

MEMORANDUM ON THE OBJECTS OF THE TAX ADMINISTRATION LAWS AMENDMENT BILL, 2012

1. PURPOSE OF BILL

The Bill provides for the enactment into law of an international agreement contemplated in terms of the Constitution of the Republic of South Africa, 1996, into law, insertion of a provision providing for the application of the Tax Administration Act, 2011 (Act No. 28 of 2011), to certain matters relating to customs and excise, amends administrative provisions of the Estate Duty Act, 1955 (Act No. 45 of 1955), 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), the Mineral and Petroleum Resources Royalty (Administration) Act, 2008 (Act No. 29 of 2008), the Taxation Laws Second Amendment Act, 2009 (Act No. 18 of 2009), the Taxation Laws Second Amendment Act, 2011 (Act No. 25 of 2011), and the Tax Administration Act, 2011 (Act No. 28 of 2011).

2. OBJECTS OF BILL

2.1 Enactment into law of an international agreement contemplated in section 231 of the Constitution of the Republic of South Africa, 1996 into law

The Republic of South Africa and the Republic of Mozambique have entered into an agreement on combined border control posts on the Mozambique-South African Border. The aim of the agreement is to provide for the implementation of one-stop border posts between South Africa and Mozambique, which as defined in the agreement, means “the joint control and management of border crossing activities by officers of the Parties, using shared facilities”. The agreement provides for the adoption of annexes as necessary to facilitate implementation of the agreement. Presently, three annexes have been adopted. These annexes enter into force after approval by the Parties in accordance with their constitutional requirements and form an integral part of the agreement. The South African Revenue Service and other organs of state must implement and administer the agreement and it is accordingly necessary that the agreement should be enacted into law. The clause will also serve as the enactment clause for similar agreements with neighbouring countries in future.

2.2 Application of Tax Administration Act to certain matters relating to customs and excise

The proposed amendment is a transitional provision that makes certain provisions currently contained in the Tax Administration Act, 2011, applicable to customs and excise matters. These are the provisions relating to the write-off or compromise of tax debts not presently covered in the Customs and Excise Act, 1964, and the Tax Ombud provisions. Provision for the write-off and compromise of debts has been made in the Customs Duty and Customs Control Bills that are in an advanced stage of drafting. Applying the Tax Ombud provisions of the Tax Administration Act to customs and excise matters means that the Tax Ombud must also deal with complaints by persons affected by the application of the Customs and Excise Act. Upon enactment of the aforementioned Bills, these transitional provisions will no longer be necessary and will be repealed.

2.3 Estate Duty Act, 1955: Amendment of section 10

The payment of interest across all tax types is now regulated by Chapter 12 of the Tax Administration Act, 2011. The proposed amendment aligns interest due in terms of the Estate Duty Act with Chapter 12 of the Tax Administration Act.

2.4 *Income Tax Act, 1962: Amendment of section 1*

The proposed amendment is of a textual nature.

2.5 *Income Tax Act, 1962: Amendment of section 11D*

Like the additional discretionary allowance of section 12I, SARS may raise an additional assessment in respect of additional deductions for research and development if the approval for those deductions has since been withdrawn (see section 12I(14)).

2.6 *Income Tax Act, 1962: Amendment of section 12I*

The proposed amendment clarifies the time-period within which the company carrying on an industrial policy project must report to the adjudication committee with respect to the progress of the project.

2.7 *Income Tax Act, 1962: Amendment of section 18A*

The provisions of section 75(k) were deleted by paragraph 64 of Schedule 1 to the Tax Administration Act, 2011. Section 75(k)(i) and (ii) provided that—

- (a) if a person in a fiduciary capacity, responsible for the management and control of the income and assets of a public benefit organisation fails to comply with the provisions of section 30 or section 18A or of the constitution, will or other instrument under which the organisation is established; and
- (b) if an accounting officer or accounting authority contemplated in the Public Finance Management Act, 1999, or the Local Government: Municipal Finance Management Act, 2003, for any institution in respect of which that Act applies who intentionally fails to comply with any provision of section 18A, that person will be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 24 months.

As a general drafting rule for purposes of the Tax Administration Act, a decision was taken that all tax type specific offences must be retained in the relevant tax Acts and not in the general criminal offences contained in section 234 of the Tax Administration Act which apply across tax types contained. Hence the relevant provisions of section 75(k) have been moved to the applicable sections in the Income Tax Act, being section 18A and section 30 as set out above.

2.8 *Income Tax, 1962: Amendment of section 30*

See paragraph 2.7 above.

2.9 *Income Tax Act, 1962: Amendment of section 30A*

A person responsible for the management or control of the income and assets of any approved recreational club acts in a similar fiduciary capacity to that of a person responsible for the management and control of an approved public benefit organisation as discussed in paragraph 2.7 above. The proposed amendment aims to introduce the same criminal offence and penalty on such person as is the case with an approved public benefit organisation, if this person intentionally fails to comply with any provision of this section or of the constitution, or other written instrument under which such recreational club is established.

