REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM ON THE TAXATION LAWS AMENDMENT BILL,1998

The Taxation Laws Amendment Bill, 1998, introduces amendments to the Marketable Securities Tax Act, 1948, the Transfer Duty Act, 1949, the Estate Duty Act, 1955, the Income Tax Act, 1962, the Customs and Excise Act, 1964, the Stamp Duties Act, 1968, the Value-Added Tax Act, 1991, the Income Tax Act, 1993, the Income Tax Act, 1996, and the Tax on Retirement Funds Act, 1996.

CLAUSE 1

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

This proposal withdraws the exemption in respect of the purchase of marketable securities issued by The South African Gas Distribution Corporation Limited (Gascor) and is consequential upon the withdrawal of the exempt status of Gascor for income tax purposes. See *clause 29(1)(c)*.

CLAUSE 2

Marketable Securities Tax: Amendment of section 5 of the Marketable Securities Tax Act, 1948

In terms of this clause it is proposed to bring the provisions relating to penalties in the Marketable Securities Tax Act, 1948, in line with the penalty provisions contained in the proposed Uncertificated Securities Tax Bill, 1998, which Bill deals with the levying of tax on the issue of, and change in beneficial ownership in, any securities which are transferable without a written instrument and are not evidenced by a certificate.

CLAUSE 3

Marketable Securities Tax: Insertion of section 5A in the Marketable Securities Tax Act, 1948

In terms of this clause it is proposed to bring the provisions relating to interest on overdue payments in the Marketable Securities Tax Act, 1948, in line with the interest provisions contained in the proposed Uncertificated Securities Tax Bill, 1998, which Bill deals with the levying of tax on the issue of, and change in beneficial ownership in, any securities which are transferable without a written instrument and are not evidenced by a certificate.

CLAUSE 4

Marketable Securities Tax: Amendment of section 7 of the Marketable Securities Tax Act, 1948

Section 44 of the Value-Added Tax (VAT) Act, 1991, provides that the Commissioner may set off any amount which has become refundable to a vendor in terms of the VAT Act against any tax, additional tax, penalty or interest payable by that vendor under that Act or any tax, interest or penalty owed by that vendor under any other Act of Parliament administered by the Commissioner. The Marketable Securities Tax Act, 1948, does not contain a similar provision and it is proposed that section 7, which provides for refunds, be amended to introduce a similar provision. Any amount refundable to a person in terms of the MST Act, may, therefore, be set off against any amount of tax, additional tax, duty, levy, charge, interest or penalty not timeously paid by such person in terms of any other Act administered by the Commissioner.

CLAUSE 5

Marketable Securities Tax: Amendment of section 9 of the Marketable Securities Tax Act, 1948

These amendments are of a textual nature.

CLAUSE 6

Marketable Securities Tax: Amendment of section 9D of the Marketable Securities Tax Act, 1948

These amendments are of a textual nature.

CLAUSE 7

Marketable Securities Tax: Amendment of section 11 of the Marketable Securities Tax Act, 1948

The Commissioner has the power to publish in the Government *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Value-Added Tax Act, 1991. The Minister of Finance announced in his Budget Review this year that provisions providing for the publication of the names of tax defaulters who had been convicted of any offence in terms of any of the other tax laws administered by the Commissioner be included in such laws. This *clause* gives effect to this proposal.

This amendment is deemed to have come into operation on 11 March 1998 and shall apply in respect of every person convicted of an offence on or after that date.

CLAUSE 8

Transfer Duty: Amendment of section 6 of the Transfer Duty Act, 1949

Section 6(1)*(a)* of the Transfer Duty Act, 1949, provides that there shall, for purposes of determining the transfer duty payable, be included in the consideration paid in respect of immovable property, so much of any fees or commission paid or payable by the purchaser of the property, as exceeds 5 per cent of the amount of the consideration payable in respect of such property.

Normally where a seller concludes an agreement with an estate agent for the sale of property, the selling price as advertised, includes the agent's commission. The commission forms part of the consideration and is included in the amount on which transfer duty is calculated. A practice has now developed whereby transactions are structured on the basis that the purchaser is responsible for the commission on the sale. It is then argued that only that portion of the commission exceeding 5 per cent of the purchase price should be included for duty purposes. On this basis a saving in transfer duty is effected.

The provisions are open to abuse and it is proposed that section 6(1)*(a)* be amended to provide that the 5 per cent rule shall only apply in respect of a sale in execution, as the fees and commissions would in such instances normally have to be paid by the buyer.

This provision will come into operation on the date of the promulgation of the Act and apply in respect of property acquired on or after that date.

CLAUSE 9

Transfer Duty: Amendment of section 11A of the Transfer Duty Act, 1949

These amendments are of a textual nature.

CLAUSE 10

Transfer Duty: Amendment of section 11E of the Transfer Duty Act, 1949

These amendments are of a textual nature.

CLAUSE 11

Transfer Duty: Amendment of section 20 of the Transfer Duty Act, 1949

Section 44 of the Value-Added Tax (VAT) Act, 1991, provides that the Commissioner may set off any amount which has become refundable to a vendor in terms of the VAT Act against any tax, additional tax, penalty or interest payable by that vendor under that Act or any tax, interest or penalty due by that vendor under any other Act of Parliament administered by the Commissioner. The Transfer Duty Act, 1949, does not contain a similar provision and it is proposed that section 20, which provides for refunds, be amended to introduce a similar provision. Any amount refundable to such person in terms of the Transfer Duty Act, 1949, may therefore be set off against any amount of tax, additional tax, duty, levy, charge, interest or penalty not timeously paid by such person in terms of any other Act administered by the Commissioner.

CLAUSE 12

Transfer Duty: Insertion of section 20A in the Transfer Duty Act, 1949

The Commissioner has the power to publish in the Government *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Value-Added Tax Act, 1991. The Minister of Finance announced in his Budget Review this year that provisions providing for the publication of the names of tax defaulters who had been convicted of any offence in terms of any of the other tax laws administered by the Commissioner, be included in such laws. This *clause* gives effect to this proposal.

This amendment is deemed to have come into operation on 11 March 1998 and shall apply in respect of every person convicted of an offence on or after that date.

CLAUSE 13

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

Section 3(3)*(a)bis* of the Estate Duty Act, 1955, deems so much of any benefit due and payable by any fund as a result of the death of the deceased, which exceeds the contributions or consideration paid by the beneficiary, to be property of the estate of the deceased person. This section does not sufficiently provide for the situation where the fund purchases the benefit (for example an annuity) from a registered insurer in the name of a member who retires from employment. It is, therefore, proposed that this paragraph should also refer to any benefit due and payable as a result of membership or past membership in any fund.

CLAUSE 14

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

Section 4*(m)* of the Estate Duty Act, 1955, provides for the deduction from the total value of all property included in the estate of a deceased person of the value of any usufructuary or other like interest in property and of any right to an annuity charged upon property, if such interest or right was created by a predeceased spouse of the deceased and?

- the property over which the deceased enjoyed such interest or right formed part of the estate of such predeceased spouse; and
- no deduction in respect of the value of such interest or right was allowed in the determination of the net value of the estate of the predeceased spouse under section 4*(q).*

Section 4*(q)* allows as a deduction so much of the value of any property included in the estate of the deceased person as accrues to the surviving spouse of the deceased person.

In order to remove any uncertainty in this regard, an amendment to section 4*(m)* is proposed to provide that where a deduction in terms of section *4(q)* was allowable, whether or not such deduction was claimed or actually allowed, for estate duty purposes in the estate of the predeceased spouse, the section 4*(m)* deduction would not apply to the estate of the surviving spouse. Section *4(m)* would, therefore, only apply in respect of an estate where such usufructuary or other like interest is included in the estate of a person who acquired such usufructuary or other like interest from a predeceased spouse who died before section 4*(q)* came into operation. In all other instances the estate of the predeceased spouse would automatically qualify for the section 4*(q)* deduction where such usufructuary or other interest accrues to the surviving spouse, which would have the effect that section 4*(m)* would not apply to the estate of such surviving spouse.

CLAUSE 15

Estate Duty: Amendment of section 8A of the Estate Duty Act, 1955

These amendments are of a textual nature.

CLAUSE 16

Estate Duty: Amendment of section 8E of the Estate Duty Act, 1955

These amendments are of a textual nature.

CLAUSE 17

Estate Duty: Insertion of section 28A in the Estate Duty Act, 1955

The Commissioner has the power to publish in the Government *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Value-Added Tax Act, 1991. The Minister of Finance announced in his Budget Review this year that provisions providing for the publication of the names of tax defaulters who had been convicted of any offence in terms of any of the other tax laws administered by the Commissioner, also be included in such laws. This *clause* gives effect to this proposal.

This amendment shall be deemed to have come into operation on 11 March 1998 and shall apply in respect of all persons convicted of any offence on or after that date.

CLAUSE 18 AND SCHEDULE 1

Income Tax: Rates of normal tax

Rates of normal tax payable by persons (other than companies) and companies are enacted by *clause 18* and Schedule 1 to the Bill.

Persons other than companies

The rates for persons (other than companies) apply in respect of the year of assessment ending on 28 February 1999 or 30 June 1999 and are provided for in paragraph 1 of Schedule 1.

The rates for persons (other than companies) and special trusts consist of a progressive rate structure ranging between 19 per cent on the lowest income segment (amounts up to R31 000) and 45 per cent which is reached on the income segment above R120 000.

The rates for trusts (other than special trusts) consist of a rate of 35 per cent on taxable income which does not exceed R100 000 and 45 per cent on the income exceeding R100 000.

The rates for?

- persons (other than companies) and special trusts are provided for in paragraph 1(a) of the Schedule; and

- trusts (other than special trusts) are provided for in paragraph 1(b) of the Schedule.

A "special trust" is defined as a trust created solely for the benefit of a person who suffers from:
(i) any "mental illness" as defined in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973); or
(ii) any serious physical disability,
where such illness or disability incapacitates such person from earning sufficient income for the maintenance of such person.

Companies

The rates for companies apply in respect of years of assessment, i.e. the financial year of the company concerned, ending during the 12-month period from 1 April 1998 to 31 March 1999, and are provided for in paragraphs 2(a) to (f) inclusive, of the Schedule.

Those rates are as follows:

(a) Taxable income derived otherwise than from gold mining, long-term insurance business, by a foreign company through a branch or agency in the Republic or a qualifying company enjoying tax holiday status: 35 cents per R1, but in the case of a company which mines for gold and which is exempt from secondary tax on companies in terms of an option exercised by it, 42 cents per R1 of its non-gold mining taxable income (paragraph 2(a) of the Schedule).

(b) Taxable income derived by a company from gold mining: an amount determined in accordance with one of the following formulae?

(i) where such company is not exempt from secondary tax on companies:

$$y = 43 - \frac{215}{x}\text{ ; or}$$

(ii) where such company is exempt from secondary tax on companies:

$$y = 51 - \frac{255}{x},$$

as provided for in paragraph 2(b) of the Schedule.

(c) Taxable income in the form of "recoupments" of capital expenditure accruing to companies which are or have been gold mining companies: the average rate of tax, determined as provided, or 35 cents per R1, whichever is the higher (paragraph 2(c) of the Schedule).

(d) Taxable income derived from long-term insurance business: 30 cents per R1 in respect of the insurer's individual policyholder fund and 35 cents per R1 in respect of its company policyholder fund and corporate fund (paragraph 2(d) of the Schedule).

(e) Taxable income (excluding from gold mining, long-term insurance business or a qualifying project enjoying tax holiday status) derived by a company which has its place of effective management outside the Republic and which carries on trade through a branch or an agency within the Republic: 40 cents per R1 (paragraph 2(e) of the Schedule).

