MEMORANDUM ON THE OBJECTS OF THE VOLUNTARY DISCLOSURE PROGRAMME AND TAXATION LAWS SECOND AMENDMENT BILL, 2010

1. PURPOSE OF BILL

The Bill introduces a voluntary disclosure programme and amends administrative provisions of the Transfer Duty Act, 1949 (Act No. 40 of 1949), the Income Tax Act, 1962 (Act No. 58 of 1962), the Customs and Excise Act, 1964 (Act No 91 of 1964), the Value-Added Tax Act, 1991 (Act No. 89 of 1991), the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002), and the Mineral and Petroleum Resources Royalty (Administration) Act (Act No. 29 of 2008).

2. OBJECTS OF BILL

2.1-2.11: Voluntary Disclosure Programme

To encourage taxpayers to come forward and avoid the future imposition of additional tax, penalties and interest, a voluntary disclosure programme (''VDP'') will be instituted. Taxpayers may come forward during the period the VDP is open to disclose their defaults and regularise their tax affairs. In line with greater international cooperation over bank secrecy and enhanced measures to prevent money laundering, the VDP will also enable taxpayers with unreported banking accounts overseas to fully disclose such untaxed revenue. Although penalties and interest will be waived for successful applicants, the full amount of tax will remain due.

A defaulting taxpayer will be granted relief under the programme, provided—
- the disclosure is complete;
- SARS was not aware of the default;
- a penalty or additional tax would have been imposed had SARS discovered the default in the normal course of business.

The proposed provisions to give effect to the VDP—
- introduce the concept of ''voluntary disclosure'';
- prescribe the relief that may be provided under the VDP;
- state who qualifies to may make a disclosure; and
- prescribe when, where and how to apply for the VDP.

2.12: Transfer Duty Act, 1949: Amendment of section 3

SARS's strategic focus is on the replacement of manual with electronic processes and the phasing out of cash payments by taxpayers in favour of the electronic transfer of funds. In order to achieve this result in the administration of transfer duty, the proposed amendment will have the effect that SARS will only process transfer duty returns that have been submitted electronically and that taxpayers may only pay transfer duty by electronic transfer of funds.

2.13: Transfer Duty Act, 1949: Amendment of section 14

Subclauses (a) to (e) and (g): See paragraph 2.12 above.

Subclause (f): The proposed amendment aligns the procedures for submitting transfer duty declarations in electronic format and the requirements for an electronic or digital signature with the rules and regulations made by the Minister of Finance in terms of section 66(7B) of the Income Tax Act.

2.14: Income Tax Act, 1962: Amendment of section 3

The proposed amendment provides for additional sections of the Act and paragraphs of Schedules to the Act to be made subject to objection and appeal.

2.15: Income Tax Act, 1962: Amendment of section 76E

Since 2006, SARS has been issuing binding advance tax rulings to taxpayers. It is proposed that this service only be available to compliant taxpayers. Therefore, the proposed amendment contains a requirement that the tax affairs of applicants for an advance tax ruling must be in order (submission of returns and payment of outstanding taxes, duties or levies for which the applicant is liable) for SARS to accept an application and issue an advance tax ruling.

2.16: Income Tax Act, 1962: Amendment of section 76G

See paragraph 2.15 above.

2.17: Income Tax Act, 1962: Amendment of section 89quat

The proposed amendment narrows SARS's discretion in terms of section 89*quat*(3) of the Act to waive interest charged on unpaid provisional tax. SARS is currently permitted to waive this interest if a taxpayer had reasonable grounds for taking the position that led to the underpayment. The question of whether a taxpayer had reasonable grounds for the position taken is a relevant factor in determining whether and what additional tax or penalties are due. Whether the taxpayer had reasonable grounds for the position taken or not, the fact remains that the taxpayer had the use of money due to the *fiscus*. Hence, the discretion to waive this interest is now narrowed to only cater for circumstances outside the taxpayer's control, similar to the provisions of the Value-Added Tax Act, 1991.

2.18: Income Tax Act, 1962: Amendment of paragraph 1 of Fourth Schedule

Subclause (1)(a): Paragraph *(b)* of the definition of remuneration includes under remuneration the value of a fringe benefit determined in terms of the Seventh Schedule. As the value of the fringe benefit for the right of use of a motor vehicle as determined in terms of paragraph 7 of the Seventh Schedule is now specifically included in the new paragraph *(c*B*)* of the definition of remuneration, paragraph *(b)* needs to exclude that amount to avoid the double inclusion of the value of this particular fringe benefit in the definition of remuneration.