2.10 *Income Tax Act, 1962: Amendment of section 30B*

A person responsible for the management or control of the income and assets of any approved association acts in a similar fiduciary capacity to that of a person responsible for the management and control of an approved public benefit organisation as discussed in paragraph 2.7 above. The proposed

amendment aims to introduce the same criminal offence and penalty on such person as is the case with an approved public benefit organisation, if this person intentionally fails to comply with any provision of this section or of the constitution, or other written instrument under which such approved association is established.

2.11 Income Tax Act, 1962: Insertion of Part IA of Chapter II

The current system of withholding taxes relating to dividend, interest and royalties differ as to rates, timing, refunds and other procedures. While some of these differences can be justified, many of these differences arose simply due to the dates in which these provisions were enacted. The amendment coordinates and streamlines the rates, liability, timing and procedure withholding taxes in the case of dividends tax, royalties and interest. See notes on “Rationalisation of withholding taxes on payments to foreign persons” in the Explanatory Memorandum to the Taxation Laws Amendment Bill, 2012.

2.12 Income Tax Act, 1962: Insertion of Part IVA of Chapter II

The current system of withholding taxes relating to dividend, interest and royalties differ as to rates, timing, refunds and other procedures. While some of these differences can be justified, many of these differences arose simply due to the dates in which these provisions were enacted. The amendment coordinates and streamlines the rates, liability, timing and procedure withholding taxes in the case of dividends tax, royalties and interest. See notes on “Rationalisation of withholding taxes on payments to foreign persons” in the Explanatory Memorandum to the Taxation Laws Amendment Bill, 2012.

2.13 Income Tax Act, 1962: Amendment of section 61

The proposed amendment is of a textual nature consequential to the amendment of the definition of ‘representative taxpayer’ in paragraph 2.4 above.

2.14 Income Tax Act, 1962: Amendment of section 64K

The submission of returns is linked to payments of dividends tax to the Commissioner only. Where no payment of tax is required, but a payment of a dividend occurred, there is no requirement to submit a return.

The above can be illustrated by the following examples:

Example 1:

A listed company declares and pays a dividend, and transfers the administration to a “regulated intermediary” and hence the liability to withhold dividends tax is also transferred to the latter. The company has no obligation to submit a return to this effect to the Commissioner.

Example 2:

A regulated intermediary facilitates the payment of a dividend on behalf of a listed company, and withholds the correct amount due, but due to claims for refunds on earlier dividends facilitated on behalf of other companies (see section 64K(1)(c)), there is nothing left and it need not make payment to the Commissioner, and hence need not submit a return to this effect to the Commissioner.

As can be seen from the above examples it will be impossible to properly administer the tax as a complete picture of the dividend flows through the chain (from the originating company through various levels of regulated intermediaries to the eventual beneficial owner) will not be available.

The proposed amendment links the submission of a return to the payment of a dividend instead of to the payment of tax, by amending section 64K(1)(d) accordingly.

2.15 Income Tax Act, 1962: Amendment of section 64L

Paragraph (a):

Section 64L (refunds by companies) make provision for refunds only where a late declaration is submitted (i.e. no withholding or reduced rate withholding). Thus, if a rebate is not allowed for some reason, the full dividends tax is withheld and proof is submitted later that a qualifying foreign tax was withheld and should have reduced the dividend tax, the rebate cannot be claimed in terms of section 64L. The proposed amendments provide that a late rebate can be claimed if claimed within three years from the payment of the relevant dividend.

Paragraph (b):

In order for a company or regulated intermediary to withhold either nothing or at a reduced rate, the beneficial owner has to submit both a declaration and a written undertaking. If he fails to do so at the required time and more is withheld he only needs to submit the declaration in order to get a refund (see section 64L(1)(c)). In other words less strict requirements apply when the taxpayer is delinquent than when the taxpayer is compliant.

However, if SARS requires the undertaking in the normal course of business SARS would also require it when the taxpayer is in default (especially since it could lead to a recovery claim from SARS under a section 64L scenario).

It is proposed that section 64L(1)(c) be amended to require submission of both the declaration and the written undertaking.

Paragraph (c):

The proposed amendments are consequential to the insertion of the new subsection (1A).

2.16 Income Tax Act, 1962: Amendment of section 64M

Paragraph (a):

Section 64M (refunds by regulated intermediaries) make provision for refunds only where a late declaration is submitted (i.e. no withholding or reduced rate withholding). Thus, if a rebate is not allowed for some reason, the full dividends tax is withheld and proof is submitted later that a qualifying foreign tax was withheld and should have reduced the dividend tax, the rebate cannot be claimed in terms of section 64M. The proposed amendments provide that a late rebate can be claimed if claimed within three years from the payment of the relevant dividend.