(f) Taxable income derived by a qualifying company which has been granted tax holiday status in terms of section 37H of the Income Tax Act: zero cents per R1 (paragraph 2(f) of the Schedule).

CLAUSE 19

Income Tax: Definitions: Amendment of section 1 of the Income Tax Act, 1962

Subclauses (1)(a) and *(b)*: In its Sixth Interim Report the Katz Commission pointed out the fact that certain categories of benefit funds are principally the creation of the Income Tax Act, 1962, and expressed its concern with regard to the lack of control of funds as contemplated in paragraph *(c)* of the definition of "benefit fund" in section 1 of the Act. The Commission, therefore, recommended that the definition be amended to delete paragraph *(c)* thereof. The funds falling within this paragraph, in essence, include funds providing benefits similar to insurance funds or medical schemes, whilst not being registered with the bodies governing such funds or schemes. The Portfolio Committee on Finance agreed with the Commission's findings and recommended that such funds should be allowed two years in which to move to an alternative environment, such as conversion to an insurance fund or a medical aid scheme. The Minister of Finance, therefore, announced in his Budget Review this year that paragraph *(c)* of the definition of "benefit fund" will be deleted with effect from 1 January 2000 and that, with effect from 11 March 1998, no further funds would be approved by the Commissioner under paragraph *(c)*. *Subclauses (1)(a)* and *(b)* give effect to this proposal.

Subclauses (1)(c) and (d): These *subclauses* amend the definition of "connected person" in section 1. All persons who are connected persons in relation to a trust will in terms of the new provisions be connected persons in relation to each other. A unit trust scheme in property shares as authorised under the Unit Trust Control Act, 1981, is specifically excluded. A unit portfolio comprised in any unit trust scheme in securities, other than property shares, would also be excluded as such a unit portfolio is in terms of the definition of "company" regarded to be a company for purposes of the Act.

Furthermore, two companies would also be connected persons in relation to each other, where such companies are managed or controlled by persons who are connected persons in relation to each other.

Subclauses (1)(e) and (f): Paragraph *(e)* of the definition of "gross income" includes lump sum benefits received or accrued from a pension fund, provident fund or retirement annuity fund. There are, however, instances where lump sum benefits are received from an entity other than the fund. This would be, for example, where the fund purchases the benefit from an insurance company and such insurance company eventually pays the benefit to the member. *Subclauses (1)(e)* and *(f)* amend paragraph *(e)* of the definition of "gross income" to include any lump sum benefit received by or accrued to any person in consequence of his membership or past membership of the fund.

Subclauses (1)(g) to (k): In 1997 the Minister of Finance proposed certain interim measures in relation to the taxation of benefits transferred from public sector pension funds to provident funds. Paragraph *(eA)* was inserted in the definition of "gross income" in section 1 of the Income Tax Act, 1962, to provide for the inclusion in the gross income of any member of a fund of two-thirds of an amount which is transferred from a public sector pension fund to another fund which allows such member or the dependants or nominees of a deceased member to receive lump sum payments exceeding one-third of the total capitalised value of all the benefits of such a member. The same measures also apply in the case of a conversion from a public sector fund to such other fund. The Minister, however, indicated that the measures would apply only to a person who is an employee on the date of transfer and who remains in the employment of the same employer. The provisions of paragraph *(eA)* do not, however, draw a clear distinction between a person who remains in the employment of the same employer and a person who terminates employment and transfers his or her benefits to the new employer's retirement fund. As it was the intention to only include in paragraph *(eA)* lump sum transfers relating to members who effectively remain in the employment of the same employer, the proposed amendment will give effect to this intention.

In certain instances members of municipal pension funds take out housing loans in their existing municipal pension funds. In normal circumstances, such a loan is repayable by the member to the fund in installments until it is redeemed. But unlike private sector retirement funds, some municipal retirement funds permit their members to use their pension interest in the fund to redeem the loan. This is done by way of a transfer of the pension interest, after deducting the amount that is required to redeem the loan, to another public sector retirement fund. In effect, the member in this way becomes entitled to a tax-free benefit from the transferor fund, which is used by him or her to redeem the loan.

Example:

> If the member's pension interest in the fund is R100, and the housing loan R20, the member would in normal circumstances be paying the loan back in installments over a period of, for example, 20 years. The fund, however, permits the member to use a portion of his or her pension interest to redeem the loan by transferring R80 only to another public sector retirement fund. The remaining R20, which is a tax-free benefit in the hands of the member, is used to redeem the loan.

In order to curb this abuse, it is proposed in *subclauses (1)(i), (j)* and *(k)* that where any amount in a public sector fund becomes payable to the member or is utilised to redeem a debt while the member effectively remains in the employment of the same employer, the provisions of paragraph *(e*A*)* would also apply and the member would, therefore, be taxed on two-thirds of the amount so payable or utilised.

These subclauses shall come into operation on the date of promulgation of the Act.

Subclause (1)(l) amends the definition of "retirement annuity fund" in section 1 to allow for the transfer of a member's interest in one retirement annuity fund to another retirement annuity fund. Paragraph 6 of the Second Schedule was amended in 1992 to exempt from tax transfers of this nature, thereby acknowledging the fact that such transfers are allowable. However, the definition of "retirement annuity fund" prohibits a fund from transferring a member's interest to another retirement annuity fund. It is, therefore, proposed that the provisions of paragraph *(b)*(xii) of the definition be amended to correct this anomaly. The provision, however, provides that such a transfer may only occur prior to the member becoming entitled to the payment of an annuity.

Subclauses (1)(m) and *(n)* amend the definitions of "tax" or "the tax" or "taxation" and "taxpayer" to delete obsolete provisions.

CLAUSE 20

Income Tax: Exercise of powers and performance of duties: Amendment of section 3 of the Income Tax Act, 1962

The proposed amendment extends the scope of the provisions of section 3(4) of the Income Tax Act, 1962, to make the objection and appeal procedures applicable to the exercise of a discretion by the Commissioner in terms of section 9C, section 9D and section 24I. The deletion of the reference to section 16A is consequential upon the deletion of that section.

CLAUSE 21

Income Tax: Preservation of secrecy: Amendment of section 4 of the Income Tax Act, 1962

Subclause (1)(a): The Auditor-General Act, 1989, was repealed in 1995 and substituted by the Auditor-General Act, 1995. This *subclause* amends section 4 to refer to the new Act.

The Minister of Finance announced in his Budget Review this year that, following discussions with the Central Statistical Services (CSS), it is the intention to revise several secrecy provisions to provide the CSS with information needed for statistical purposes. *Subclauses (1)(b)* and *(c)* give effect to this proposal and make provision that information in the possession or custody of the Commissioner may be provided to the CSS where such information is required by the CSS in connection with the collection of statistics in carrying out the provisions of the Statistics Act, 1976. It is also proposed that a further subsection be inserted to provide that the Chief of the CSS and any person acting under the direction and control of such Chief, shall not disclose to any person any information so supplied by the Commissioner other than in the exercise of his or her powers or performance of his or her duties to publish statistics in any anonymous form.

CLAUSE 22

Income Tax: Normal tax rebates: Amendment of section 6 of the Income Tax Act, 1962

This *clause* increases the primary rebate from R3 215 to R3 515, and the rebate in respect of persons over 65 years from R2 500 to R2 660.

CLAUSE 23

Income Tax: When income is deemed to have accrued or to have been received: Amendment of section 7 of the Income Tax Act, 1962

This amendment is consequential upon the deletion of paragraph *(c)* of the definition of “benefit fund” in section 1 of the Income Tax Act, 1962. This clause will come into operation on 1 January 1999 and shall apply in respect of years of assessment commencing on or after that date.

CLAUSE 24

Income Tax: Certain amounts to be included in income or taxable income: Amendment of section 8 of the Income Tax Act, 1962

Section 8(1)*(b)*(ii)*(cc)* of the Act provides that where the recipient of a travelling allowance interchangeably uses more than one vehicle for business purposes and one or more of such vehicles were not used primarily for business purposes, the provisions pertaining to the 14 000 deemed private kilometres and 32 000 total kilometres shall apply separately to each vehicle which was not used primarily for business purposes. As it is difficult in practice to determine the business usage of a number of vehicles and whether a specific vehicle is used primarily for business purposes or not, it is proposed that the deemed private kilometres test be applied separately to each vehicle in respect of which the taxpayer has not kept accurate records of business travel.

CLAUSE 25

Income Tax: Circumstances in which amounts deemed to have accrued from sources within the Republic: Amendment of section 9 of the Income Tax Act, 1962

Subclause (1)(a): This *subclause* deletes the reference to the Railway Administration which no longer exists.

Subclause (1)(b): The Katz Commission recommended in its Fifth Interim Report that specific rules with regard to the primary source of interest be introduced. The Income Tax Act, 1962, at present does not contain any statutory definition of the primary source of interest. The general rule was laid down by the court in *CIR v Lever Brothers and Another 1946 AD 441*, in which case it was held that the source of interest is *inter alia* the location where the capital is made available. The Minister of Finance announced in his Budget Review this year that rules relating to the source of interest are to be introduced to provide that the source of interest shall be where the capital or credit in respect of which the interest is payable, is utilised or applied. This amendment gives effect to this proposal.

Subclause (1)(b) provides further that the place of utilisation or application of the funds shall, unless the contrary is proved be deemed to be, in the case where such funds are utilised or such credit is applied by?

- a natural person, the place where such person is ordinarily resident; or
- a person other than a natural person, its place of effective management.

This amendments effected by this clause shall be deemed to have come into operation on 1 July 1998 and shall apply in respect of any interest received or accrued on or after that date.

CLAUSE 26

Income Tax: Circumstances in which certain amounts received or accrued in relation to disposal of listed shares are deemed to be of capital nature: Amendment of section 9B of the Income Tax Act, 1962

The amendment is of a textual nature and is consequential upon the amendment of section 22(8) of the Income Tax Act, 1962, by section 12 of the Income Tax Act, 1996 (Act No. 36 of 1996).

CLAUSE 27

Income Tax: Taxation of investment income from foreign sources: Amendment of section 9C of the Income Tax Act, 1962

Subclause (1)(a): Section 9C of the Act deems investment income received by or accrued to a resident from a foreign country to be from a source in the Republic. However, where the exchange control regulations of any country provide that any portion or all of the income from capital invested in such country is blocked and cannot be remitted to South Africa, the resident would be in the inequitable position of having to pay South African tax on foreign income which he or she is not able to access for this purpose. It is, therefore, proposed that section 9C be amended to provide that where such investment income cannot be remitted to the Republic as a result of such exchange control restrictions, the investment income will be deemed to be received or accrued in the year in which it may be remitted to the Republic. Any expenses will, therefore, also only be allowable in such later year of assessment.

Subclause (1)(b): Subsection (3) excludes from the provisions of section 9C any investment income which arises from and is effectively connected to the business activities of a substantive business enterprise conducted by the resident through a permanent establishment in a foreign country. Although it is implied, the Act does not specifically state that it should be the permanent establishment of the resident. This subclause therefore, amends subsection (3) to clarify any uncertainty in this regard.

The amendments effected by this clause shall be deemed to have come into operation on 1 July 1997.

CLAUSE 28

Income Tax: Investment income of controlled foreign entities and investment income arising from donations, settlements or other dispositions: Amendment of section 9D of the Income Tax Act, 1962

Subclause (1)(a): Section 9D(4) of the Act provides that where by reason of or in consequence of any donation, settlement or other disposition made by any resident, investment income is received or accrued to any person?

