subclause (a): Section 22(1) allows a vendor who has made a taxable supply and accounted for the VAT in respect thereof a deduction of the tax portion of any amount of consideration written off by him. The practice has since the introduction of VAT been to allow factoring cost incurred by a vendor ceding accounts receivable (i.e. trade debtors) as an irrecoverable debt deduction in terms of section 22(1). No distinction has been drawn between accounts receivable transferred on a recourse or non-recourse basis.

In terms of the amendment introduced by this subclause, a new paragraph (iv) is added to the first proviso to section 22(1). In terms thereof, no irrecoverable debt deduction may in terms of section 22(1) be made by a vendor in respect of the transfer of an account receivable at face value on a *non-recourse basis* to any other person. The reason is that the factoring cost incurred by the vendor is not an amount of consideration for the underlying taxable supply which is written off as irrecoverable. The factoring cost is incurred to earn factoring income and the factoring income is consideration for the transfer of a debt security which is exempt from VAT in terms of section 12(a) read with section 2(1)(c).

Where a vendor has transferred an account receivable at face value on a *recourse basis* to another person, he may make a deduction in terms of section 22(1) only when such account receivable is transferred back to him and he has written off so much of the consideration as has become irrecoverable. He may thus not make a deduction in respect of any factoring cost incurred on the transfer of the account receivable, but may make a deduction in accordance with the general principles of section 22(1) if he writes off any portion of the consideration as irrecoverable after the account receivable has been transferred back to him.

Subclause (b): In terms of the new subsection (1A) introduced by this subclause, where a vendor (the dealer)-

•. has made a taxable supply for consideration in money, and

•. has accounted for the output tax in respect of such supply (at the standard rate), and

•. has transferred the account receivable relating to such taxable supply at face value to another vendor (the bank) on a non-recourse basis,

and the bank has written off any amount of the face value (excluding any amount of finance charges or collection costs) of such account receivable, the bank may make an input tax deduction equal to the tax fraction of the amount of such face value written off by him.

The face value is the net value of the account receivable at the time of transfer, thus after adjustments have been made for debit and credit notes and bad debts already written off by the dealer. Any finance charges and collection costs are specifically excluded, as no output tax would originally have been accounted for in respect thereof. The bank will acquire the account receivable at a cost below the face value thereof, in order to be able to make a profit if the full account receivable is collected. If the account receivable cannot be collected, the amount of the face value written off by the bank will be limited to the amount the bank paid for the face value.

The bank may, however, make such a deduction only in respect of accounts receivable transferred to it on or after the date of promulgation of the Taxation Laws Amendment Act, 1997. This provision ensures that the bank does not claim a bad debt deduction where the dealer has already deducted the factoring cost incurred by him as a deduction.

CLAUSE 37

Registration of persons making supplies in the course of enterprises: Amendment to section 23 of the Value-Added Tax Act, 1991

Section 23(2) provides that a person must apply for registration as a vendor within 21 days after becoming liable for registration in terms of the provisions of section 23(1). The insertion of the reference to section 50A is consequential upon the insertion of a new section

50A by *clause 44*, in terms of which separate persons carrying on the same enterprise are in certain circumstances deemed to be a single person and must apply for registration in accordance with section 23(2).

In terms of section 23(2) any person liable for registration must apply for registration in such form as the Commissioner may direct and provide the Commissioner with such particulars as the Commissioner may require. The word "approve" is substituted for the word "direct", as application for registration may, in practice, not be done in any other manner than in the form VAT 101, "Application for registration", prescribed by the Commissioner.

The VAT 101 form requires certain documentation to be attached, for example a certified copy of the identity document of an individual, a copy of a partnership agreement, trust deed or articles of association. Section 23(2) is thus also amended to specifically provide that such documentation requested by the Commissioner in the application form must also be provided by the person applying for registration.