Paragraph (b):

In order for a regulated intermediary to withhold either nothing or at a reduced rate, the beneficial owner has to submit both a declaration and a written undertaking. If he fails to do so at the required time and more is withheld he only needs to submit the declaration in order to get a refund (see section 64M(1)(c)). In other words less strict requirements apply when the taxpayer is delinquent than when the taxpayer is compliant.

However, if SARS requires the undertaking in the normal course of business SARS would also require it when the taxpayer is in default (especially since it could lead to a recovery claim from SARS under a section 64M scenario).

It is proposed that section 64M(1)(c) be amended to require submission of both the declaration and the written undertaking.

Paragraph (c):

The proposed amendments are consequential to the insertion of the new subsection (1A).

2.17 Income Tax Act, 1962: Amendment of section 64N

The proposed amendment, amends section 64N(5) in order to require a company or regulated intermediary to obtain proof of the foreign tax paid and deducted from dividends tax payable in the prescribed form and manner, to enable SARS to verify it.

2.18 Income Tax Act, 1962: Amendment of section 72A

The amendment is consequential upon the deletion of the definition of “foreign tax year” in section 9D and the insertion of the same definition in section 1.

2.19 Income Tax Act, 1962: Amendment of paragraph 2 of Fourth Schedule

Paragraph (a):

A new section 7B is proposed to be inserted in the Income Tax Act, 1962, by means of the Taxation Laws Amendment Bill, 2012. The new section provides for the date of accrual of “variable remuneration” to be the date on which the remuneration is paid to the relevant employee. The proposed amendment in this Bill stipulates that the deduction or withholding of employees’ tax by the employer should take place on the same date.

Paragraphs (b) and (c):

A proposed amendment in the Taxation Laws Amendment Bill, 2012, will remove persons of 65 years and older from the current provisions of section 18, and place them under the provisions of section 6A. From 1 March 2014 they will also become entitled to a medical scheme fees tax credit and the additional medical expenses tax credit proposed to be inserted in section 6B. Paragraph 2(4)(d) of the Fourth Schedule, which allows the deduction of contributions to medical schemes when determining the amount of employees’ tax will, therefore, no longer apply from that date and its deletion is proposed. A consequential correction of a reference in paragraph 2(4)(f) is required.

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

The proposed amendment aligns the relevant provisions of the Income Tax Act, with those of the Tax Administration Act, 2011, and provides clarity that the imposition of a penalty under paragraph 14(6) of the Fourth Schedule must be in accordance with the procedures referred to in Chapter 15 of the Tax Administration Act.

2.21 Income Tax Act, 1962: Amendment of paragraph 18 of Fourth Schedule

This amendment proposes that taxable capital gains resulting from the deemed disposal rules under section 29B, are exempt from provisional tax for purposes of the second provisional tax payments of companies for years of assessment ending on or after 29 February 2012 but not later than 31 October 2012. Accordingly, these amounts must be excluded from the estimates of taxable income by a company under paragraph 19 of the Fourth Schedule as well as the calculation of a penalty under paragraph 20 or 20A of the Fourth Schedule.

2.22 Income Tax Act, 1962: Amendment of paragraph 19 of Fourth Schedule

Paragraph (a):

Paragraph 19(1)(a) of the Fourth Schedule, provides that a taxpayer (other than a company) should submit an estimate of the total taxable income which will be derived by the taxpayer in respect of the year of assessment for purposes of determining provisional tax liability. “Taxable income” is defined as the amount remaining after deducting from the “income” of any person the deductions allowable under the Act. Income includes a retirement fund lump sum benefit, retirement fund lump sum withdrawal benefit and severance benefit.

Based on the above, the taxpayer must include these benefits in the total taxable income estimates for purposes of provisional tax, even though these amounts are taxed using separate tax tables and the tax deducted using these tables is final.

It is proposed to exclude these benefits from the estimate of total taxable income, as these benefits are separately taxed.

Paragraph (b):

Paragraph 19(1)(d)(i)(aa) of the Fourth Schedule, specifically excludes the taxable portion of any lump sum contemplated in section 7A(4A) and paragraph (d) of the definition of gross income from the basic amount applicable to any estimate submitted by a provisional taxpayer under this paragraph. However, section 7A(4A) was deleted with effect from 1 March 2011. It is proposed that the reference to section 7A(4A) be deleted. A severance benefit is covered by paragraph (d) of the definition of gross income.