- who is not a resident; or
- who is a resident and to whom the provisions of section 7(3) to (7) would have applied had the investment income been received or accrued from a source within the Republic,

the resident who made the donation, settlement or other disposition shall be taxable on such investment income. Section 7(3) to (7) should, however, apply to the investment income and not the recipient and it is proposed that the section be amended to rectify the anomaly.

Subclause (1)(b): Where the exchange control regulations of any country from where income is deemed to have been derived provide that all or any portion of the investment income from capital invested in such country is blocked and cannot be remitted to South Africa, the resident would be in the inequitable position of having to pay South African tax on foreign income which he is not able to access for this purpose. It is, therefore, proposed that section 9D be amended to provide that where such investment income cannot be remitted to the Republic as a result of such exchange control restrictions, the investment income will be included in the income of the resident in the year in which it may be remitted to the Republic. Any expenses will, therefore, effectively only be allowed in such later year.

Subclause (1)(c): Section 9D(8)*(b)* regulates the carry forward of the amount whereby deductions and allowances exceed investment income to the immediately succeeding year of assessment. The present wording may create the impression that such amount may only be carried forward to the immediately succeeding year of assessment and that the loss would be allowable only in that immediately succeeding year for set-off. In order to remove any uncertainty in this regard, it is, therefore, proposed that subsection (8) be amended to provide that the amount by which the deductions exceed the investment income shall be deemed to be a deduction or allowance which may be made in the determination of the taxable income of the resident in the following year of assessment and, if not utilised, may be carried forward to subsequent years.

Subclause (1)(d): Section 9D(9)*(a)* provides for an exclusion from the provisions of section 9D where the foreign tax payable on the proportional amount of the investment income to be included in terms of section 9D is more than 85 per cent of the South African normal tax in respect of that proportional amount. For purposes of the determination of the tax payable in the Republic on the proportional amount of investment income, the ratio which the proportional amount bears to the total income of the resident is applied in terms of subsection (9)*(a)*. The ratio which should be applied is the ratio which the taxable income attributable to the inclusion of the proportional amount bears to the total taxable income of the resident. This will result in the application of the same principle contained in section 6*quat*, but will require the calculation of taxable income in respect of the investment income in order to determine whether the 85 per cent rule applies. It is proposed that subsection (9)*(a)* be amended to achieve this.

Subclause (1)(e): Section 9D(9)*(b)* provides that the provisions of section 9D shall not apply where the investment income arises from and is effectively connected to the business activities of a substantive business enterprise conducted through a permanent establishment in a foreign country. Although it is implied, it does not specifically state that it should be the substantive business enterprise of the controlled foreign entity. This *subclause* therefore amends subsection (9)*(b)* to clarify any uncertainty in this regard.

Subclauses (1)(f) to (h): Where a royalty or similar payment as contemplated in section 9(1)*(b) and* (b*A*) is received by or has accrued to a controlled foreign entity, it is deemed to accrue from a source within the Republic and the controlled foreign entity is effectively taxed on 30 per cent of such amount in terms of section 35. The person liable to pay such amount is obliged to withhold and pay 12 per cent of such amount to the Commissioner. However, the same amount is included in the income of a resident where such person has a participation right in relation to the controlled foreign entity. As the rebates contained in section 6*quat* only apply in respect of foreign taxes paid, the resident will not, in terms of that section be entitled to a rebate of South African income tax withheld or which is payable by the controlled foreign entity in respect of the royalty or similar payment. It is proposed that section 9D(9) be amended to provide that section 9D would not apply in respect of investment income to which the provisions of section 9(1)*(b)* and *(b*A*)* applies.

It is, furthermore, proposed that the provisions of section 9D shall not apply in respect of any other investment income which is included in the taxable income of the controlled foreign entity in the Republic. This proposed amendment is consequential upon the proposed introduction of section 9(6) into the Income Tax Act, 1962, to avoid the possibility that tax is payable in the Republic by both the controlled foreign entity and the resident on the same investment income.

Subclauses (1)(a), (b), (c), (e), (f), (g) and *(h)* shall be deemed to have come into operation on 1 July 1997. *Subclause (1)(d)* shall be deemed to have come into operation on 1 July 1998 and shall apply in respect of years of assessment commencing on or after that date.

CLAUSE 29

Income Tax: Exemptions: Amendment of section 10 of the Income Tax Act, 1962

Subclause (1)(a): Section 10(1)*(f)* of the Act exempts from tax the receipts and accruals of all religious, charitable and educational institutions of a public character, whether or not supported wholly or partly by grants from public revenue. In terms of the current wording of this section, the receipts and accruals of foreign institutions that carry on religious, charitable and educational activities outside the Republic, may be exempt from income tax regardless of the type of activities carried on in the Republic. It is proposed that section 10(1)*(f)* be amended to limit the exemption to the receipts and accruals of any such institutions which carry on religious, charitable and educational activities in the Republic. This amendment shall be deemed to have come into operation on 11 March 1998.

Subclause (1)(b): The Social Pensions Act, 1973, was repealed and replaced by the Social Assistance Act, 1992. This *subclause* amends section 10(1)*(g*A*)* to refer to the new Act.

Subclause (1)(c): The Minister of Finance announced in his Budget Review this year that the exemption from income tax in respect of The South African Gas Distribution Corporation Limited would be withdrawn with effect from 26 June 1998. This amendment gives effect to this proposal.

Subclause (1)(d): The receipts and accruals of any company which qualifies for exemption under the provisions of section 2 of the Company Tax Amendment Decree, 1994 (Decree No. 2 of 1994 of Ciskei) are exempt from income tax. This decree came into operation in 1994 and granted exemption to certain qualifying companies. The Government at the time accepted the decree as akin to an agreement between the former government of Ciskei and the qualifying companies which should be honoured until the period of the exemption expires.

This exemption has up to now been contained in the annual Schedule to the Bill which fixes the rates of tax for income tax purposes. As the decree provides for an exemption and is not a zero rate for tax purposes, it is now included as a specific exemption in section 10(1)*(t*A*)* of the Income Tax Act, 1962. This amendment is deemed to have come into operation on 1 April 1998.

Subclause (1)(e): The deletion of section 10(1)*(w)* is consequential upon the proposed introduction of section 9(6) into the Income Tax Act, 1962. This amendment is deemed to have come into operation on 1 July 1998.

CLAUSE 30

Income Tax: General deductions allowed in determination of taxable income: Amendment of section 11 of the Income Tax Act, 1962

Subclause (1)(a): Deductions in respect of contributions to public sector retirement funds are not limited for tax purposes, whereas contributions to private sector retirement funds are limited to the greater of R1 750 or 7,5 per cent of the remuneration of the contributing taxpayer. Members of municipal retirement funds are, however, paying bonuses, leave gratuities and other lump sum awards into their municipal retirement funds. In doing so, large tax deductions are claimed while the proceeds of such deposits, when distributed by the public sector retirement fund, will in many cases be virtually tax free, if the major part of the employee's membership relates to service prior to 1 March 1998. It is proposed that section 11*(k)* be amended to do away with the unlimited deduction which is available for members of public sector retirement funds and to bring the deduction in respect of contributions to public sector retirement funds in line with the deduction limit applicable to private sector retirement funds. This proposal was also recommended by the Katz Commission in its Third Interim Report.

Subclause (1)(b): The amendment to section 11*(l)* gives effect to the Minister of Finance's proposal that contributions to friendly societies should no longer be tax deductible.

The amendments effected by this clause will come into operation on 1 March 1999.

CLAUSE 31

Income Tax: Deduction of compensation for railway operating losses: Amendment of section 11sex of the Income Tax Act, 1962

This *clause* amends section 11*sex* by substituting the reference to the Railway Administration, which no longer exists, with a reference to Transnet Limited which has, in terms of the Legal Succession to The South African Transport Services Act, 1989 (Act No. 9 of 1989), taken over the functions of the Railway Administration with effect from 1 April 1990.

CLAUSE 32

Income Tax: Deduction of expenses incurred by medical practitioners and dentists on courses or congresses outside the Republic: Deletion of section 16A of the Income Tax Act, 1962

Section 16A was inserted in the Act for the purpose of granting a deduction to medical practitioners and dentists in respect of expenditure incurred by them in attending certain overseas courses. This confers preferential treatment on medical practitioners and dentists and numerous requests have been received to extend the provisions of section 16A to other professions. As section 16A in its present form is regarded to be unconstitutional, it is proposed that it be repealed.

CLAUSE 33

Income Tax: Deductions and set-off from income derived from dividends: Amendment of section 19 of the Income Tax Act, 1962

Any amount distributed by a unit portfolio referred to in paragraph *(e)* of the definition of "company" in section 1 of the Income Tax Act, 1962, is a dividend for income tax purposes. Such dividends may be distributed by such unit portfolio out of various types of income derived by the unit portfolio. Generally dividends received by any person are exempt from income tax. There are, however, a number of exceptions to this rule, for example in the case of dividends distributed by such a unit portfolio which is a company, out of interest which is exempt in the hands of such unit portfolio.

Dividends distributed by such a unit portfolio constituting a company, out of dividends received from a unit portfolio in a unit trust scheme in property shares, where such dividends were deductible from the income of the property company distributing such dividends, are also excluded from the dividend exemption contained in section 10(1)(k). The R2 000 exemption provided for in section 10(1)*(i)*(xvi) is, however, not applicable to such dividends. In order to also allow such dividends to qualify for the R2 000 exemption, it is proposed that section 19(5B) be amended to provide that a dividend distributed by a unit portfolio constituting a company out of amounts received by or accrued to it by way of dividends referred to in section 11*(s)* of the Income Tax Act, 1962, be deemed to be income derived by the unit holder otherwise than in the form of dividends.

This will bring the tax treatment of such dividends in line with the tax treatment of a dividend received by a unit holder directly from a unit portfolio in property shares.

CLAUSE 34

Income Tax: Limitation of allowances granted to lessors of certain assets: Amendment of section 23A of the Income Tax Act, 1962

Paragraph *(b)* of the present definition of "affected asset" in section 23A of the Act refers to any machinery, plant, implement, utensil or article. Although this reference has always been interpreted by the Commissioner to include ships and aircraft, this *clause* proposes an amendment to the paragraph to include a reference to ships and aircraft to remove any uncertainty in this regard.

CLAUSE 35

Income Tax: Gains or losses on foreign exchange transactions: Amendment of section 24I of the Income Tax Act, 1962

Subclause (1)(a): The definition of "affected forward exchange contract" was inserted to address a situation where a taxpayer takes out cover by way of a forward exchange contract (FEC) to serve as a hedge for future obligations in a foreign currency. Although agreements from which such obligations stemmed, had already been entered into, a loan, advance or debt had not yet arisen. Consequently, an undesirable situation arises in respect of such an FEC as it has to be revalued at year end by applying a market related forward rate. As a result of such revaluation an exchange difference would normally have arisen without a compensating exchange difference in relation to an underlying loan, advance or debt. In order to address the situation the aforementioned definition was introduced and allows a taxpayer to utilise the forward rate specified in such a FEC at year end, where the FEC is to serve as a hedge in respect of a loan, advance or debt, which?

- is to be utilised by that taxpayer to acquire any asset or to finance any expense; or
- will arise from the sale of any asset or the supply of any services,

in the ordinary course of his trade in terms of an agreement entered into by that taxpayer.

Similar difficulties may, however, arise in the case of a foreign currency option contract (FCOC) used to hedge future obligations. In order to effect the same tax treatment in respect of a FCOC used to hedge a loan, advance or debt which will arise in a future year of assessment in terms of an agreement entered into, as in the case of an affected FEC, it is proposed to introduce the concept of an affected contract. An affected contract will incorporate the concept of the current affected FEC as well as a FCOC used to hedge a loan, advance or debt in the circumstances described above.