In terms of paragraph (i) of the proviso introduced by this clause, a person is deemed not to have applied for registration until he has provided all such particulars and documentation to the Commissioner. This is aimed at ensuring that all information and documentation necessary to verify the existence of the person or business, or to audit its VAT affairs at any time after such registration are available to the Commissioner. The amendment thus improves the Commissioner's control measures to prevent fraud in respect of the VAT system. It should be borne in mind that a person who fails to apply for registration as required by section 23, commits an offence in terms of section 58(c).

Paragraph (ii) of the new proviso specifically deals with persons who are not residents of the Republic. It provides that such a person is deemed not to have applied for registration until he has-

•. appointed a representative vendor as contemplated in section 48(1) in the Republic and furnished the Commissioner with his particulars, and

•. opened a banking account in the Republic and furnished the Commissioner with the particulars thereof.

These particulars are needed by the Commissioner for control and audit purposes. The Commissioner can, for example, not process a refund to a foreign vendor who has no presence or representation in the Republic as the transactions giving rise to such refund claim cannot be audited.

CLAUSE 38

Objections to certain decisions or assessments: Amendment to section 32 of the Value-Added Tax Act, 1991

Section 32(1) provides that any person may lodge an objection to certain decisions made by the Commissioner regarding registration, deregistration and any refusal to make a refund of VAT, as well as any assessment made upon him. In terms of the new paragraph (c) which is introduced to section 32(1) in terms of this subclause, a person may also lodge an objection if such a direction is made by the Commissioner and served on such person in terms of the new section 50A.

This amendment should be read with the portion of this Memorandum dealing with *clause 44*.

CLAUSE 39

Payment of tax pending appeal: Amendment to section 36 of the Value-Added Tax Act, 1991

In terms of section 36(1), the obligation to pay VAT is normally not suspended by any appeal or pending the decision of a court of law. In terms of the first amendment introduced by this clause, the obligation to pay additional tax, penalty or interest is similarly not suspended.

If an assessment is subsequently altered on appeal or in conformity with a decision of a court of law or as the Commissioner conceded the appeal, any amount paid in excess is refunded to the vendor with interest. The interest payable by the Commissioner in such a case is the same as the interest payable in terms of section 45 in respect of delayed refunds (i.e. currently 16 per cent).

In the case of section 45(1) the 21 day period within which refunds must be made by the Commissioner is in certain circumstances reckoned from a date after the date of receipt of the return, for example where previous returns are outstanding or where the relevant refund return is defective or incomplete in a material respect. No similar principle applies in respect of refunds made in terms of section 36(1) following upon an appeal, which means that a vendor can be better off as far as the payment of interest by the Commissioner is concerned, merely because he has noticed an appeal.

An amendment is, therefore, introduced by this *clause* in terms whereof any refund in terms of section 36 is subject to the provisions of section 45(1). The effect hereof is that interest will be calculated for the period starting after the period of 21 business days after receipt of the relevant return. Where the circumstances contemplated in the proviso to section 45(1) are present, the period of 21 business days will be reckoned from the date specified in that section.

This amendment should be read with the amendment discussed in the portion of this Memorandum dealing with *clause 43*.

CLAUSE 40

Penalty and interest for failure to pay tax when due: Amendments to section 39 of the Value-Added Tax Act, 1991

Subclause (a): Section 39(4) provides for the levying of penalty and interest where VAT on importation is not paid timeously. As the provisions of the Customs and Excise Act apply regarding the levying of VAT on importation and the recovery thereof, subsection (4) of section 39 is deleted by this *subclause*.

This amendment should be read with the amendments discussed in the portion of this Memorandum dealing with *clause 30*.

Subclause (b): Section 39(7) provides that where the Commissioner is satisfied that the failure on the part of any person to make payment of tax within the period for payment contemplated in the other subsections of section 39 was not due to an intent to avoid or postpone liability for the payment of VAT, he may remit any penalty or interest.

If interest is remitted in full where a person did not have any intention not to make payment, that person could be placed in a better position than the person who made payment timeously, as the person who did not make payment had the use of the money in the mean time.