2.23 Income Tax Act, 1962: Amendment of paragraph 20 of Fourth Schedule

Paragraph 20(1) of the Fourth Schedule, does not provide relief if the actual tax paid is higher than the tax on estimated taxable income. Currently, a penalty may be imposed in some instances where actual tax paid exceeds the tax on the required estimated amount for provisional tax purposes. The reason for this unintended outcome is that payment of employees’ tax and provisional tax paid before the end of the relevant tax year is not properly taken into account in determining the penalty.

Accordingly, a change in the determination of the penalty on the underestimation of provisional tax is proposed. The amendment to the provisional tax understatement penalty rules has the effect that a penalty will be imposed only where the full amount of the tax on the required estimated taxable income is not paid by the end of the tax year. The proposal will eliminate the possibility that an underestimation penalty may be levied if the required provisional tax has been paid.

The proposed amendment also aligns the provisions of paragraph 20 of the Fourth Schedule with that of the Tax Administration Act, 2011, and provides clarity that a penalty under paragraph 20 is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, and must, therefore, be imposed in accordance with the procedures referred to in Chapter 15.

2.24 Income Tax Act, 1962: Amendment of paragraph 20A of Fourth Schedule

The proposed amendment aligns the relevant provisions of the Income Tax Act, with that of the Tax Administration Act, 2011, and provides clarity that a penalty under paragraph 20A of the Fourth Schedule is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration

Act, and must, therefore, be imposed in accordance with the procedures referred to in Chapter 15.

2.25 Income Tax Act, 1962: Amendment of paragraph 27 of Fourth Schedule

The proposed amendment aligns the relevant provisions of the Income Tax Act, with that of the Tax Administration Act, 2011, and provides clarity that a penalty under paragraph 27 of the Fourth Schedule is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, and must, therefore, be imposed in accordance with the procedures referred to in Chapter 15.

2.26 Income Tax Act, 1962: Amendment of paragraph 11 of Sixth Schedule

Paragraph (a):

The proposed amendment gives effect to the turnover tax and employees' tax aspects of the 2012 Budget proposal to provide micro-businesses with the option of making payments for turnover tax, VAT and employees' tax at twice-yearly intervals from date of promulgation.

Paragraph (b):

The proposed amendment aligns the relevant provisions of the Income Tax Act with those of the Tax Administration Act, 2011, and provides clarity that a penalty under paragraph 11 of the Sixth Schedule is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, and must, therefore, be imposed in accordance with the procedures referred to in Chapter 15.

Paragraph (c):

The proposed amendment is a technical correction.

2.27 Customs and Excise Act, 1964: Amendment of section 3

Section 3(1) provides for the delegation of any duty imposed or power conferred on the Commissioner to an officer or any other person. In terms of subsection (2)(a), any decision made and any notice or communication signed or issued by such officer or person may be withdrawn or amended by the Commissioner or by the officer or the person concerned. It is arguable that if, for instance, the officer or person is no longer in service, the Commissioner must personally withdraw or amend the decision, notice or communication.

The proposed amendment moves away from a broad approach to a specific one that provides that the decision, notice or communication may be withdrawn or amended by the officer or person concerned, branch manager to whom the relevant officer or person reports, the officer or person in charge of customs operations or excise operations, or the Commissioner personally.

2.28 Customs and Excise Act, 1964: Continuation of amendments made under section 119A

This clause provides, as contemplated in section 119A of the Act, for the continuation of any rule made under that section or any amendment or withdrawal of or insertion in such rule during the period 1 August 2011 to 31 July 2012.

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

The proposed amendment increases the threshold within which an abridged tax invoice may be supplied by a vendor from R3 000 to R5 000.

2.30 Value-Added Tax, 1991: Amendment of section 27

The proposed amendment gives effect to the VAT aspect of the 2012 Budget proposal to provide micro-businesses with the option of making payments for turnover tax, VAT and employees' tax at twice-yearly intervals from 1 March 2014.

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

Paragraph (a):

The proposed amendment is a technical correction as section 28(4) was deleted by paragraph 121 of Schedule 1 to the Tax Administration Act, 2011.

Paragraph (b):

The decision given effect to in the Tax Administration Act was that eFiling vendors should submit returns on the same date as other vendors and only payment may be made by month-end and if not, the vendor is regarded to have been obliged to pay by the 25th to align the effective date for interest for purposes of the new interest regime under the Tax Administration Act. Accordingly, such amendment was effected in paragraph 121 of Schedule 1 to the Tax Administration Act. However, there has subsequently been major concerns expressed by the taxpayer representative bodies as a result of the new onerous obligation to submit electronic returns by the 25th instead of by the end of the month, and an amendment is proposed to alleviate these concerns.