Subclause (1)(b): These amendments are consequential upon the introduction of the concept of affected contract in terms of *subclause (1)(a)*.

Subclause (1)(c): In order to bring the tax treatment of an affected FCOC in line with the tax treatment of an affected FEC on the date of translation thereof, the rate which constitutes the ruling exchange rate on the date of translation will be determined by dividing the premium or consideration contemplated in section 24I(4)(a) by the foreign currency amount as specified in such contract. No taxable income will, therefore, arise in respect of a FCOC which is an affected contract on date of translation.

Example

The taxpayer enters into a financing agreement on 9 November 1998 in terms of which a loan will be provided to the taxpayer on 1 February 1999 and in terms of which an amount of $70 000 interest incurred in respect of the loan will be payable on 30 June 1999. The taxpayer acquires a foreign currency option contract on 9 November 1998 in terms of which he obtains the right to purchase $70 000 on 30 June 1999 at a rate (the option strike rate) of R5.1/$1. The acquisition price of the option contract amounts to R5 000 and is paid on 9 November 1998. The tax year ends on 31 December:

YEAR END 31/12/1998

Ruling exchange rates:

Transaction date (09/11/1998)	0.00000
Date of translation (31/12/1998) *(See calculation)*	0.07143

Exchange difference:

[(0.0000 - 0.07143) x $70 000]	R5 000 gain

Note:

The consideration of R5 000 is deductible from income in terms of section 24I(4)(a) in this year of assessment.

NET TAX RESULT	R0
Exchange difference	*gain of R5 000*
Consideration paid	*deduction of R5 000*

Calculation:

Consideration paid	*R5 000*
Ruling exchange rate (R5 000/$70 000)	*0.07143*

Note:
The actual market value of the option on 31 December 1998 is not relevant for purposes of the calculation of the exchange difference as the FCOC is an affected contract.

Subclause (1)(d): Section 24I(4) *inter alia* provides that a premium or like consideration paid or payable or received or receivable in respect of the entering into of a FCOC by a taxpayer in the course of the taxpayer's trade, may be deducted from the income of the holder of the option contract and must be included in the income of the writer of such a contract.

Where the period from the date a FCOC is entered into until the date of realisation is a lengthy period, for example a number of years, the market value of the contract may especially during its earlier years differ considerably from the premium or consideration fixed at the time of entering into, or acquisition of, the contract. During the term of the contract, exchange differences arise which may create unacceptable tax deferral opportunities in the absence of the payment of any amounts. In order to address this anomaly it is proposed to limit the inclusion in, or deduction from, the income of a taxpayer in terms of section 24I(4)(a) to amounts actually received or paid, as the case may be. The amendments effected to section 24I in terms of this clause (other than *subclause (1)(d)*) shall come into operation on the date of promulgation of the Act. *Subclause (1)(d)* shall come into operation on the date of tabling of the Bill.

CLAUSE 36

Income Tax: Income of trusts and beneficiaries of trust: Amendment of section 25B of the Income Tax Act, 1962

The Minister of Finance in his Budget Review this year announced that trusts have become widely used?

- for income splitting, thereby reducing the marginal rate at which the income is ultimately taxed; and
- for chanelling losses, incurred as a result of the deduction of expenditure and allowances, via trusts to their beneficiaries, who then set off these losses against their income.

As far as the splitting of income is concerned, the Minister proposed a revised rate structure for trusts. This aspect is dealt with in *clause 18.*

In relation to the utilisation of losses for tax purposes, it is apparent that this mechanism is quite popular in the structuring of financing transactions. Notwithstanding the fact that a beneficiary generally enjoys limited personal liability with regard to the debts of a trust, the existing provisions of section 25B grant such a beneficiary the advantage of the loss without the risk of being held liable for payment by a creditor of the trust.

It is, therefore, proposed that subsection (4) be inserted in section 25B to provide that the deductions and allowances which are deemed to be deductions and allowances of the beneficiary in terms of subsection (3), be limited to the income of the beneficiary derived from the trust during the year of assessment.

Where the aggregate of such deductions and allowances exceeds such income of the beneficiary, subsection (5) provides that such excess may be set off against the taxable income of the trust during the relevant year of assessment, provided that such excess shall not exceed the taxable income of the trust, as calculated before allowing the above-mentioned set-off.

Finally, subsection (6) specifies that where the aggregate of the deductions and allowances contemplated in subsection (4) exceeds both the income contemplated in subsection (4) of the beneficiary and the taxable income of the trust contemplated in subsection (5), such excess may be set off against the income of the beneficiary which is derived from the trust in the immediately succeeding year of assessment. The effect of the application of the provisions of subsection (6) is that the excess carried forward may then be allowed as a deduction as envisaged in subsection (3), (4) and (5) during the succeeding year.

The amendments to section 25B give effect to this proposal and will apply in respect of all new trusts created on or after 11 March 1998 and to existing trusts with effect from years of assessment commencing on or after 1 January 1999.

CLAUSE 37

Income Tax: Determination of taxable income of certain persons in respect of international agreements: Amendment of section 31 of the Income Tax Act, 1962

Section 31 of the Act was inserted in 1995 thereby incorporating transfer pricing and thin capitalisation provisions into the Act in order to neutralise tax benefits arising from transfer pricing and thin capitalisation practices.

Section 31(2) applies where goods or services are supplied in terms of an international agreement, i.e. between a resident and a non-resident. These provisions do not, therefore, apply where the agreement for the supply of goods or services is entered into between two non-residents, and where such goods or services will be utilised in the business activities of one of the non-residents carried on through a branch in the Republic. In these circumstances, the Commissioner would not be able to adjust the consideration for such goods or services to reflect an arm's length price if the consideration in terms of the agreement does not reflect the price that such goods or services might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length. This clause proposes an amendment to section 31 to include such transactions.

CLAUSE 38

Income Tax: Tax Holiday Scheme for certain companies: Amendment of section 37H of the Income Tax Act, 1962

This amendment is of a textual nature.

CLAUSE 39

Income Tax: Exemptions: Amendment of section 56 of the Income Tax Act, 1962

Government's Land Reform Programme, is contained in the White Paper on South African Land Policy which was released in 1997. Increasingly, individuals and companies are considering the possibility of donating land to the underprivileged in terms of the redistribution and other land reform sub-programmes.

In terms of the provisions of the Income Tax Act, 1962, such donations would be subject to the payment of donations tax. In order to encourage compliance with the Government's Land Reform Programme, it is proposed that an exemption from donations tax be introduced where donations of land are made in these circumstances. The project in terms of which the donation is made would, however, require to be approved by the Minister of Land Affairs on such conditions as such Minister, in consultation with the Commissioner for SARS, may prescribe. This amendment is deemed to have come into operation on 27 April 1994.

CLAUSE 40

Income Tax: Certain amounts distributed deemed to be dividends: Amendment of section 64C of the Income Tax Act, 1962

Section 64C deems certain amounts distributed by a company to be a dividend for the purposes of secondary tax on companies.

Section 64C(4)*(d)* excludes from the application of that section any loan granted in respect of which a market-related rate of interest is payable by the recipient (usually the shareholder). It is, however, sometimes difficult to determine a market-related rate and it is, therefore, proposed that the rate of interest be linked to the "official rate" contained in the Seventh Schedule where the loan is denominated in the currency of the Republic. Where the loan is denominated in a foreign currency, the requirement of a market-related interest rate will be maintained.

CLAUSE 41

Income Tax: Duty to furnish returns as to employees, their earnings and other matters: Amendment of section 69 of the Income Tax Act, 1962

Section 70 of the Income Tax Act, 1962, was amended in 1997 by the addition of a requirement to ensure that companies paying interest to any person must furnish, in addition to the name and address, also the identification number of any natural person or the registration number in the case of an insolvent or deceased estate, company, trust or any other form of corporate entity to whom the interest is paid. Section 69 also places a duty on a person to furnish information and returns, if required by the Commissioner, and it is proposed that the provisions of this section also be extended to include the names and addresses and, in the case of natural persons, the identification number or, in the case of any person other than a natural person, the registration number.

CLAUSE 42

Income Tax: Publication of names of offenders: Insertion of section 75A in the Income Tax Act, 1962

The Commissioner has the power to publish in the Government *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Value-Added Tax Act, 1991. The Minister of Finance announced in his Budget Review this year that provisions providing for the publication of the names of tax defaulters who had been convicted of any offence in terms of any of the other tax laws administered by the Commissioner be included in all such laws. This *clause* gives effect to this proposal.

This amendment is deemed to have come into operation on 11 March 1998 and shall apply in respect of every person convicted of an offence on or after that date.

CLAUSE 43

Income Tax: Persons by whom normal tax payable: Amendment of section 90 of the Income Tax Act, 1962

This *clause* deletes an obsolete provision.

CLAUSE 44

Income Tax: Refunds: Amendment of section 102 of the Income Tax Act, 1962

Section 44 of the Value-Added Tax (VAT) Act, 1991, provides that the Commissioner may set off any amount which has become refundable to a vendor in terms of the VAT Act against any tax, additional tax, penalty or interest payable under that Act or any tax, interest or penalty due by that vendor under any Act of Parliament administered by the Commissioner. The Income Tax Act does not contain a similar provision and it is proposed that section 102, which provides for refunds, be amended to introduce a similar provision. Any amount refundable to a person may, therefore, be set off against any amount of tax, additional tax, duty, levy, charge, interest or penalty not timeously paid by such person in terms of any other Act administered by the Commissioner.

CLAUSE 45

Income Tax: Transactions, operations or schemes for purposes of avoiding or postponing liability for or reducing amounts of taxes on income: Amendment of section 103 of the Income Tax Act, 1962

Section 103(2) of the Act provides that where any agreement affecting a company or any change in the shareholding in any company or in the members' interest in a close corporation, has been entered into of effected solely or mainly for the purpose of utilising any assessed loss in order to avoid liability for the payment of tax, the Commissioner may disallow the set-off of any such assessed loss against income received or accrued as a result of such agreement or change.

This clause proposes that the provisions of section 103(2) be extended to also incorporate trusts, thereby preventing the utilisation of any loss in a trust solely or mainly for the purposes of avoiding tax as envisaged in the circumstances set out in section 103(2). This amendment is consequential upon the amendment to section 25B.

This amendment shall be deemed to have come into operation on the date of promulgation of the Act and will apply in respect of any agreement affecting any trust entered into on or after that date, or any change in trustees or beneficiaries effected on or after that date.

CLAUSE 46

Income Tax: Regulations: Amendment of section 107 of the Income Tax Act, 1962

Section 107(1)*(c)* of the Act empowers the Minister of Finance to issue regulations prescribing the nature of the accounts to be rendered by any taxpayer in support of any returns rendered. It is proposed that this provision be extended to provide that the Minister may also prescribe the content of such accounts.

CLAUSE 47 TO 51

Income Tax: Computation of gross income derived by way of lump sum benefits from Pension, Provident and Retirement Annuity Funds: Amendment of the Second Schedule to the Income Tax Act

Subclause 47(1)(a): Formula C was introduced into paragraph 1 of the Second Schedule to the Income Tax Act, 1962, in 1997 to determine the taxable portion of a lump sum benefit (i.e the portion relating to employment or membership after 1 March 1998) derived by a member from a public sector pension fund. The wording of the formula, however, requires to be amended as follows?