Subclause (1)(b): The proposed amendment provides where the taxpayer's employer is satisfied that at least 80 per cent of the use of the motor vehicle for a year of assessment will be for business purposes, then only 20 per cent of the amount of any allowance or advance contemplated in section 8(1)*(b)* must be included in the definition of ''remuneration'' for purposes of the Fourth Schedule.

Subclause (1)(c): The proposed amendment provides that only 80 per cent of the value of the fringe benefit as calculated in terms of paragraph 7 of the Seventh Schedule will be included in the definition of 'remuneration' of the Fourth Schedule and hence subject to the deduction of employees' tax. Further relief based on actual distance travelled for business purposes and qualifying expenditure incurred by the taxpayer is granted on assessment. This amendment forms part of the proposed amendments to paragraph 7 of the Seventh Schedule. However, where the taxpayer's employer is satisfied that at least 80 per cent of the use of the motor vehicle for a year of assessment will be for business purposes, then only 20 per cent of the amount of any allowance or advance as aforementioned must be included. A more detailed explanation with regard to employer-provided motor vehicles is contained in an explanatory memorandum on the Taxation Laws Amendment Bill, 2010.

Subclause (1)(d): Technically, persons who are exempt from the payment of provisional tax are still provisional taxpayers. Although SARS does not treat those exempt persons as provisional taxpayers as a practical matter, it is proposed that the definition of ''provisional taxpayer'' be amended to clarify that those exempt persons are not provisional taxpayers.

2.19: Income Tax Act, 1962: Amendment of paragraph 11A of the Fourth Schedule

Paragraph 11A deals with the withholding or deduction of employees' tax from remuneration in the form of gains contemplated in sections 8A, 8B and 8C which is deemed to become payable to employees. It deems that the person who granted the right to acquire the marketable security or from whom the employee acquired the equity instrument or qualifying equity share, to have paid remuneration equal to the amount of the gain to the employee.

In the majority of cases rights to acquire marketable securities, qualifying equity shares and equity instruments are granted by or acquired by employees from trusts established by employers to provide these benefits. As these trusts only provide benefits in the form of gains they do not pay the employees cash remuneration and as a result the employees' tax liability is not paid during the year of assessment when the gain arises. The same position occurs where the employees are employed by a subsidiary of an international company and the shares are granted or awarded by a body outside the Republic.

It is proposed that in the circumstances where—

- a gain arises in the hands of an employee in a year of assessment;
- the entity granting the right to acquire a marketable security or from whom the employee acquired the equity instrument or qualifying equity share is an associated institution as defined in paragraph 1 of the Seventh Schedule in relation to an employer of the employee;
- the associated institution is neither resident nor has a representative employer in the Republic; or
- the associated institution is unable to deduct all or part of the employees' tax due because it does not pay cash remuneration to the employee from which the full amount of tax can be withheld,

the associated institution and the employer are jointly and severally liable for the tax and must withhold the employees' tax from the remuneration payable to the employee.

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

The proposed amendment forms part of the discontinuation of Standard Income Tax on Employees (SITE) administrative provisions. A detailed explanation of the proposed discontinuation is contained in an explanatory memorandum on the Taxation Laws Amendment Bill, 2010. The proposed amendment makes it clear that SITE is no longer a final withholding tax, as is currently the case.

2.21 Income Tax Act, 1962: Amendment of paragraph 12 of Fourth Schedule

Paragraph 12(1)*(a)* of the Fourth Schedule provides that the Commissioner may make a reasonable estimate of the amount of employees' tax required to be deducted if the employer has failed to furnish a return as required in terms of paragraph 14(1) of the Schedule. It is paragraphs 14(2) and 14(3) that provide that the employer must submit a declaration when paying employees' tax or render a return to the Commissioner and not paragraph 14(1) (which only provides for the information to be kept by the employer in respect of each employee). The proposed amendment substitutes the reference to paragraph 14(1) in paragraph 12(1)*(a)* of the Schedule with paragraph 14(2) or 14(3).