2.32 Unemployment Insurance Contributions Act, 2002: Amendment of section 10

Employee information required to be submitted by employers in terms of section 10(3) is submitted by all employers directly to the Unemployment Insurance Commissioner and not to the Commissioner for SARS. It was agreed with the Unemployment Insurance Commissioner that the relevant database facilitating the employment detail of employees and the calculation of benefits, would be established and maintained by the Unemployment Insurance Fund ("UIF"). The UIF utilises the employee information to establish and maintain an employment record for each registered employee which facilitates the validation and calculation of employee benefits immediately when benefits are claimed. This proposed amendment will align the Unemployment Contributions Act, with what is done in practice.

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

Paragraph (a):

In terms of section 19(1), an extractor is duly obliged to submit certain information in a report to the Minister of Finance on an annual basis, in respect of a year of assessment. This amendment determines that the report must in the form and manner that the Minister may prescribe in order to facilitate and streamline the disclosure of the information by the Minister under this section to the Commissioner for SARS (who carries out the administration of the Mineral and Petroleum Resources Royalty Administration Act).

Paragraph (b):

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:

- The amounts of the royalty imposed in terms of the Mineral and Petroleum Resources Royalty Act, 2008, in respect of refined and unrefined minerals;
- The quantum of earnings before interest and tax calculated per the Mineral and Petroleum Resources Royalty Act;
- The amount of the royalty that would have been payable if the gross sales of that extractor (in respect of all mineral resources) does not exceed R10 million during that year;
- The royalty (in respect of all mineral resources) imposed on an extractor if the extractor was not subject to the R100 000 exemption per year of assessment;
- The amount of the royalty that would have been payable if the rollover relief for transfers between extractors, did not apply.

2.34 Taxation Laws Second Amendment Act, 2009: Repeal of section 1

The proposed amendment is a technical correction as section 1 should have been repealed together with sections 12, 13, 14, 33, 34 and 38 under paragraph 196 of Schedule 1 of the Tax Administration Act, 2011.

2.35 Taxation Laws Second Amendment Act, 2011: Amendment of section 1

The proposed amendment defers the effective date for the new research and development provisions from 1 April 2012 to 1 October 2012.

2.36 Tax Administration Act, 2011: Amendment of section 1

Paragraph (a):

The proposed definition of “asset” is inserted in the general definitions as it is used in more than one Chapter of the Act.

Paragraph (b):

The proposed definition of “registered tax practitioner” is inserted in the general definitions as it is used in more than one Chapter of the Act.

Paragraph (c):

The proposed amendment to the definition of “SARS official” aims to include, within the ambit of the definition of a ‘SARS official’, persons from other organs of state whose services are obtained by SARS, for example under section 5(1)(c) of the SARS Act, but with whom no commercial contracts are concluded.

Paragraph (d):

The proposed amendment to the definition of “shareholder” ensures that the definition does not exclude shareholders who hold beneficial interests in a company otherwise than through shares.

2.37 Tax Administration Act, 2011: Amendment of section 3

Paragraph (a):

The proposed amendment is a technical correction in order to apply the defined term “tax offence” for purposes of the Act.

Paragraph (b):

The proposed amendment is a technical correction in order to remove unnecessary words.

2.38 Tax Administration Act, 2011: Amendment of section 6**Paragraph (a):**

This amendment clarifies that the authorisation of a SARS official occupying a designated post as a senior SARS official must be in writing and is aligned with the similar requirement when a specific SARS official is so authorised.

Paragraph (b):

This amendment is of a textual nature.

Paragraph (c):

The proposed amendment aims to include within the ambit of the definition of a 'SARS official' persons from other organs of state whose services are obtained by SARS, for example under section 5(1)(c) of the SARS Act, but with whom no commercial contracts are concluded.

2.39 Tax Administration Act, 2011: Amendment of section 8

The proposed amendment provides SARS with the discretion to issue identity cards and clarifies that a SARS official must only produce an identity card when exercising a power or duty for purposes of the administration of a tax Act outside SARS premises.

2.40 Tax Administration Act, 2011: Amendment of section 11

The proposed amendment incorporates the provisions of section 235(3), and makes it clear that where a cost order is granted in favour of SARS in any civil proceedings under the Act, whether by the tax court, Magistrate's Court, any higher court or otherwise, such amounts would constitute funds of SARS within the meaning of section 24 of the South African Revenue Service Act, 1997, as these funds are intended to reimburse SARS for its legal costs.

2.41 Tax Administration Act, 2011: Amendment of section 26

The proposed amendment clarifies that the return must be in the prescribed form and manner and that the information to be contained in a return need not be prescribed by public notice.

2.42 Tax Administration Act, 2011: Amendment of section 27

The proposed amendment aligns section 27 with the proposed amendment to section 26.

2.43 Tax Administration Act, 2011: Amendment of section 29

The Tax Administration Act, 2011, imposes a general record keeping requirement and some tax Acts, in addition, specify records that must be kept. The proposed amendment is to enable the Commissioner to further specify, in certain circumstances, what records are specifically required to be kept. The further amendments to section 29 are of a textual nature.