- Symbol "B" of the formula represents the number of completed years of employment of the taxpayer after 1 March 1998 and includes previous or other periods of service approved as pensionable service in terms of the rules of the fund after 1 March 1998. This ensures that any pensionable service "bought back" after 1 March 1998 would be taxable. The effect thereof is, unfortunately, that where a member of a public sector fund transfers his or her interest to another public sector fund after 1 March 1998, the vested rights in respect of employment prior to 1 March 1998 so transferred would in effect be approved after that date and such interest would thus become taxable. It is, therefore, proposed that such vested rights so transferred to another public sector fund remain protected by excluding from symbol "B", years of employment representing such a benefit so transferred after 1 March 1998.

- Where the rules of the fund provide that a member's benefits are not calculated in accordance with such member's period of employment, symbol "B" provides that the number of completed years after 1 March 1998, during which the taxpayer had been a member of the fund, will be taken into account. This, however, creates a problem where a member of a public sector fund transfers after 1 March 1998, to a second public sector fund. In terms of the current provisions only the years of membership of the second public sector fund would be taken into account in symbols "B" and "C", thereby including the full amount of the lump sum in the result after applying "formula C". The vested rights of the member would, in these instances, not be protected. It is proposed, therefore, that in determining the taxable portion of the lump sum, the membership in all such public sector funds of which the member had before retirement continuously been a member, be taken into account. This would have the effect of taxing only the portion of the lump sum benefit which relates to membership of all such public sector funds after 1 March 1998.

- Symbols "B" and "C" of "formula C" provide for the number of years of membership in the fund to be taken into account in circumstances where the rules do not provide for benefits based on the number of years of pensionable service. The possibility exists that these provisions can, on the other hand, be abused by way of a transfer of benefits within a year before retirement to a fund which provides benefits based on the number of years of membership, in which case the taxable amount would be nil. This can be addressed by an amendment to "formula C" to include in symbol "B", the total number of years of membership of all public sector retirement funds from 1 March 1998 until the date of retirement. It is, therefore, recommended that symbol "B" be amended to include the total number of years of membership of all such funds from 1 March 1998 until the date of retirement.

A proviso to paragraph 2A of the Second Schedule to the Act is, furthermore, inserted to provide that "formula C" shall only apply in respect of a public sector fund, where the person was a member of such fund on 1 March 1998 and continued to be a member of any such fund until the date of accrual of the lump sum benefit.

Subclauses 47(1)(b): The definition of "lump sum benefit" in paragraph 1 of the Second Schedule to the Act refers to an amount payable by any pension fund, provident fund or retirement annuity fund.

There are, however, instances where lump sum benefits are received from an entity other than the fund. This would be, for example, where the fund purchases the benefit from an insurance company and such insurance company eventually pays the benefit to the member. This *subclause* amends the definition of "lump sum benefit" to include any lump sum benefit received or accrued to any person in consequence of his membership or past membership of the fund.

Subclauses 47(1)(c) and (d): These amendments are of a textual nature.

Clause 48: Paragraph 2 of the Second Schedule to the Act provides that the amount to be included in the gross income of a person shall be the amounts accrued to such person by way of lump sum benefits from any pension funds, provident funds or retirement annuity funds, less the deductions permitted under the provisions of the

Schedule. A similar amendment is proposed as the amendment to the definition of "lump sum benefit" in *subclause 47(1)(b)*.

Clause 49: See amendments to "formula 'C' in *clause 47(1)(a).*

Clause 50: Paragraph 3 of the Second Schedule to the Act provides that any lump sum benefit which becomes recoverable in consequence of or following upon the death of a member of a pension fund, provident fund or retirement fund shall be deemed to be a lump sum benefit which accrued to such member immediately prior to his death. A similar amendment to that contained in *clause 47(1)(b)* is proposed in respect of this paragraph.

Clause 51: With effect from 1 March 1998, that portion of any lump sum benefit derived from public sector retirement funds which relates to periods of employment after that date, will be included in a taxpayer's income by virtue of the provisions of the Second Schedule. It is proposed that paragraph 6 of the Second Schedule to the Act be amended to also afford a deduction in the case of a transfer from a public sector fund to another pension fund or retirement annuity fund. However, in terms of "formula C" only such portion of the lump sum benefit which relates to service or membership after 1 March 1998 will be included in the taxable income of the taxpayer. It is, therefore, proposed that the deduction to be allowed under paragraph 6 be limited to the amount of the lump sum benefit determined in accordance with "formula C".

CLAUSE 52

Income Tax: Definitions: Amendment of paragraph 1 of the Fourth Schedule to the Income Tax Act

Subclause (1)(a): A labour broker is defined in the Fourth Schedule to the Act as "any person who conducts or carries on a labour broker's office as defined in section 1 of the Labour Relations Act, 1956 (Act No. 28 of 1956), whether or not such labour broker's office is registered under section 63 of that Act". The Labour Relations Act, 1956, was repealed by the Labour Relations Act, 1995, and it is proposed that the Income Tax Act should contain a definition of "labour broker" without reference to another Act. This subclause gives effect to such proposal.

Subclause (1)(b): Where an allowance is paid to employees to compensate them for the official or business use of their private motor vehicles, employees' tax is deducted monthly from 40 per cent of the allowance. The Minister of Finance in his Budget Review this year announced that the portion of the travelling allowance from which employees' tax is deducted be raised to 50 per cent with effect from 1 April 1998. This amendment gives effect to such proposal.

CLAUSE 53

Income Tax: Standard Income Tax on Employees: Amendment of paragraph 11B of the Fourth Schedule to the Income Tax Act

This amendment is consequential upon the deletion of section 16A of the Income Tax Act, 1962.

CLAUSE 54

Income Tax: Taxable benefits: Amendment of paragraph 2 of the Seventh Schedule to the Income Tax Act

The Minister of Finance announced in his Budget Review this year that the amount by which the employer's contribution to a medical scheme on behalf of an employee exceeds two-thirds of the total contribution in relation to the employee, will be taxed as a fringe benefit. Paragraphs 2*(i)* and 12A are, therefore, introduced into the Seventh Schedule to the Act to give effect to this proposal.

Where the contribution can, however, not be attributed to any specific employee, i.e. where the employer makes a lump sum payment to the fund in respect of all employees or a class of employees, the benefit is determined in accordance with a formula. This will have the effect that the lump sum so paid in respect of the employees will be apportioned equally amongst them. The Commissioner may, however, determine that the apportionment be made in any other manner where he is satisfied that the formula will not represent a fair apportionment. The benefit will, furthermore, not be regarded as a taxable benefit where the payment by the employer is made?

- on behalf of a pensioner;
- on behalf of the dependants of a pensioner after the death of the pensioner;
- on behalf of the dependents of a deceased employee, if the employee was in the employ of the employer on date of death.

This clause is deemed to have come into operation on 1 April 1998.

CLAUSE 55

Income Tax: Residential Accommodation: Amendment of paragraph 9 of the Seventh Schedule to the Income Tax Act

Last year it was announced in the Budget Review that there is widespread abuse of the provisions relating to the formula-based determination of the taxable value of residential accommodation provided by employers to employees. Two types of schemes were identified?

- aggressive tax avoidance schemes in terms of which an employee retains an interest in the accommodation, for example, via a connected person, but the accommodation is let to the employer to be provided to the employee as a fringe benefit; and
- salary sacrifice schemes, in terms of which the employer pays the monthly rental in respect of the accommodation utilised by the employee, thereby reducing the taxable income of the employee.

Certain measures to combat these schemes were proposed last year to tax the employee on the cost to the employer where such accommodation is not owned by the employer or associated institution in relation to the employer. It appeared, however, that these measures would have had a much wider impact than was first envisaged, especially on the lower income groups. After deliberation with the Portfolio Committee on Finance, it was agreed that the only measures that were to be introduced in 1997, were the measures relating to the aggressive tax avoidance schemes and the increase of the percentages contained in the formula by one percentage point with effect from 1 March 1998. It was, however, announced that the salary sacrifice schemes would be addressed in the 1998 legislation.

The matter was further investigated by a working group and after consideration of various options in this regard, it is proposed that last year's proposal be implemented whereby the taxable value of residential accommodation which is not owned by the employer or associated institution in relation to the employer, be the greater of the value determined in accordance with the formula, or an amount equal to the cost to the employer (i.e. rentals paid and other expenses defrayed in order to provide such accommodation). The valuation based on the cost to the employer will, however, not apply where ?

- it is customary for an employer in the industry concerned to provide free or subsidised accommodation to its employees;
- it is necessary for the particular employer, having regard to the kind of employment, to provide free or subsidised accommodation?
  - ♦ for the proper performance of the duties of the employee;
  - ♦ as a result of the frequent movement of employees; or
  - ♦ due to the lack of employer-owned accommodation; and
- the benefit is provided for *bona fide* business purposes, other than the obtaining of a tax benefit.

When all three of the criteria have been met, the formula-based value will be included in the taxable income of the employee, even though the accommodation is not owned by the employer.

This clause gives effect to this proposal and will come into operation on 1 March 1999.

In terms of *subclause (1)(b)* it is, furthermore, proposed that the percentages which are applied to the formula determination of the taxable value of the housing benefit, be increased by one percentage point from 16, 17 and 18 per cent to 17, 18 and 19 per cent, respectively, with effect from 1 March 1999. The reason therefor being that the formula in most cases produces a result which is lower than the actual market value. A gradual increase in the percentages applicable to the formula will have the effect of bringing the formula-based taxable value closer to the market related values.

CLAUSE 56

Income Tax: Contributions to a Benefit Fund: Insertion of paragraph 12A in the Seventh Schedule to the Income Tax Act, 1962

See in this regard the explanation in respect of *clause 54.*

CLAUSE 57

Customs and Excise: Amendment of section 1 of the Customs and Excise Act, 1964

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

CLAUSE 58

Customs and Excise: Amendment of section 4 of the Customs and Excise Act, 1964

The Minister of Finance announced in his Budget Review this year that, following discussions with the Central Statistical Services (CSS), it is the intention to revise several secrecy provisions to provide the CSS with information needed for statistical purposes. *Subclauses (1)(a)* and *(c)* give effect to this proposal and make provision that information in the possession or custody of the Commissioner may be provided to the CSS where such information is required by the CSS in connection with the collection of statistics in carrying out the provisions of the Statistics Act, 1976. It is also proposed that a further subsection be inserted to provide that the Chief of the CSS and any person acting under the direction and control of such Chief, shall not disclose to any person any information so supplied by the Commissioner other than in the exercise of his or her powers or performance of his or her duties to publish statistics in any anonymous form.

The provisions of subsection (3A) of the Customs and Excise Act, 1964, have now been incorporated into the proposed new section 50(1) to be introduced into the Act by *clause 66* and the subsection is, therefore, deleted by *subclause (1)(b)*.

CLAUSE 59

Customs and Excise: Amendment of section 20 of the Customs and Excise Act, 1964

This amendment is of a textual nature and is consequential upon the deletion of section 35(2) of the Customs and Excise Act, 1964.

CLAUSE 60

Customs and Excise: Amendment of section 34 of the Customs and Excise Act, 1964

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

CLAUSE 61

Customs and Excise: Amendment of section 37 of the Customs and Excise Act, 1964

This amendment is consequential upon the proposed insertion of section 37A in the Customs and Excise Act, 1964, by *clause 62*.

CLAUSE 62

Customs and Excise: Insertion of section 37A of the Customs and Excise Act, 1964

It is proposed that a new section 37A be introduced into the Customs and Excise Act, 1964.

It is estimated that the illegal use of illuminating paraffin (kerosene) in mixtures, which are then used as fuel in compression ignition engines, may result in an annual loss of more than R500 million.

The new section seeks to create measures to combat this problem of which the principal features are that?

- kerosene for uses other than fuel in engines will be marked;
- distribution will be subject to certain control procedures (issuing of invoices and keeping of records); and
- officers will monitor distribution and test contents of containers and tanks of vehicles.

