

Revised Joint presentation to the Standing Committee on Finance (SCoF) and Select Committee on Finance (SECoF) on the Response to the 2019 Tax Bills

2019 Medium term budget policy statement

30 October 2019

2019 MTBPS | 30 October 2019



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

2019 DRAFT RATES AND MONETARY AMOUNTS AND REVENUE LAWS AMENDMENT BILL, 2019 DRAFT TAXATION LAWS AMENDMENT BILL, 2019 DRAFT TAX ADMINISTRATION LAWS AMENDMENT BILL & 2019 DRAFT INCOME TAX AMENDMENT BILL

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Consultation process

- The 2019 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill (Draft Rates Bill), the 2019 Draft Taxation Laws Amendment Bill (Draft TLAB) and the 2019 Draft Tax Administration Laws Amendment Bill (Draft TALAB) were published for public comment on 21 July 2019.
- This year, a separate 2019 Draft Income Tax Amendment Bill was published for public comment on 30 July 2019. This bill contains environmental incentive announcements made in the 2019 Budget.
- National Treasury and SARS received written comments from 77 organisations and 600 individuals on the Draft TLAB, the Draft TALAB and the Draft Income Tax Amendment Bill by deadline of 23 August 2019.
- National Treasury and SARS briefed the SCoF and the SECoF on the draft bills on 3 September 2019.
- Oral presentations by taxpayers and tax advisors on the draft bills were made at hearings by the SCoF and the SECoF on 10 September 2019.
- Workshops with stakeholders to discuss their comments on the 2017 Draft TLAB & TALAB were held by National Treasury and SARS on 5 and 6 September 2019.
- On 18 September 2019, National Treasury and SARS present to the SCoF and the SECoF a draft response document containing a summary of draft responses to public comments received on the draft bills.

Way forward for tax law bills

- The Minister will introduce the 2019 tax law bills on the day of the MTBS in October.
- The SCoF will consider and approve the 2019 tax law bills for approval.
- NA to vote for the 2019 tax law bills around mid-November.
- SECoF in NCOP to consider the 2019 tax law bills for approval.
- NCOP to vote on the 2019 tax law bills before Parliament rises for the year.
- Subsequently, the 2019 tax law bills will be submitted to the President for ascent.

Key issues raised during consultation process

The proposed amendments included in the draft bills that received most comments are the following:

2019 Draft Rates Bill

- Increase on excise duty on tobacco

Carbon Tax Amendments

➤ 2019 Draft Income Tax Amendment Bill

- Repeal of the tax exemption for Certified Emission Reductions
- Extension of the Energy Efficiency Savings Tax Incentive
- **Technical carbon tax amendments contained in the 2019 Draft TLAB**

2019 Draft TLAB

➤ Employment, Individuals and Savings

- Reviewing the tax treatment of surviving spouse pensions
- Tax treatment of bulk payments to former members of closed funds
- Exemption relating to annuities from a provident or provident preservation fund
- Aligning the effective date of tax neutral transfers between retirement funds with the effective date of all retirement reforms
- Reviewing measures aimed at avoiding Estate Duty
- Extending the scope of amounts constituting variable remuneration

Key issues raised during consultation process

➤ **Business Tax (General)**

- Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions
- Correcting anomalies arising from applying anti value shifting rules
- Refining provisions around the special interest deduction for debt funded share acquisitions
 - Clarifying the exclusion from deducting interest for debt financed acquisitions of start-ups
 - Amending the special interest deduction rules in respect of share acquisitions funded by debt to allow for deductions after unbundling transactions
- Clarifying the interaction between corporate reorganisation rules and other provisions in the Income Tax Act
 - Clarifying corporate reorganisations rules relating to exchange items and interest bearing instruments
 - Refining the interaction between the anti-avoidance provisions for intra-group transactions

➤ **Business Tax (Financial Institutions and Products)**

- Clarifying inconsistencies in the current listed and regulated property company (REIT) tax regime
 - Changes to the definition of rental income
 - Interaction between reorganisation rules and REITs regime
- Taxation of long-term insurers
 - Refinement to taxation of risk policy funds of long term insurers
 - Alignment of the tax treatment of “deferred revenue” between long term and short term insurers
- Consequential amendments to tax treatment of doubtful debts for banks in terms of section 11(jA)

Key issues raised during consultation process

➤ **Business Tax (Incentives)**

- Reviewing the Special Economic Zone (SEZ) tax incentive regime
- Reviewing the venture capital company tax incentive regime
- Employment tax incentive (ETI)
 - Updating the employment tax incentive to align with the national minimum wage
 - Clarifying the interaction between the employment tax incentive and the special economic zone provisions
- Repeal of the retrospective approval of tax exempt status for Public Benefit Organisations (PBOs) and recreational clubs

➤ **Business Tax (International)**

- Reviewing the comparable tax exemption
- Considering the “affected transaction” definition in the arm’s length transfer pricing rules
- Reviewing the definition of “permanent establishment”

➤ **Value Added Tax**

- Refining the VAT treatment of foreign donor funded projects
- Reviewing section 72 of the VAT Act

➤ **Customs and Excise Act**

- Ad-valorem excise duty on motor vehicles

Key issues raised during consultation process

2019 Draft TALAB

➤ **Income Tax Act**

- Removal of per payment declaration that royalties and interest are exempt or subject to a reduced rate in terms of a double taxation agreement, introduction of two year expiry period for declarations and undertakings