The amendment introduced by this subclause, therefore, adds a new paragraph (a) in terms whereof *interest* may be remitted by the Commissioner only to the extent that the failure to pay VAT-

•. did, having regard to the net result of output tax and input tax in respect of the supply, not result in any financial loss to the State, or

•. did not benefit the person who did not make payment financially.

Any loss of interest to the State or the actual interest saved or earned as a result of not having made payment, must also be taken into account.

Example:

X made a taxable supply to Y and had to make payment of VAT of R100 000 to the Receiver on or before 25 April 1997.

X makes the payment only on 7 May 1997 and interest of R1 200 is levied in terms of section 39(1). As X has not yet issued a tax invoice in respect of the supply to Y, Y has not deducted the R100 000 as input tax on its return which was submitted on 25 April 1997.

As the net effect of X' failure to make payment on 25 April 1997 has not resulted in a financial loss to the State, the Commissioner may remit the interest levied.

The amendments to the new paragraph (b) are of a textual nature. In terms of a further amendment to this subsection, the intent not to make payment or to postpone the payment of VAT of the person concerned or any other person under his control or acting on his behalf must be taken into account when considering a remittance of *penalty* levied.

Example:

X's failure to make payment on 25 April 1997 was due its bookkeeper's intention to use the VAT payable to the Receiver to finance an urgent project as the bookkeeper forgot to make the necessary financing arrangements with the bank. X was not aware of its bookkeeper's plans.

The fact that VAT was not paid on time due to the intent of a person under the control of X, even though X as such had no such intent, must be taken into account when considering a remittance of any amount of the penalty.

The deletion of the reference to subsection (4) is consequential upon the amendment introduced by *subclause (a)*.

CLAUSE 41

Liability for tax in respect of certain past supplies or importations: Amendments to section 41 of the Value-Added Tax Act, 1991

Subclause (a): Section 41(d) provides that certain amounts of VAT are not recoverable after a period of five years. In terms of this amendment the reference to VAT payable on importation is deleted. This amendment is consequential upon the amendments to section 13 introduced by *clause 30*.

Subclause (b): One of the requirements for any VAT payable not being recoverable after a period of five years is that the failure to pay the amount which should have been paid was not due to an intent to avoid the payment of VAT.

In terms of the amendment introduced by this clause, the failure to make payment should not have been due to intent of the person concerned or any other person acting on behalf of that person.

CLAUSE 42

Refunds: Amendments to section 44 of the Value-Added Tax Act, 1991

Subclause (a): In terms of section 44(3)(a) the Commissioner shall not make a refund of any amount of tax, additional tax, penalty or interest unless the claim for the refund is made within five years after the date upon which payment of the amount claimed to be refundable was made. Where the Commissioner is satisfied that such payment was made in accordance with the practice generally prevailing at the said date, no refund will be made by the Commissioner unless the claim for the refund is made within six months of the date of payment.

In terms of the amendment introduced by this subclause, the claim for the refund must be *received* by the Commissioner within such period of five years or six months, as the case may be. This amendment is aimed at preventing back dating of claims.

Subclause (b): Section 44(8) provides that the Commissioner must, at the request of a vendor, give him written notice of his refusal to make a refund. This provision is amended by this subclause which provides that the Commissioner will always give written notice of and furnish reasons for such refusal.

CLAUSE 43

Interest on delayed refunds: Amendments to section 45 of the Value-Added Tax Act, 1991

Subclause (a): Section 45(1) provides that where the Commissioner does not refund an amount refundable to a vendor within the period of 21 business days after the date of receipt of the vendor's return, the Commissioner pays interest at the rate of, currently, 16 per cent per annum (refer to the definition of "prescribed rate"). In terms of paragraph (i) of the proviso no interest is paid by the Commissioner where the relevant return submitted by the vendor is incomplete or defective in any material respect or the vendor is in default in respect of any return for any previous tax period.