In the event of dealing with goods in conflict with specified prohibitions or non-compliance with the duties imposed of keeping records, liability for duty is incurred, offences will be committed and goods, containers, engines or vehicles are liable to forfeiture (with regard to offences, see for example the draft amendment to section 80 (1) (o) in *clause 68*).

The main features of the new section are as follows?

- *Subclause (1)* requires that free goods as defined in that subsection must be stored in a customs and excise warehouse;
- In terms of *subclause (2)* marked goods must be marked in a customs and excise warehouse and any goods to which the provisions of subsection (1) apply are subject to the provisions of the Act relating to dutiable goods stored and removed from a customs and excise warehouse (paragraphs *(a)* and *(b)*). Paragraphs *(c), (d)* and *(e)* deal with other miscellaneous matters relating to marked goods;
- *Subclause (3)* requires that invoices must be issued on sale and disposal of marked goods in excess of quantities specified by rule. Such invoices must be kept, and books, accounts and documents completed and kept for such period as may be prescribed by rule;
- *Subclause (4)* specifies certain prohibitions in respect of marked goods and provides for liability for payment of duty on such marked goods, of an amount equal to treble the sum of the duty applicable to any distillate fuel, petrol, lubricity agent or unmarked goods (whichever yields the greater amount of duty), which?

    - are in possession or under control of the person who acts as so prohibited; or
    - if the Commissioner so determines, goods which were previously sold or under the control of such person, unless the contrary is proved within 30 days.

  Further, if different rates of duty on such fuel, petrol, agents or unmarked goods were in force during any such time, the highest rate is applicable. If any tank or container contains any marked goods mixed with distillate fuel, petrol or lubricity agent, the contents are regarded for the purposes of determining the duty payable as consisting entirely of unmarked goods. Provision is, furthermore, made for payment of duty if invoices are not issued or kept, or books, accounts and documents are not produced;
- *Subclause (5)* empowers an officer to take samples, to test them, to send them to a designated institution and to stop any vehicle. In terms of paragraph *(c)* the Commissioner may prescribe various matters relating to the testing of samples;
- *Subclause (6)* provides for the forfeiture of goods, any engine and a vehicle if dealt with contrary to the provisions of the Act (paragraph (a)). A report by the

designated person is regarded as correct unless the contrary is proved (paragraph (b));

- *Subclause (7)* provides for an indemnity;
- *Subclause (8)* provides for definitions for “engine” and “vehicle” for purposes of this section; and
- The section also contains, to a great extent, enabling provisions to enable the Commissioner to regulate various matters by the making of rules.

CLAUSE 63

Customs and Excise: Amendment of section 47 of the Customs and Excise Act, 1964

Subclauses (a) and (b): These amendments are of textual nature and are consequential upon the promulgation of the Constitution of the Republic of South Africa, 1996.

Subclause (c): The period within which an appeal must be prosecuted was amended in 1996 from 90 days to one year. This amendment brings section 47(9)(c) in line with section 47(9)(f).

CLAUSE 64

Customs and Excise: Amendment of section 48 of the Customs and Excise Act, 1964

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

CLAUSE 65

Customs and Excise: Amendment of section 49 of the Customs and Excise Act, 1964

This amendment provides for the conclusion of agreements by the National Executive in respect of rates of duty lower than the general rate of duty or free of duty. It also extends the scope of section 49 of the Act to any country and is not limited to Part 1 of Schedule No. 1. Provision is also made for the conclusion of agreements in respect of the exchange of information and the rendering of mutual and technical assistance between the Republic and other countries.

Furthermore, it is provided that the Commissioner may prescribe rules in order to comply with any provision of such agreements.

CLAUSE 66

Customs and Excise: Insertion of section 50 of the Customs and Excise Act, 1964

The proposed new section 50 of the Act incorporates the former provisions of section 4(3A) of the Act and provides for the rendering of mutual and technical assistance and the disclosure of information by the Commissioner in accordance with a convention or agreement.

CLAUSE 67

Customs and Excise: Insertion of section 76B and 76C in the Customs and Excise Act, 1964

This amendment limits the payment of refund claims to a period of two years prior to the date of determination of any duty. In terms of section 47(10) and 65(7) of the Customs and Excise Act, 1964, any liability arising from an underpayment on any goods also ceases after two years.

Refunds will, therefore, be limited to refunds in respect of goods entered for home consumption during a period of 2 years prior to?

- the date of the determination in terms of section 47(9)*(a)* of the Act; or
- the date of the amendment in terms of section 47(9)*(d)* of the Act; or
- the date of the withdrawal in terms of section 47(9)*(d)* of the Act,

whichever occurs last.

Section 44 of the Value-Added Tax (VAT) Act, 1991, provides that the Commissioner may set off any amount which has become refundable to a vendor in terms of the VAT Act against any tax, additional tax, penalty or interest payable under that Act or any tax, interest or penalty due by that vendor under any Act of Parliament administered by the Commissioner. The Customs and Excise Act, 1964, does not contain a similar provision and it is proposed that section 76C be inserted in the Act to introduce a similar provision. Any amount refundable to a person may, therefore, be set off against any amount of tax, additional tax, duty, levy, charge, interest or penalty not timeously paid by such person in terms of any other Act administered by the Commissioner.

CLAUSE 68

Customs and Excise: Amendment of section 80 of the Customs and Excise Act, 1964

Subclause (a): At present section 80(1)(h) of the Customs and Excise Act provides that any person who, without lawful excuse, brings into the Republic or has in his possession any blank or incomplete invoice or any bill head or similar document will be guilty of an offence. Such documents are used to defraud the South African Revenue Service and to evade the payment of duty. The amendment provides that the producer of such documents will also be guilty of an offence. The purpose of this amendment is to curb the amount of false documents presented to the South African Revenue Service.

Subclause (b): This amendment is consequential upon the introduction of section 37A(4)*(a)* in the Act and the amendment to section 113(2) of the Act.

CLAUSE 69

Customs and Excise: Insertion of section 86A in the Customs and Excise Act, 1964

The Commissioner has the power to publish in the Government *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Value-Added Tax Act, 1991. The Minister of Finance announced in his Budget Review this year that provisions providing for the publication of the names of tax defaulters who had been convicted of any offence in terms of any of the other tax laws administered by the Commissioner be included in all such laws. This *clause* gives effect to this proposal.

This amendment is deemed to have come into operation on 11 March 1998 and shall apply in respect of every person convicted of an offence on or after that date.

CLAUSE 70

Customs and Excise: Amendment of section 92 of the Customs and Excise Act, 1964

This clause in the first instance introduces an amendment of a textual nature which is consequential upon the promulgation of the Constitution of the Republic of South Africa, 1996.

The amendment to the proviso to section 92(1) of the Act is necessary because the existing provisions of the section are discriminatory in that the award is only available to certain employees of the South African Revenue Service and could lead to possible abuse within the organization. For these reasons, the granting of an award to any officer or employee of the South African Revenue Service is now excluded from the proviso.

This amendment will come into operation on a date fixed by the President by proclamation in the *Gazette* and no award to any officer or person employed by the South African Revenue Service shall be paid by the Commissioner after such date.

CLAUSE 71

Customs and Excise: Amendment of section 99 of the Customs and Excise Act, 1964

Section 99 regulates the liability of an agent for obligations imposed on such agent's principal. The amendment makes it clear that the Commissioner may, in circumstances where goods which are liable to forfeiture under the Act cannot readily be found, demand payment of an amount in lieu of such forfeiture from that agent. The payment of an amount in lieu of forfeiture is provided for in section 88(2)*(a)* of the Customs and Excise Act, 1964.

CLAUSE 72

Customs and Excise: Amendment of section 105 of the Customs and Excise Act, 1964

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

CLAUSE 73

Customs and Excise: Amendment of section 113 of the Customs and Excise Act, 1964

Subclause (a): The prohibition of the importation of unlawful reproductions is prohibited in section 23(2)(a) of the Copyright Act 1978 and section 113(1)*(g)* of the Act is consequently unnecessary.

Subclause (b): Section 113(2) of the Act refers to the importation of goods referred to in subsection (1) under a permit, certificate or other authority. All references in subsection (1) to goods imported under a permit, certificate or other authority have been deleted. This section will now apply to goods that purport to be imported under a permit, certificate or other authority in terms not only of the Customs and Excise Act, 1964, but also any other law.

CLAUSE 74

Customs and Excise: Amendment of section 120 of the Customs and Excise Act, 1964

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

CLAUSE 75

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 to the Act and the date of commencement thereof. Such amendments are reflected in Schedule 2 to this Bill and arise from the taxation proposals which were tabled by the Minister of Finance during his Budget Speech.

CLAUSE 76

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 1997 calendar year.

CLAUSE 77

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

In terms of section 1 of the Stamp Duties Act, 1968, “fixed deposit” is defined as a deposit of money for a definite period and includes a deposit of money for an indefinite period which is withdrawable after the expiration of a period of notice equal to at least 89 days. This definition causes economic distortions as stamp duty would be payable in respect of any fixed deposit, regardless of the period, as long as such period is fixed. It is, therefore, proposed that the definition of "fixed deposit" be amended to exclude a fixed deposit for a period of notice not exceeding 89 days from the payment of stamp duty, to bring this in line with the position relating to notice deposits.

CLAUSE 78

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

Section 4 of the Stamp Duties Act, 1968, provides for exemption from payment of duty under certain circumstances.

The Commission for Conciliation, Mediation and Arbitration was established on 16 October 1996 in terms of section 112 of the Labour Relations Act, 1995. This Commission enjoys tax exempt status for income tax purposes under section 10(1)*(c*A*)* of the Income Tax Act, 1962 and it is proposed that an exemption in respect of the payment of stamp duty also be introduced.

CLAUSE 79

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

It is proposed that section 5(1) of the Act be amended to provide that the maximum amount of revenue stamps to be allowed per document be limited to R400. The stamp duty in excess of that amount must be denoted by way of?

- impressed stamps;
- an endorsement upon the instrument of a certificate of due payment; or
- the issue of a special receipt.

This would avoid the necessity of keeping large amounts of revenue stamps at Revenue Offices and other offices that deal with dutiable instruments on a regular basis.

CLAUSE 80

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

The definition of "lending arrangement" in the Stamp Duties Act, 1968, has a time limit, which requires that the transfer of the securities from the borrower back to the lender must take place within a period of 6 months. Securities lending arrangements generally take place for the following reasons:

(a) to cover a short sale, i.e. where the borrower has agreed to sell a certain type of security, but is for some reason unable to deliver;

(b) the borrower wishes to take advantage of a pricing differential between related securities, e.g. the borrower may be able to enter into a futures contract in terms of which he can buy a specified security at some future date at a lower price than that for which the security is currently trading on the equities exchange. He thus borrows the security to sell on the equities

exchange and simultaneously enters into a futures contract to buy an equivalent security at a lower price in the future;

(c) the borrower may wish to take advantage of a downward trend in the equities market by borrowing securities, selling them and using the proceeds as loan capital. The cost of buying back the security will be less than the interest that would have been payable on the loan.

Where the motivation for the loan is to take advantage of a pricing differential between a listed equity and related instruments (such as futures options or convertible bonds), the particular option may close out at the end of a 9 or 12 month period, in which case the existing exemption does not apply. Similarly, if the bond in question is only convertible after a period greater than 6 months, the exemption is again of no use.

It is, therefore proposed that the six month period contained in the definition of “lending arrangement” in section 23 of the in the Stamp Duties Act, 1968, be extended to 12 months.

CLAUSE 81

Stamp Duty: Amendment of section 31 of the Stamp Duties Act, 1968

These amendments are of a textual nature.