Paragraph 12(1)*(b)* of the Fourth Schedule provides that the Commissioner may make a reasonable estimate of the amount of employees' tax required to be deducted if the employer has furnished a return as required in terms of paragraph 14(3) of the Schedule but the Commissioner is not satisfied with the return. No provision is made for the Commissioner to make a reasonable estimate if the employer has submitted a declaration in terms of paragraph 14(2) and the Commissioner is not satisfied with the declaration. The proposed amendment adds a reference to a declaration submitted in terms of paragraph 14(2) so that the Commissioner may make a reasonable estimate if not satisfied with the declaration submitted.

2.22: Income Tax Act, 1962: Amendment of paragraph 14 of Fourth Schedule

The proposed amendment clarifies the period (and hence the amount of employees' tax) in respect of which the 10 per cent penalty shall be levied in terms of this paragraph.

2.23: Income Tax Act, 1962: Amendment of paragraph 3 of Seventh Schedule

Employers have an obligation to deduct or withhold employees' tax from the value of fringe benefits granted to employees. A recent judgment has created the impression that an incorrect determination by an employer of PAYE on fringe benefits can only be remedied on assessment of the individual employees. To enable SARS to effectively administer employees' tax in these situations, the proposed amendment enables SARS to raise an assessment on an employer where it was found that the value of a fringe benefit has not been taken into account or undervalued for employees' tax purposes.

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

Section 4(3) allows the disclosure of information relating to a person, firm or business acquired by the Commissioner or an officer in the performance of his or her duties to Directors-General of certain departments, the National Commissioner of the South African Police Service and the Governor of the South African Reserve Bank subject to certain conditions. Information regarding imports and exports, as well as importers and exporters, is provided to the Director-General of the Department of Trade and Industry as required for the determination of trade policy.

The proposed amendment provides for the furnishing of information to the Chief Commissioner of the International Trade Administration Commission for performing functions conferred by or in terms of the International Trade Administration Act, 2002 (Act No. 71 of 2002), from the commencement of that Act.

2.25: Customs and Excise Act, 1964: Continuation of rules made under section 119A

Provision is made that any rule made under section 119A of the Act or any amendment or withdrawal of or insertion in such rule during the period 1 October 2009 up to and including 31 May 2010 must not lapse by virtue of section 119A(3) of the Act.

2.26: Value-Added Tax Act, 1991: Amendment of section 1

The proposed amendment is a textual amendment, correcting a previous incorrect reference.

2.27: Value-Added Tax Act, 1991: Amendment of section 9

The proposed amendment clarifies that the time of supply in section 9(2) also applies to supplies made or acquired by means of any machine, meter or other device that is operated by paper currency or other payment facility, for example a credit card.

2.28: Value-Added Tax Act, 1991: Amendment of section 14

This amendment makes it mandatory for a vendor who is required to calculate and pay VAT on imported services to calculate and pay the VAT to the Commissioner in the VAT 201 return corresponding to the tax period in which the supply was made.

2.29: Value-Added Tax Act, 1991: Amendment of section 16

The proposed amendment is consequential to paragraph 2.30 and requires the vendor acquiring goods or services to be in possession of the documentary proof issued in terms of section 20(6).

2.30: Value-Added Tax Act, 1991: Amendment of section 20

Subclause (a): This amendment clarifies that in the case of vendors supplying goods or services where the consideration in money is R50 or less, where the issue of a tax invoice is not compulsory, the Commissioner may require that vendors issue an acceptable alternative.

Subclause (b): The amendment will require a vendor who wishes to deduct input tax when acquiring second hand goods to obtain and retain documentary proof of payment for the goods and the date on which such payment for the goods was made. Further, the limitation in respect of the consideration in money of the supply for which documentary proof is required is removed, which now requires documentary proof to be obtained and retained irrespective of the value of the acquisition.

2.31: Value-Added Tax Act, 1991: Amendment of section 28

The proposed amendment is consequential upon the amendments to section 14 of the Act.

2.32: Unemployment Insurance Contributions Act, 2002: Amendment of section 8

The proposed amendment corrects a textual error.

2.33: Mineral and Petroleum Resources Royalty (Administration) Act, 2008: Amendment of section 1

The proposed amendment now defines a year of assessment as—

(a) 1 March to 28 February for natural persons and trusts; and
(b) for any other person (e.g. companies) that person's financial year.

The amendment provides special rules for the first year of operation of the Royalty Act. In this first year, every person (other than a natural person or trust) will have a short year that begins on 1 March 2010.