The effect of the amendment to paragraph (i) of the proviso is that where the relevant return is incomplete or defective in any material respect, the said period of 21 business days shall be reckoned from the date on which the vendor rectifies the return and satisfies the Commissioner that the incompleteness or defectiveness thereof does not affect the amount refundable, or the Commissioner makes an assessment upon the vendor reflecting the amount properly refundable. Therefore, where there is a material error on the return but it does not affect the amount of VAT refundable, the 21 business day period within which the Commissioner must make the refund will run from the date the Commissioner is satisfied as to the amount refundable. If the refund is not made within that period, interest will be paid by the Commissioner.

This subclause also introduces a new paragraph (iA), which provides that where the vendor is in default in respect of any of his obligations to furnish a return for a previous tax period, the Commissioner will pay interest if he does not refund the amount within the period of 21 business days after the date of receipt of any outstanding return.

Subclause (b): In terms of the new paragraph (iii) added to the proviso to section 45(1) in terms of this subclause, where a vendor who is not a resident of the Republic has submitted a refund return, the refund will not be made by the Commissioner until the vendor has appointed a representative vendor (as contemplated in section 48(1), read with section 46(f)) and notified the Commissioner of his particulars, and the vendor has opened a banking account in the Republic and furnished the Commissioner with the particulars thereof. The Commissioner will have 21 business days after receipt of the relevant particulars to make a refund. If the refund is not made within that period, interest will be payable to the vendor.

Although the amendment to section 23(2) provides that a person who is not a resident is deemed not to have applied for registration until a representative vendor has been appointed and a banking account has been opened in the Republic, there may be such non-resident persons who have already been registered as vendors without having furnished the relevant particulars to the

Commissioner. Where such vendors claim refunds, the Commissioner must be able to audit the refund in the Republic, therefore a representative vendor must be appointed in the Republic. To enable the Commissioner to refund the amount in Rand, the vendor must have a banking account in the Republic.

CLAUSE 44

Separate persons carrying on same enterprise under certain circumstances deemed to be single person: Insertion of section 50A in the Value-Added Tax Act, 1991

A new section 50A is introduced to the Act by this clause. The purpose thereof is to prevent the splitting of business activities between different persons to stay below the registration threshold of R150 000, thus avoiding the liability to register for VAT.

In terms of the new subsection (1) the Commissioner may make a direction naming certain separate persons who he deems to be a single person carrying on one enterprise. That single person will then have to register as a vendor in terms of section 23 with effect from the date of the direction or, if the direction provides for another effective date, from that date. Any person named in such a direction may lodge an objection thereto in terms of the amendment to section 32 introduced by *clause 38*.

Subsection (2) provides that the Commissioner shall not make a direction naming any person unless-

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• •. he makes taxable supplies in the course of an activity which should properly be regarded as the activities of the enterprise of the single person described in the direction,

•. the single person carrying on the enterprise described in the direction would be liable for registration at the time of the direction if all its taxable supplies were taken into account, and

•. the main reason, or one of the main reasons, for the person carrying on the activities in that manner is the avoidance of the liability to register. This requirement also makes it clear that section 50A is an anti-avoidance provision and is not intended to provide for group registration of companies in the same group in order to eliminate the VAT consequence of inter-company transactions.

The said direction will, in terms of subsection (3), be served on each person named in it.

If it later appears to the Commissioner that another person should also be named in the direction, a supplementary direction may in terms of subsection (4) be served on him, adding his name to the names of the other persons who are deemed to be a separate person. The supplies made by him will then also be deemed to be made by the single person registered as a vendor.

Subsection (5) deals with the situation where, immediately before a direction or a supplementary direction is made by the Commissioner, a person who is named therein is registered as a vendor in his own name in respect of his own taxable supplies. Such a person is deemed to cease to be liable with effect from the date the single person became liable for registration or the date of the direction, whichever is the later.

In terms of subsection (6) the persons named in the direction are in subsections (7) and (8) referred to as "members".