CLAUSE 82

Stamp Duty: Amendment of section 31D of the Stamp Duties Act, 1968

These amendments are of a textual nature.

CLAUSE 83

Stamp Duty: Amendment of section 32 of the Stamp Duties Act, 1968

Section 44 of the Value-Added Tax Act, 1991, provides that the Commissioner may set off any amount which has become refundable to the vendor against any tax, additional tax, penalty or interest payable under that Act or any tax, interest or penalty levied under any Act of Parliament administered by the Commissioner where the vendor is in default in respect of the payment of such amount. The Stamp Duties Act does not contain a similar provision and it is proposed that section 32, which provides for refunds of duty be amended to provide that any amount of duty refundable to any person, may be set off against any amount of tax, additional tax, duty, levy, charge, interest or penalty not timeously paid by such person in terms of any other Act administered by the Commissioner.

CLAUSE 84

Stamp Duty: Amendment of section 32A of the Stamp Duties Act, 1968

The Commissioner has the power to publish in the Government *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Value-Added Tax Act, 1991. The Minister of Finance announced in his Budget Review this year that provisions providing for the publication of the names of tax defaulters who had been convicted of an offence in terms of tax laws be included in all fiscal laws administered by the Commissioner. This *clause* gives effect to this proposal.

This amendment is deemed to have come into operation on 11 March 1998 and shall apply in respect of any person convicted of an offence on or after that date.

CLAUSE 85

Stamp Duty: Amendment of item 13 of Schedule 1 to the Stamp Duties Act, 1968

Paragraph *(b)* of the *Exemptions* contained in item 13 of Schedule 1 to the Stamp Duties Act, 1968, provides for an exemption from stamp duty of any acknowledgment or slip relating to a fixed deposit of an amount not exceeding R20-00. As most financial institutions do not provide for fixed deposits of amounts under R500-00, it is proposed that this paragraph be deleted. This clause will come into operation on the date of promulgation.

CLAUSE 86

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

The Minister of Finance announced in his Budget Review this year that the exemption from tax in respect of the South African Gas Distribution Corporation Limited would be withdrawn with effect from 26 June 1998. The proposal is effected in *subclause (1)(a)*.

The National Housing Finance Corporation (NHFC) was incorporated on 10 May 1996 with its sole shareholder being the Government through the Department of Housing. The mandate of the NHFC is to fund or facilitate the funding of housing opportunities to the lower and lower-middle income groups through intermediaries, being retail lenders and housing institutions.

The National Housing Commissioner and the South African Housing Trust Limited are exempt from stamp duty on marketable securities. The activities of the NHFC are similar to those of the South African Housing Trust Ltd, except that the NHFC lends wholesale to intermediaries and not directly to the public and it is, therefore, proposed that item 15 be amended to make provision for an exemption from stamp duty to be granted to the NHFC. The amendment is effected in *subclause (1)(d)*.

CLAUSE 87

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

With the introduction of value-added tax (VAT) in 1991, the supply of financial services was made exempt from VAT, mainly as a result of the difficulties in identifying and measuring the value added, particularly as regards interest. Although this principle is in line with the practice followed in most countries, the Tax Commission recognised that, in principle there was no reason why value added in respect of financial transactions not involving interest should be treated differently from value added in other sectors of the economy. Financial services are, furthermore, consumed mainly by businesses and the more affluent section of the population.

The first step in taxing fee-based financial services was taken in 1995 and this process was continued in 1996 by the deletion of a number of services from the definition of "financial services" in section 2. A proviso was also introduced in section 2(1) to exclude any fee, commission or similar charge from the definition of financial services. This proviso, however, was not made applicable to merchant's discount for this charge relates not only to taxable services such as guarantees for payment and transaction handling fees, but also include interest, which is consideration for an exempt supply.

After consultation with members of the financial services industry it has now been decided to extend the proviso to section 2(1) to specifically exclude merchant's discounts from the definition of "financial services". It has been found that the interest element of merchant's discounts usually makes up only a minor or variable portion thereof, while the charge made to the merchant is a fixed fee to cover a multitude of services. The term "merchant's discount" is further defined in section 2(2) to mean a charge made to merchants for accepting a credit or debit card as payment for the supply of goods or services or a similar charge made by a buying organisation.

Although the view has always been held that fees payable to buying organisations do not constitute consideration for financial services, but rather the acceptance of a debt security, which became a taxable service in 1995, there appears to be some uncertainty in the industry in this regard. The services giving rise to these fees are similar to merchant's discounts and are, therefore, now also specifically excluded from financial services. This amendment comes into operation on 1 March 1999 to allow time for system changes.

CLAUSE 88

Value-Added Tax: Secrecy: Amendment to section 6 of the Value-Added Tax Act, 1991.

The amendment to subsection (2)*(c)* is made to bring the provisions relating to the furnishing of information to the Head: Central Statistical Services into line with those now introduced into the Income Tax Act, 1962.

Subsection (2)*(d)* was introduced in 1976 to allow the Commissioner to confirm to the recipient or the intended recipient of a supply whether the supplier is registered in terms of the Act or not, as the recipient of the supply is the person who ultimately pays the tax. As a result of numerous enquiries received from suppliers, an amendment is introduced to also allow the Commissioner to confirm to the supplier whether the recipient of a supply is registered under the Act. The supplier could, for example, have an interest in such information where he is making a supply of a going concern. This amendment proposes that the Commissioner be allowed to give such confirmation to the supplier.

CLAUSE 89

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

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 is not enjoyed in the Republic, are subjected to VAT at the rate of zero per cent. In this regard section 11(2)(*l*) of the Act provides that services 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 are subject to the zero rate of VAT, except in those specific circumstances mentioned in that section.

Where services are contractually supplied to a person who is outside the Republic, but physically rendered to a person who is in the Republic at the time the services are rendered for the benefit of both the person outside the Republic and the person inside the Republic, some doubt exists as to whether the zero rate of VAT may be applied or not.

A typical example would be where a local tour operator supplies a tour package to a foreign tour operator who in turn sells the tour package to foreign tourists at a profit. The physical rendering of services by the local tour operator, such as the supply of accommodation, tour guides, sightseeing etc. will, however, only take place when the tourists are in the Republic. Those services will be consumed in the Republic and should therefore be standard rated. It can, however, not be disputed that the overseas tour operator also benefits from the rendering of the services as he is making a profit by selling these packages to the tourists.

The amendment to section 11(2)(*l*) is aimed at eliminating any doubt as to the scope of this subsection. The supply of the services must be made to a recipient who is not a resident, and neither the recipient nor any other person to whom the services are rendered may be in the Republic at the time the services are rendered, for the zero rate of VAT to apply.

It is not the intention that any incidental benefit derived by a person who is in the Republic should disqualify the supply of the service from being zero-rated. Where, for instance, a local newspaper contracts with a foreign advertiser to publish an advertisement, the local newspaper will supply the service to the foreign advertiser at the zero rate. The fact that local readers of the newspaper may also benefit from reading the advertisement is merely incidental and will not require the service to be supplied at the standard rate. The word “directly” in the subsection ensures that an incidental benefit will not affect the zero-rating of the supply.

CLAUSE 90

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

The South African VAT is an invoice based tax. A concession is, however, made to certain vendors (in particular those with annual turnovers of less than R2,5 million) to account for VAT on the payments basis. This gives recognition to the fact that smaller businesses often do not maintain sufficient accounting records to enable them, on a two-monthly basis, to bring debtors and creditors into account as is required by the invoice basis. This reason is not entirely valid as far as companies and close corporations are concerned, as they are required, in terms of other legislation, to keep proper accounting records.

A vendor who accounts for VAT on the invoice basis, accounts for output tax and claims VAT as input tax upon the earlier of the issuing of an invoice or the receipt or making of any payment. A vendor who accounts for VAT on the payments basis on the other hand only accounts for output tax and claims VAT as input tax once payment has been made.

A number of cases have been identified where goods or services were supplied by a juristic person, such as a close corporation or private company, which is registered as a vendor and accounts 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 output tax only needs to be accounted for by the supplier when payment has been received by him. By the time the supplier becomes liable to account for output tax the supplier has often been found to be stripped of all assets or liquidated, with no prospect of recovering any output tax from that vendor.

The amendment to section 15(2) is in essence an anti-avoidance measure whereby one of the vehicles often used to abuse the payments basis, namely a juristic person, is removed from the scope of section 15 of the Act.

Vendors who are now required to change to the invoice basis will be allowed a period of six months in which to pay any additional amount they may become liable for.

CLAUSE 91

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

Subclause (a): It has been found that many small retailers selling both standard rated and zero-rated goods do not keep sufficient records to enable the Commissioner to verify the sales figures reported. In these circumstances vendors often inflate the zero-rated sales. It is therefore intended to introduce a scheme for small retailers which will simplify their accounting requirements and reduce the amount of evasion. The scheme will not be available to vendors with annual turnovers in excess of R2,5 million, or vendors who have accounting systems which are able to separate standard and zero-rated sales. The scheme will entail the vendor calculating these zero-rated sales by adding a standard mark-up to his purchases. Where he is able to establish his mark-up more accurately he may use such mark-up. The scheme is similar to one of the schemes operating in the United Kingdom and the proviso introduced to section 16(1) makes provision for such scheme.

Subclause (b): In terms of section 16(2) a deduction of input tax may *inter alia* be made by a vendor holding a tax invoice or bill of entry at the time any return in respect of a supply or importation of any goods into the Republic is made. Should a vendor be in possession of a tax invoice or bill of entry, but for some or other reason not deduct the input tax in the tax period during which he obtained the tax invoice or bill of entry he may deduct that input tax in any subsequent tax period.

Tax invoices are essential to the VAT system as they create an audit trail which enables the Commissioner to verify any input tax deduction with the supplier of goods or services. In terms of section 55(3) of the Act vendors are required to keep their records for a period prescribed in the Income Tax Act, which will normally be approximately 5 years. It follows that, where a vendor makes a deduction of input tax in respect of a supply made to him more than 5 years ago, the Commissioner will not be able to verify this deduction because the supplier may no longer be in possession of records relating to such supply.

The amendment to section 16(2), in terms of which an input tax deduction may not be made in respect of supplies or the importation of goods in respect of which input tax could have been deducted more than 5 years ago is aimed at preventing fraudulent input tax deductions due to the Commissioner's inability to verify such deductions.

Subclause (c): In terms of section 16(3)*(h)* a deduction may be made by a vendor who has supplied goods or services where such goods or services were previously used or applied for purposes of making taxable supplies, as well as for other purposes.

This provision has on a number of occasions been abused by vendors to avoid the restriction of a notional input tax deduction in respect of second-hand fixed property to the amount of transfer duty paid, which is contained in paragraph (b) of the definition of "input tax" in section 1.

Section 16(3)*(h)* of the Act is accordingly amended by introducing the same restriction of the input tax deduction to the amount of transfer duty or stamp duty paid, as is the case when the deduction is claimed under other sections of the Act. The deduction which may be made in terms of section 16(3)*(h)*, together with any deduction which may previously have been made under subsection 3*(a)*(ii), *(b)*(i), 18(4) or 18(5) may not exceed the amount of transfer duty or stamp duty paid in respect of the acquisition.

CLAUSE 92

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

Subclause (a): In terms of paragraph (b) of the definition of "input tax" in section 1 of the Act, the input tax in respect of the acquisition of second-hand goods amounts to the tax fraction of the lesser of the consideration for, or the open market value of the goods. Where the second-hand goods consist of fixed property or a share in a share block company, the amount calculated by applying the tax fraction is limited to the amount of transfer duty or stamp duty payable in respect of such acquisition.