2.44 Tax Administration Act, 2011: Amendment of section 32

These amendments are of a textual nature.

2.45 Tax Administration Act, 2011: Amendment of section 34

The proposed amendment to the definition of 'promoter' is a technical correction in order to insert the defined term 'arrangement' in single quotation marks.

2.46 Tax Administration Act, 2011: Amendment of section 36

This amendment is to align section 36 with the meaning of 'debt' used in the Income Tax Act, 1962, as a result of amendment proposed in the Taxation Laws Amendment Bill, 2012.

2.47 Tax Administration Act, 2011: Amendment of section 37

This is a textual amendment to clarify that the information referred to in subsection (3) is the information referred to in subsection (1).

2.48 Tax Administration Act, 2011: Amendment of section 42

These amendments are technical corrections to clarify that an audit referred to in subsection (1) is an audit under Chapter 5 and not just Part A of Chapter 5, and to align the wording of subsection (6) with subsection (2)(b).

2.49 Tax Administration Act, 2011: Amendment of section 43

The proposed amendments clarify that the section applies to relevant material obtained from the taxpayer and not third parties, and remove the part of subsection (2) that overlaps with section 72(2), which section protects the taxpayer against self-incrimination.

2.50 Tax Administration Act, 2011: Amendment of section 46**Paragraph (a):**

The proposed amendment clarifies that only a request for relevant material from a third party is limited to relevant information related to records maintained or that should reasonably be maintained by the third party.

Paragraph (b):

The proposed amendment is a technical correction in order to effect consistency regarding the basis of the exercise of a discretion by SARS for an extension of a time period under the Act.

2.51 Tax Administration Act, 2011: Amendment of section 49**Paragraph (a):**

The proposed amendment is a technical correction to enhance clarity regarding which persons may be questioned by SARS during a field audit or investigation.

Paragraph (b):

The proposed amendment is a technical correction to ensure photocopying costs may also be claimed by a person where SARS uses the photocopying facilities of that person during a criminal investigation.

2.52 Tax Administration Act, 2011: Amendment of section 61

The proposed amendment gives effect to the notice requirement where the owner or person in control of the premises is not present during a search and seizure by SARS.

2.53 Tax Administration Act, 2011: Amendment of section 63

The proposed amendment gives effect to the notice requirement where the owner or person in control of the premises is not present during a search and seizure by SARS.

2.54 Tax Administration Act, 2011: Amendment of section 71

The proposed amendment is a technical correction in order to use a more appropriate term.

2.55 Tax Administration Act, 2011: Amendment of section 72

The proposed amendment is a technical correction in order to apply the defined term “tax offence”.

2.56 Tax Administration Act, 2011: Amendment of section 79

The proposed amendments are technical corrections in order to include the requirements for an application for a ruling effected by section 15(a) of Act No. 8 of 2010, but omitted in the Act.

2.57 Tax Administration Act, 2011: Amendment of section 80

Section 80(1)(a)(vi), currently provides that SARS may reject an application for an advance ruling if the matter can be resolved by SARS issuing a directive under the Fourth Schedule. The proposed amendment extends this provision to include directive issued under the Seventh Schedule of the Income Tax Act, 1962.

2.58 Tax Administration Act, 2011: Amendment of section 91**Paragraph (a):**

The proposed amendment clarifies the applicable time period within which a return must be submitted after an assessment based on an estimation as a result of the failure by a taxpayer to submit a return, and that the assessment is not subject to objection and appeal unless the return is submitted or the return is submitted but SARS does not issue a revised assessment.

Paragraph (b):

The proposed amendment enables SARS to extend the period within which the return must be submitted for the period referred to in section 211(2). For example, if SARS has the current address of the taxpayer who failed to submit a return which resulted in the issue of the assessment based on an estimation, the period within which the taxpayer must submit the return may be extended by SARS for up to 35 months.

2.59 Tax Administration Act, 2011: Amendment of section 99

The proposed amendment is a technical correction in order to enhance clarity regarding the particular assessment in issue.

2.60 Tax Administration Act, 2011: Amendment of section 107

The proposed amendment clarifies that SARS may concede an appeal similar to its power to allow an objection under section 106(2), but limits SARS's ability to concede an appeal to before the appeal is heard by the tax court or a higher court dealing with an appeal against the judgment of the tax court.

2.61 Tax Administration Act, 2011: Amendment of section 130

Amendment consequential upon amendment to section 11. (See the notes to paragraph 2.39 above).

2.62 Tax Administration Act, 2011: Amendment of section 135

The proposed amendment is a technical correction in order to clarify that this section only applies to appeals against tax court judgments to the Supreme Court of Appeal.