In terms of subsection (7)(a) the members shall be registrable in the name they indicate in the form VAT 101, "Application for registration". If they do not apply for registration in the prescribed form within 21 days of the date of their liability as indicated in the direction, the Commissioner may register the single person based on the information available to him, and raise estimated assessments upon him.

Any supply by or to a member will in terms of subsection 7(b) be deemed to be a supply by or to that person. The single person will thus have to account for output tax in respect of any supply made by a member. The single person will also be entitled to an input tax deduction, in accordance with the general provisions of the Act, in respect of supplies made by someone else to the member, even if the tax invoice is made out to the member.

Subsection (7)(c) provides that each of the members will be jointly and severally liable for any VAT due by the single person, but a failure by the single person may, in terms of subsection (7)(d) be treated as a failure of each of the members severally. In terms of subsection (7)(e) the members are deemed to be a body of persons carrying on the enterprise of the single person.

In terms of subsection (8), if the Commissioner is of the opinion that one of the members should no longer be regarded as a member of the single person, and he gives the member notice to that effect, that member will no longer be liable for the single person's affairs after the date the Commissioner notifies him accordingly.

CLAUSE 45

Pooling arrangements: Amendment to section 52 of the Value-Added Tax Act, 1991

This amendment is consequential upon the repeal of the Marketing Act, 1968.

CLAUSE 46

Agents and auctioneers: Amendment to section 54 of the Value-Added Tax Act, 1991

In terms of section 54(2A), where any goods are imported into the Republic by an agent who is acting on behalf of his principal, the importation is deemed to be made by the principal and not the agent. The effect hereof is that even if the VAT is physically paid by the agent on importation, only the principal may claim the VAT as input tax deduction if he imported the goods for the purposes of making taxable supplies.

Where a person who is not a resident of the Republic and is not a registered vendor in the Republic imports any goods into the Republic, albeit through an agent in the Republic, the VAT payable on importation is a cost to him as he cannot claim it as an input tax deduction. Such person will necessarily include the VAT cost in his price to the South African recipient of his supply. Where the goods are ultimately sold by way of a taxable supply, VAT will be payable on an amount which includes the VAT cost borne by the foreign principal on importation.

In terms of the amendment introduced by this clause, the existing subsection 54(2A) is numbered paragraph (a) and a new paragraph (b) is added. The new paragraph (b) is aimed at ensuring that the VAT paid on importation by the agent on behalf of a foreign principal may be claimed as an input tax deduction by the agent where-

•. the agent is a registered vendor,

•. the principal is not a resident of the Republic and is not a registered vendor,

•. the goods are imported by the foreign principal for the purposes of a supply made or to be made to a person in the Republic (that person is in section 8(20), which is introduced by *clause 25*, referred to as the "recipient of the supply by the principal"),

•. the agent obtains documentary proof that he paid the VAT on importation on behalf of that principal (this requirement ensures that an input tax deduction is not allowed to the agent where no VAT has actually been paid on importation),

•. the agent obtains documentary proof that he and the foreign principal agree that the VAT paid by the agent on importation will not be refunded to the agent by the foreign principal (this requirement ensures that an agent does not claim the VAT paid on importation as an input tax deduction, while he is also reimbursed by the foreign principal).

To ensure that no VAT is lost in the system where the recipient of the supply by the foreign principal is not a vendor or would not be entitled to a full input tax credit, the agent is in terms of the new section 8(20) deemed to make a taxable supply of the goods deemed to be imported by him, to that recipient. The value of that supply is in terms of the new section 10(22B) the value of the goods for customs purposes plus any

VAT paid on importation. The amount claimed as input tax in respect of the importation and the amount of output tax in respect of the deemed supply by the agent will thus be the same. The supply is in terms of the new section 9(9) deemed to be made at the time the tax payable on importation is paid by the agent. As it is a requirement of the new section 54(2A)(b) that the VAT payable on importation must have been paid by the agent, it means that the agent may (even if he is in possession of the bill of entry) not make an input tax deduction if he has not yet made payment, for example as a result of a deferment allowed by Customs and Excise. The agent is, therefore, required to account for output tax on the supply deemed to be made by him only when he makes payment of VAT which entitles him to a deduction of input tax.