Section 17(1) prescribes to what extent tax is input tax where goods or services are acquired partly for purposes of use, consumption or supply in the course of making taxable supplies. As regards input tax in respect of second-hand goods, however, section 17(1) only refers to the tax fraction contemplated in paragraph (b) of the definition of "input tax", without recognising that the amount determined by applying the tax fraction will, in the event of the supply of fixed property or a share in a share block company, be limited to the amount of the transfer duty or stamp duty paid.

The amendment to section 17(1) whereby reference is now made to the amount determined in accordance with paragraph (b) or (c) of the definition of “input tax” is therefore consequential upon the earlier amendment to the definition of “input tax”.

Subclause (c): Section 17(1) provides that, where goods or services are acquired for consumption, use or supply in the course of making taxable supplies and partly for another intended use, input tax shall be an amount which bears to the full amount of tax charged in respect of the acquisition of those goods or services, the same ratio as the intended use for making taxable supplies bears to the total intended use of the goods or services.

The Commissioner often only becomes aware of the method used by the vendor for determining the ratio when an audit is carried out, which may in some cases only be after a lengthy period. Should the method at that stage be found unacceptable or not in accordance with one of the methods approved by the Commissioner in a general written ruling, such as that contained in the *Guide For Vendors*, much time and effort is needed to rectify the method.

The further amendment to section 17(1) requires a vendor to obtain the Commissioner’s approval where he wishes to use a method other than a method approved by the Commissioner by way of a general written ruling, or where he wishes to change his method of apportionment. Such change may be made only with effect from a future date, or any other date approved by the Commissioner.

CLAUSE 93

Value-Added Tax: Adjustments: Amendment to section 18(4) of the Value-Added Tax Act, 1991

Section 18(4)(c) provides that a vendor may make an adjustment 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 section 18(4), where such second-hand goods consist of fixed property, the amount of the adjustment is limited to the amount of transfer duty or stamp duty payable and the adjustment may only be made after such transfer duty or stamp duty has been paid.

The payment requirement in the case of second-hand goods is intended to prevent input tax manipulations. Since the amount of the adjustment has been restricted to the amount of transfer duty or stamp duty paid in the case of fixed property, the incentive for entering into simulated transactions has been eliminated and the previous anti-avoidance provision has become superfluous and is now deleted.

CLAUSE 94

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

Subclauses (a), (b), (c) and (d): Sections 20(4) and (5) sets out the particulars which a tax invoice must contain, but does not require the value of the supply, the amount of tax charged or the consideration for the supply to be stated in South African currency. This situation is undesirable as it complicates the auditing of vendors' VAT returns and also leads to a mismatch between input tax deducted and output tax accounted for.

Where vendors prefer to issue tax invoices in foreign currency they are now required to also state the consideration and the tax in South African currency. The VAT liability is fixed at the time of supply. Should the amount eventually paid differ from the amount of consideration reflected on the tax invoice due to currency fluctuations, this difference will not affect the VAT charged on the supply. Input tax may be deducted and output tax has to be accounted for in accordance with the tax invoice issued.

The amendment requires vendors to issue tax invoices in South African currency, unless tax is charged at the zero rate in terms of section 11.

Subclause (e): Section 20(8) sets out the particulars which should be maintained by a vendor in respect of the acquisition of second-hand goods. In spite of these requirements it is still found that vendors make deductions of notional input tax as if in respect of the acquisition of second-hand goods, when they should in fact deduct input tax on the strength of a tax invoice. This often happens when the vendor is not aware of the fact that he was dealing with another vendor, where a dispute arises between the parties as to whether the supply constitutes a taxable supply or not, or simply because the vendor is not in possession of a proper tax invoice.

The purpose of the amendment whereby vendors will be required, in respect of supplies of R1 000 or more, to obtain a statement from the supplier stating that the supply is not a taxable supply, is to tighten the control measures available to the Commissioner and to ensure that vendors and suppliers of second-hand goods give proper consideration to the VAT implications of supplies of this nature.

CLAUSE 95

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

As the law stands, the recipient of a supply of goods or services who has claimed an input tax deduction in relation thereto and who has not yet paid the full consideration charged in respect thereof after a period of 36 months has lapsed is liable to account for output tax equal to the tax fraction of the amount still outstanding. The period of 36 months is now reduced to 12 months which begins at the end of the tax period during which the input tax deduction was claimed and the supply is deemed to take place during the tax period that follows upon the period of 12 months. The vendor must, therefore, account for the VAT by means of an adjustment in his VAT return.

CLAUSE 96

Value-Added Tax: Vendor to notify change of status: Amendment to section 25 of the Value-Added Tax Act, 1991.

Section 25 stipulates that every vendor is under obligation to notify the Commissioner of any change in the details or information as originally furnished by such vendor to the Commissioner. These details or information relate to, *inter alia*, a change in the name and address of the enterprise.

In terms of section 51(3), the partners in a partnership shall be liable jointly and severally with the other partners to perform the duties in terms of the Act. It is therefore important that the Commissioner also be notified of any changes of the partners in a partnership.

The amendment will have the effect of enforcing an obligation that, should there be a change in the composition of members of a partnership or joint venture, such change must also be reported to the Commissioner. These particulars are required by the Commissioner for smooth administrative and control purposes.

CLAUSE 97

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

The amendment to section 32 is intended to afford vendors the right to object to the Commissioner's refusal to approve a method for determining the ratio referred to in section 17(1). This clause should therefore be read in conjunction with the clause dealing with the amendment to section 17.

CLAUSE 98

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

Subclauses (a) and (b): The amendments introduced by these subclauses are of a textual nature.

Subclause (c): Section 41(c) of the Act provides that where a decision was given by the Commissioner and such decision is subsequently withdrawn, the withdrawal of the decision will not have any effect on the VAT liability of the vendor concerned in respect of any contractual obligation incurred by the vendor prior to the decision being withdrawn.

A number of vendors have in the past relied upon this provision where decisions were obtained after entering into contracts for the supply of goods or services. In these instances it is clear that the decision of the Commissioner did not have any influence on the terms of the agreement entered into and that the vendor should not enjoy any protection from any subsequent withdrawal of the decision.

The amendment makes it clear that a vendor will not enjoy protection under this section unless the contractual obligation was incurred in accordance with the ruling given by the Commissioner.

CLAUSE 99

Value-Added Tax: Security for tax: Amendment of section 43 of the Value-Added Tax Act, 1991.

In terms of section 43(1) of the Act the Commissioner may require a vendor to furnish security for tax which has, or may become payable by that vendor, where that vendor has been convicted of an offence under this Act or has repeatedly failed to comply with the requirements of this Act.

This provision, which is in essence aimed at assisting the Commissioner in recovering VAT from vendors with a record of non-compliance, has in a number of cases been evaded by persons making use of newly established companies, close corporations and trust funds which do not yet have a record of non-compliance and which can, therefore, not be required to furnish security.

The amendment of section 43(1) is intended to enable the Commissioner, in addition to his present powers, to require a vendor to furnish security for his tax liabilities if the vendor is under the management or control of a person who is or was a vendor and who has a record of non-compliance, or under the management and control of a person who also manages or controls another person who is or was a vendor with a record of non-compliance.

CLAUSE 100

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

Subclause (a): In terms of proviso (i) to section 44(1) a refund may not be made unless the claim for the refund is **made** within five years after the end of the tax period.

The effect of the amendment to paragraph (i) of the proviso to subsection (1), is to provide that a refund will not be made in terms of the amended section unless the claim for the refund is **received** by the Commissioner within such period of five years. This amendment is aimed at preventing back-dating of claims.

Subclause (b): In terms of section 44(6) of the Act, where the vendor owes VAT, additional tax, penalty or interest on VAT or any other tax, interest or penalty levied under any Act of Parliament administered by the Commissioner, the Commissioner may set off against the amounts so owing, any amount or part thereof refundable, or any interest payable to the vendor. For example, where a vendor has failed to submit his monthly PAYE return and payment, the Commissioner may off-set his VAT refund against this liability.

To eliminate any doubt as to whether the term “taxes” includes duties such as stamp duties, transfer duties or customs duties, section 44(6) is amended to include additional tax, duties, levies, charges, interest or penalties levied under any Act of Parliament which is administered by the Commissioner.

CLAUSE 101

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

Subclause (a): In terms of paragraph (i) of the proviso to section 45(1) the 21 business days in which the Commissioner may make a refund without having to pay interest is, in the event of an incorrect or defective return made by the vendor, reckoned from the date on which the vendor rectifies the return and satisfies the

Commissioner that the incompleteness or defectiveness does not affect the amount of the refund.

It is important that the 21 days be reckoned from the correct date in order to determine whether interest is payable, and if so, to correctly determine the amount of the interest. Section 45(1) is therefore amended to the effect that the vendor must rectify the return in writing and satisfy the Commissioner in writing that the incompleteness or defectiveness of the return does not affect the amount refundable, as the date of receipt of the written document can more easily be ascertained.

Subclause (b): In terms of paragraph (iA) of the proviso to section 45(1) the 21 business days within which the Commissioner may make a refund without having to pay interest is, in the event of the vendor being in default to submit a return for any preceding tax period, reckoned from the date on which the outstanding returns are furnished to the Receiver of Revenue.

This is an effective measure to obtain returns which are outstanding in respect of tax periods preceding the tax period in respect of which the refund has to be made. The amendment is accordingly aimed at broadening the scope of this section, by enabling the Commissioner to also withhold a refund when returns in respect of tax periods following upon the tax period in respect of which a refund has to be made have not been furnished.

Subclause (c): Where the Commissioner is unable to determine the amount refundable to the vendor, due to insufficient information or records being available, notice informing the vendor of the situation may now be given by registered mail, facsimile transmission, electronic means, or hand delivered notice. The purpose of this amendment is thus to expedite the audit process.

CLAUSE 102

Value-Added Tax: Records: Amendment of section 55 of the Value-Added Tax Act, 1991

This amendment is consequential to the amendment of section 16(1) and releases small vendors from the obligation to keep certain records if they are permitted to account for VAT in accordance with the method approved by regulation.

CLAUSE 103

Value-Added Tax: Publication of names of tax offenders: Amendment to section 62 of the Value-Added Tax Act, 1991.

Subclause (a): As the Act stands the Commissioner shall from time publish the names of persons convicted of offences under section 59(1) of the Act. The amendment broadens the scope of section 62(1) in that the names of offenders who have been convicted under section 58 of the Act may now also be published.

Subclause (b): Section 62(2) prescribes what information the Commissioner may publish in respect of persons convicted of offences under the Act. The amendment of Section 62(2) now permits the Commissioner to also publish particulars of the fine or sentence imposed by the court for such offence.

CLAUSE 104

Value-Added Tax: Schedule 2: Amendment to Schedule 2 to the Value-Added Tax Act, 1991

This amendment is of a textual nature and replaces the references to the Marketing Act, 1968, with references to the Agricultural Product Standards Act, 1990. (Act no 119 of 1990)

CLAUSE 105

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

This amendment is of a textual nature.

CLAUSE 106

Income Tax Act: Commencement date: Amendment of section 8 of the Income Tax Act, 1996

This amendment is of a textual nature.

CLAUSE 107

Tax on Retirement Funds: Amendment of section 2 of the Tax on Retirement Funds Act, 1996

The tax on retirement funds was introduced on 1 March 1996 at a rate of 17 per cent on certain specified income. The Minister of Finance proposed in his Budget Speech this year that the rate be increased from 17 per cent to 25 per cent with effect from 1 March 1998.

This clause gives effect to this proposal.

CLAUSE 108

Short title and commencement

This clause provides the short title and commencement date of the Bill.