2.63 Tax Administration Act, 2011: Amendment of section 142

The proposed amendment is a technical correction to align the Chapter definition of 'settle' with the definition of 'dispute' to clarify that a settlement may be concluded at any time after the issue of an assessment or the making of a 'decision' which is 'disputed', and not only after an appeal is lodged.

2.64 Tax Administration Act, 2011: Amendment of section 164

The proposed amendment is a technical correction in order to enhance clarity.

2.65 Tax Administration Act, 2011: Amendment of section 166

The proposed amendment is a technical correction to enable SARS to allocate a payment against an amount of interest or penalty before capital, particularly where payment is made in respect of a tax type where interest is not yet calculated on a daily basis and compounded monthly under section 187(2).

2.66 Tax Administration Act, 2011: Amendment of section 187

The proposed amendment is a technical correction to ensure the correct application of the interest regime under the Tax Administration Act, 2011, i.e. if a penalty is not paid by the payment date specified in the penalty assessment interest runs from the liability date which is the date of assessment.

2.67 Tax Administration Act, 2011: Amendment of section 189

The proposed amendment is a technical correction to delete a incorrect reference to a defined term.

2.68 Tax Administration Act, 2011: Amendment of section 192

The definition of 'asset' has been moved to the general definitions in section 1.

2.69 Tax Administration Act, 2011: Amendment to Chapter 14

The proposed amendment is consequential upon the deletion of the definition of 'asset' in section 192.

2.70 Tax Administration Act, 2011: Amendment of section 210

The proposed amendments seek to avoid administrative 'double jeopardy' by providing that a fixed amount administrative penalty may not be imposed for non-compliance which is subject to a percentage based penalty, in respect of

which an understatement penalty has been imposed or constitutes failure to disclose information subject to a reportable arrangement penalty.

2.71 Tax Administration Act, 2011: Amendment of section 211

The proposed amendment is a technical correction to effect an ascertainable increment commencement date and a consistent period before each increment of an administrative non-compliance penalty.

2.72 Tax Administration Act, 2011: Amendment of section 217

Paragraph (a):

The proposed amendment is a technical correction in order to remove unnecessary cross-references.

Paragraph (b):

The proposed amendment is a technical correction in order to enhance clarity.

2.73 Tax Administration Act, 2011: Amendment of section 223

The proposed amendment aims to make it clear that a taxpayer cannot rely upon an opinion regarding the GAAR or the substance over form doctrine unless there has been full disclosure of all steps in or parts of the arrangements (whether or not the taxpayer is a direct party to those steps and arrangements), as well as any other material facts.

2.74 Tax Administration Act, 2011: Amendment of section 224

The proposed amendment is a technical correction in order to clarify the application of the remittal remedy.

2.75 Tax Administration Act, 2011: Amendment of section 229

The proposed amendment is a technical correction in order to apply the defined term “tax offence” for purposes of the Act.

2.76 Tax Administration Act, 2011: Amendment of section 231

The proposed amendment is a technical correction in order to apply the defined term “tax offence” for purposes of the Act.

2.77 Tax Administration Act, 2011: Amendment of section 234

Paragraph (a):

See the notes on paragraph 2.79 below. The proposed amendment is a consequential amendment in order to give effect to the first phase of the regulation of tax practitioners.

Paragraph (b):

The proposed amendment is a technical correction in order to clarify an offence.

Paragraph (c):

The proposed amendment criminalises the failure to withhold and pay to SARS any amount of tax as and when required under a tax Act.

2.78 Tax Administration Act, 2011: Amendment of section 235

The proposed amendment is a technical correction.

2.79 Tax Administration Act, 2011: Amendment of section 237

The proposed amendment is a technical correction in order to clarify that a signature cannot be used without the consent and authority of the person whose signature it is.

2.80 Tax Administration Act, 2011: Registration of Tax Practitioners

It is proposed that the regulation of tax practitioners be divided into two phases. The first phase will be the compulsory registration of tax practitioners with a recognised controlling body, which is discussed in more detail below. The second phase will be the establishment of an independent regulatory board for tax practitioners. The second phase will begin with a review of the success or otherwise of the first phase eighteen months after its implementation.

The proposed recognised controlling body model is a middle way between a lack of regulation and a statutory regulator, which will leverage existing bodies. It is intended to provide a framework to ensure that tax practitioners are appropriately qualified and that a mechanism is available, both to taxpayers and SARS, to ensure that misconduct is addressed.

This proposal hinges on two requirements. The first is the existing requirement that tax practitioners register with SARS, which was brought into force in 2005. The Tax Administration Act, 2011, already modifies this requirement to provide that a tax practitioner may not be registered if he or she has been removed from a professional body or convicted for a crime involving dishonesty in the preceding five years. The second is a new requirement for all tax practitioners to belong to a recognised tax practitioners' association or fall under the authority of a directly relevant statutory regulator, such as the Independent Regulatory Board for Auditors (IRBA).