The amendment introduced by this clause should be read with the amendments discussed in the portion of this Memorandum dealing with *clauses 25, 26, 27(b)*.

CLAUSE 47

General provisions with regard to information, documents or things: Amendment to section 57 of the Value-Added Tax Act, 1991

This amendment is consequential upon the provisions of the Constitution.

CLAUSE 48

Inquiry: Amendment to section 57C of the Value-Added Tax Act, 1991

In terms of section 57C(3) a judge may on *ex parte* application by the Commissioner grant an order in terms of which a person who is a member of the Special Tax Board is designated to act as presiding officer at an inquiry held for purposes of the VAT Act. The effect of the amendment is that such an order may be granted on application, by a judge in chambers.

CLAUSE 49

Search and seizure: Amendment to section 57D of the Value-Added Tax Act, 1991

In terms of section 57D(1)(a) a judge may on *ex parte* application by the Commissioner issue a warrant authorising the officer named therein to, *inter alia*, enter premises and search for records. The effect of the amendment introduced by this *clause* is that such a warrant may be granted by a judge in chambers.

CLAUSE 50

Additional tax in case of evasion: Amendment to section 60 of the Value-Added Tax Act, 1991

Section 60(1) provides that additional tax is imposed on any vendor who fails to perform his duties under the Act, or who does or omits to do anything with *intent* to evade the payment of tax payable by him, or to cause a refund to him.

In terms of this amendment, where any person under the control or acting on behalf of the vendor fails to perform a duty or does or omits to do anything with such intent, the vendor shall be charged with additional tax.

CLAUSE 51

Registration of motor vehicles prohibited in certain circumstances: Insertion of section 67B in the Value-Added Tax Act, 1991

Under the Sales Tax Act, 1978, the registration of motor vehicles was prohibited unless the applicant could prove payment of sales tax. The relevant provisions of the Sales Tax Act were not included in the Value-Added Tax Act as private sales of motor cars are not subject to VAT. In order to ensure control over the payment of VAT on motor vehicles imported, section 67B is introduced by this clause in terms of which no motor vehicle registering authority shall register any imported motor vehicle unless the person applying for registration produces proof to the registering authority that the tax payable has been paid. Where no tax is payable on the importation, a certificate issued by the Commissioner to that effect should be produced to the registering authority.

This amendment will come into operation on a date fixed by the Minister of Finance by notice in the Government Gazette. This ensures that adequate time be allowed to the registering authorities to make the necessary administrative arrangements in this regard.

CLAUSE 52

Tax agreements: Amendments to section 75 of the Value-Added Tax Act, 1991

The amendments introduced by *subclauses (a) to (e)* are in some respects textual and, otherwise, consequential upon the provisions of the Constitution relating to international agreements.

CLAUSE 53

Exemption: Certain goods imported into the Republic: Amendment to the Value-Added Tax Act, 1991

In terms of paragraph 5 of PART A of Schedule 1 goods forwarded unsolicited and free of charge to certain entities are in certain circumstances exempt from VAT on importation. While such goods forwarded to a public authority are exempt, no provision is made in paragraph 5 for such goods forwarded to local authorities. This amendment is aimed at eliminating this anomaly.

CLAUSE 54

Special exemption in respect of goods or services supplied by International Telecommunication Union

The International Telecommunication Union ("ITU"), an agency of the United Nations, has been invited by President Mandela to hold its "Africa Telecom 98" exhibition of telecommunication equipment in South Africa. An international precedent exists obliging host countries to provide relief from tax to the ITU. In terms of the amendment introduced by this clause the supply of any goods or services by the ITU in connection with "Africa Telecom 98" will be exempt from value-added tax. The ITU will thus not have to register as a vendor for value-added tax purposes. Relief for value-added tax incurred by the ITU will be granted in terms of section 68 of the Value-Added Tax Act, 1991, which deals with tax relief to diplomatic missions.