2.34: Mineral and Petroleum Resources Royalty (Administration) Act, 2008: Amendment of section 2

Section 2 provides for the required registration of persons in terms of the Royalty Act. These persons presently must have registered with the Commissioner by 31 January 2010. Due to a few technicalities associated with the Act, it was decided to extend the registration date to 28 February 2010.

2.35: Mineral and Petroleum Resources Royalty (Administration) Act, 2008: Amendment of section 4

The proposed amendments provide an election so that an unincorporated body of persons can be deemed to be a person for the Royalty Act, the Royalty Administration Act and the Income Tax Act as applied to the Royalty Act (if the members of that unincorporated body so elect). This election is available as long as the unincorporated body holds a prospecting right, retention permit, exploration right, mining right, mining permit or production right granted in terms of the Mineral and Petroleum Resources Development Act. However, it is legally impossible for an unincorporated body to hold these rights directly because an unincorporated body is not a juristic person. The pre-conditions for the election will accordingly be revised so that the unincorporated body must instead—

(i) carry on prospecting or mining operations;
(ii) consist of two or more members; and
(iii) have one or more members who hold in their own name a prospecting right, retention permit, exploration right, mining right, mining permit or production right granted in terms of the Mineral and Petroleum Resources Development Act.

2.36: Mineral and Petroleum Resources Royalty (Administration) Act, 2008: Amendment of section 5

Section 5 provides for estimated royalty payments by registered persons at two points during the year. These persons must estimate and remit one-half of the royalty amount payable within six months after the first day of that year of assessment. At year end, these persons must estimate and remit the full royalty amount payable for a year of assessment.

At issue is the mid-year payment. The current mid-year calculation fails to account for short-years in general and for short-years caused by the initial 1 March 2010 starting date of the Royalty Act. Firstly, the exact trigger for mid-year estimates should be six months before the last day of the year of assessment (instead of six months after the beginning). Secondly, the procedure for the calculation should be revised so that the registered person applies the mid-year estimate for the number of months in the first estimate period over the number of months for the year. This revised calculation can best be understood through the following example:

Facts: Company X is expected to generate a R4 million royalty liability during 2010. Company X has a financial year ending 31 December 2010.

Result: Company X has a short-year from 1 March until the close of 31 December 2010 because the Royalty Act begins from 1 March (as opposed to 1 January). The first royalty estimate due for 30 June 2010 accordingly amounts to R1.6 million (the first four months over the total 10 months for the 2010 short-year).

2.37: Mineral and Petroleum Resources Royalty (Administration) Act, 2008: Amendment of section 14

If the actual royalty payable for the year of assessment exceeds the estimated royalty payments (i.e. both six-monthly payments) by more than 10 per cent, current law provides that the Commissioner may levy a maximum penalty of 20 per cent of that excess. The 10 per cent allowable estimate differential is, however, stringent. The allowable estimate differential is accordingly increased from 10 per cent to 20 per cent.

2.38: Mineral and Petroleum Resources Royalty (Administration) Act, 2008: Amendment of section 19

In terms of section 19(1), an extractor is duly obliged to submit certain information to the Minister of Finance on an annual basis, in respect of a year of assessment. The Minister may in turn disclose any information disclosed under this section to the Commissioner (who carries out the administration of the Mineral and Petroleum Resources Royalty (Administration) Act).

An extractor will now be required to submit the following additional information to the Minister on an annual basis, in respect of a year of assessment, per section 19(1):

- methodology to adjust section 5 expenditure in the Mineral and Petroleum Resources Royalty Act, and
- methodology to adjust section 6 gross sales in the Mineral and Petroleum Resources Royalty Act, and
- allocation of expenditure per mineral resource.

SARS secrecy provisions are relaxed to the extent to which they relate to the exchange of information with the Department of Mineral Resources (DMR). The Commissioner may exchange the above information with the DMR. The Chief Executive Officer of the Petroleum Agency SA, i.e. the designated agency, may also receive information.

2.39: Short title and commencement

Clause 39 provides for the name and commencement of the proposed Act.

3. CONSULTATION

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

4. FINANCIAL IMPLICATIONS FOR STATE

An account of the financial implications for the State was given in the 2010 Budget Review.

5. PARLIAMENTARY PROCEDURE

5.1 The State Law Advisers and the National Treasury are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996, since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

5.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.

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