SARS would review the minimum qualifications and experience requirements, continuing professional education requirements, codes of ethics and conduct and disciplinary procedures of a professional association seeking recognition. It would ensure that members are required to have knowledge of tax that is kept up to date, are subject to codes of ethics and conduct that are relevant to the tax field and require members to act ethically and professionally and that an effective disciplinary mechanism exists to deal with members who contravene the codes of ethics and conduct.

To ensure sustainability and credibility, associations should have a minimum of 1 000 members upon either application or within a year to cater for new associations. To cater for associations that lack the capacity or willingness to deal with SARS's complaints of members' misconduct adequately, it is proposed that the Minister be empowered to appoint a panel of retired judges or persons of similar stature and competence to hear these complaints on an association's behalf. The costs of the appointment will be borne equally by the association and SARS. A process for revoking an association's recognition if it does not follow through on its commitments is also proposed.

In order to recognise the status of statutory regulators, recognition of the relevant bodies would be automatic.

Finally, the range of misconduct that may be reported by SARS to a professional association or statutory regulator in terms of section 241, the successor to section 105A of the Income Tax Act, 1962, is expanded to cover additional tax specific misconduct.

2.81 Tax Administration Act, 2011: Amendment of section 239**Paragraph (a):**

See the notes on paragraph 2.79 above.

Paragraph (b):

The definition of “registered tax practitioner” is used in other Chapters of the Act, and thus serves as a global definition that should be included in section 1.

2.82 Tax Administration Act, 2011: Amendment of section 240**Paragraphs (a), (c) and (d):**

The proposed amendments are technical corrections in order to clarify what ‘document’ is referred to namely a return as defined in the Act.

Paragraph (b):

See the notes on paragraph 2.79 above. The proposed amendments are consequential amendments in order to give effect to the first phase of the regulation of tax practitioners.

Paragraph (e):

The proposed amendments clarify that removal from a professional association only bars a person from registering as a tax practitioner if the removal is for serious misconduct and corrects the conjunction between paragraphs (a) and (b).

2.83 Tax Administration Act, 2011: Insertion of section 240A

See the notes on paragraph 2.79 above.

2.84 Tax Administration Act, 2011: Amendment of section 241

See the notes on paragraph 2.79 above.

2.85 Tax Administration Act, 2011: Amendment of section 244

The proposed amendment is a technical correction to give effect to the general approach in the Act that business days are used in the context of time periods other than time periods for payment.

2.86 Tax Administration Act, 2011: Amendment of section 246

The proposed amendment is a technical correction in order to enhance clarity.

2.87 Tax Administration Act, 2011: Amendment of section 252

The proposed amendment is a technical correction in order to align section 252(a) with section 251(a).

2.88 Tax Administration Act, 2011: Amendment of section 255

The proposed amendment enables the Commissioner to make rules, by public notice, with regard to the procedures for electronic record retention by SARS.

2.89 Tax Administration Act, 2011: Amendment of section 256

The proposed amendments are required to cater for the modernisation of the tax clearance certificate procedure, which will essentially enable both taxpayers and third parties to verify the tax compliance status of a taxpayer online. Also, the proposed amendments—

- enable SARS to extend the 21 business day period within which a certificate must be issued where more time is required to ensure that the taxpayer is compliant, for example where it appears that the taxpayer intends to make offshore transfers of large amounts; and
- invalidate a tax clearance certificate from the period from the date that a taxpayer becomes non-compliant until such time that the taxpayer remedies the non-compliance.

2.90 Tax Administration Act, 2011: Amendment of section 257

The proposed amendment enables the Minister to determine by regulation the circumstances when a tax clearance certificate may be required from a person for governmental purposes, for example when tendering for procurement contracts with an organ of state, or issued by SARS, and to prescribe additional procedural requirements for the issue and withdrawal of tax clearance certificates.

2.91 Tax Administration Act, 2011: Amendment of section 269

The proposed amendment is a technical correction in order to apply the transitional rule to electronic communication rules and regulations issued under provisions of the tax Acts repealed by the Act.

2.92 Amendment of Tax Administration Act, 2011: Paragraph 78 of Schedule 1

There was a duplication as section 94 of the Taxation Laws Amendment Act, 2011, also inserted item (cA) in paragraph 2(4) of the Fourth Schedule. The two amendments serve the same purpose and hence paragraph 78 is obsolete.

2.93 Amendment of Tax Administration Act, 2011: Paragraph 167 of Schedule 1

The proposed amendment is a technical correction.

2.94 Short title and commencement

Clause 93 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 2012 Budget Review.

5. PARLIAMENTARY PROCEDURE

- 5.1 The State Law Advisers, South African Revenue Service and 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.