CLAUSES 55 AND 56

Special provisions in relation to unbundling transactions: Amendment of section 60 of the Income Tax Act, 1993

Exemption from stamp duty or transfer duty relating to transfer of marketable securities or property or of rights or obligations under bonds under a scheme for the rationalisation of a group of companies and the assessment of companies in such a group for income tax purposes in certain circumstances: Amendment of section 39 of the Taxation Laws Amendment Act, 1994

Both the unbundling and the rationalisation provisions at present require that there should have been in place an existing situation on a specific date before the provisions can apply. At present the Minister of Finance has the authority to change the date from time to time by way of a notice in the *Gazette*. As it has now become necessary to extend the date frequently to enable newly formed groups to make use of the special provisions, it is proposed to remove the requirement of a specific date.

CLAUSE 57

Tax on Retirement Funds: Amendment of section 1 of the Tax on Retirement Funds Act, 1996

Subclauses (a) and (b): The amendments introduced in terms of these *clauses* are of a textual nature.

Subclause (c): In terms of this *clause* it is proposed that the definition of "interest" be extended to include amounts as contemplated in section 24K of the Income Tax Act. Section 24K of that Act regulates certain tax consequences of arrangements in terms of which an interest rate or combination of interest rates is applied to a notional amount to calculate any amount receivable or payable in terms of such an arrangement. Such arrangements are in essence interest rate swap agreements or any similar agreements where cash flows are calculated with reference to a notional capital amount and an interest rate or combination of interest rates. As the amounts payable in terms of such arrangements are based on interest rates, the ambit of the definition of interest is extended to include such amounts.

Subclause (d): The amendment introduced in terms of this *subclause* gives effect to the Minister of Finance's proposal in his Budget Speech that income arising from the following two arrangements should also be regarded as rental income-

• Firstly, in the case of investments made by funds in unit trust schemes comprising of investments in property companies, such funds receive dividends which are derived from property companies. As dividends of this nature are distributed before taxation in the hands of the property companies, such dividends are effectively a distribution of the rental income received by the property companies. The taxation of such rental income is therefore in essence shifted to the unit holders. At present dividends of this nature received by funds are neither subject to normal tax, nor subject to the tax on retirement funds. As such dividends effectively represent rental income, it is proposed that they be included in the ambit of the definition of rental income and, therefore, become subject to the tax on retirement funds with effect from 1 March 1997.

• Secondly, where a fund lends marketable securities to a borrower, as contemplated in the definition of "lending arrangement" in section 23(1) of the Stamp Duties Act, 1968, a fee is normally paid by the borrower to the lender for the use of the borrowed security. As fees of this nature represent a payment for the use of such securities, it is proposed that fees of this nature be included in the definition of rental income for the purposes of the Tax on Retirement Funds Act.

CLAUSE 58

Tax on Retirement Funds: Amendment of section 3 of the Tax on Retirement Funds 1996

The amendments to this section are consequential upon the insertion of section 9C in the Income Tax Act, 1962.

CLAUSE 59

Tax on Retirement Funds: Amendment of section 16 of the Tax on Retirement Funds, 1996

In terms of this *clause* the provisions contained in the Income Tax Act, 1962, relating to-

- the granting of any rebate in respect of foreign taxes on income; and

- the inclusion of investment income from foreign sources,

will *mutatis mutandis* apply to funds as defined.

CLAUSE 60

Customs and Excise: Continuation of certain amendments of Schedules 1 to 6 to the Customs and Excise Act, 1964

This *clause* seeks the continuation of the amendments to the Schedules to the Act effected by the Minister during the 1996 calendar year as well as the continuation of the amendments published on 13 March 1997 in terms of which the refund scheme on distillate fuel was abolished and the Schedule No. 1 Part 2B duties (*ad valorem* duties) were reduced, as announced on 12 March 1997.

CLAUSE 61

Short title

Short title

This *clause* provides the short title of the Bill.