➤ **Customs and Excise Act**

- Sharing of information required to administer carbon offsets and greenhouse gas emissions reporting

➤ **Tax Administration Act**

- Extension of notice period to institute legal proceedings against the Commissioner
- Criminal sanctions for erroneous, incomplete or false documents submitted to SARS
- Common Reporting Standard mandatory disclosure rules and non-compliance penalties
- Completing move from tax compliance certificate to tax compliance status

2019 Draft Rates Bill

Increase of excise duty on tobacco

(Clause 63 of the Draft TLAB: Section 65 of the Customs and Excise Act)

Comment:

An increase in taxes, and therefore an increase in the price to consumers of legal tobacco products, drives consumers to cheaper, illegal products. It is our forecast that the illicit market will outgrow the legal market, within 5 years. This will have a devastating impact on the total legal tobacco value chain, including commercial and emerging farmers in deep rural areas of our country. Tobacco farmers have already experienced a 15 per cent decrease in the demand for tobacco leaves over the past two years as a direct result of the illegal trade.

Response:

Not accepted. Increases in excise rates are not responsible for the growth of illicit trade in tobacco products, but rather due to a lack of legal enforcement and the criminal nature of the activities. There have been problems with enforcement over the last couple of years which most likely has led to an increase in illicit trade. SARS is however rebuilding capacity and strengthening enforcement to address problems of illicit economy (especially in tobacco).

Comment:

The current fiscal framework for the tobacco category reveals that cigarettes carry the highest excise rate within the tobacco products category. Pipe tobacco (a semi-finished tobacco product) and water pipe tobacco, which carry similar harmful effects as cigarettes are given reprieve, indexing 21 per cent of cigarettes excise rate. The current excise framework is unbalanced, and can no longer deliver revenues as expected without a policy review that internalises harm and captures the revenue opportunity from the non-cigarette tobacco subcategories.

Response:

Not accepted. The tobacco excise policy uses the targeted incidence approach that is set at 40 per cent of the retail selling price of the most popular brand within each product category. Also, cigarettes make up the majority of the tobacco market.

Increase on excise duty o tobacco

(Clause 63 of the Draft TLAB: Section 65 of the Customs and Excise Act)

Comment:

It is requested that excise rates on cigarettes are held at current levels for at least three years or until the illicit trade has been drastically reduced.

Response:

Not accepted. There is an excise tax policy in place to increase the excise rates by at least inflation or the targeted incidence, whichever is higher, on an annual basis. The decision to raise excise duties also rests with the Minister of Finance.

Comment:

It is recommended that less harmful tobacco products be given subcategory role, and an excise rate that reflects the harm associated with the product. As these categories are new in the tobacco category, affording consumers options to migrate to these new products as harm reduced products must outweigh the need to tax them on the same level as cigarettes. Using the Risk Continuum Model, as a guiding tool for excise structuring, tobacco heated products, for example, must carry an excise rate equivalent to their harm and the premium price position they currently occupy. On the other hand, nicotine containing chemical preparations have 95 per cent less harmful health effects and should be encouraged as a substitute product to cigarettes.

Response:

Accepted. Government had already indicated in the 2019 February Budget that the use of electronic cigarettes and tobacco heating products has increased in recent years, and it intends to start taxing these products. The process will be completed in consultation with the National Department of Health, who have already started a process of amending the current tobacco legislation through the “Control of Tobacco Products and Electronic Delivery Systems Bill”. The excise policy work in this regard is currently underway.

CARBON TAX AMENDMENTS

2019 Draft Income Tax Amendment Bill

Repeal of the tax exemption for Certified Emission Reductions (Clause 1 of the Draft Income Tax Amendment Bill: Section 12K of the Income Tax Act)

- In 2009, government introduced a tax exemption for income generated from the sale of certified emission reduction credits arising from projects developed under the Clean Development Mechanism (CDM) of the Kyoto Protocol. To avoid a double benefit scenario, where the same emissions reductions lead to both an income tax exemption under section 12K of the Act and a lower carbon tax liability for a taxpayer under the Carbon Tax Act, it is proposed that the tax exemption for certified emission reduction units is repealed to become effective from the date of introduction of the carbon tax.

Comment:

Some stakeholders acknowledged the potential for double dipping. Suggested that the exemption continues but is limited to those credits from projects that will not be used as offsets under the carbon tax

Response:

Not accepted.

- The carbon tax creates the economic incentives for the uptake of carbon offset projects in South Africa by helping to improve the financial viability of low carbon projects and making these projects more cost competitive with high carbon emitting initiatives. The offset allowance provides an additional incentive for taxpayers to invest in low carbon projects and to help reduce their tax liability. To date, since the introduction of the tax exemption for CERs, there has also been a limited uptake of CDM projects in South Africa with only 15 projects issued with carbon credits. In light of this, the primary instrument that will drive investments in carbon offset projects over the short, medium and long term will be the carbon tax.
- Maintaining the tax exemption for CERs could create further distortions in the market where credits from CDM projects qualify for preferential tax treatment compared to credits generated under the GS and VCS. The repeal of the tax exemption will ensure a more equitable tax regime where offsets generated under the different carbon standards will be subject to similar tax treatment.

Extension of the Energy Efficiency Savings Tax Incentive (Clause 2 of the Draft Income Tax Amendment Bill: Section 12L of the Income Tax Act)

- In 2013, Government introduced the energy efficiency savings tax incentive to encourage investments in energy efficiency measures to help reduce emissions of greenhouse gases, address climate change, and promote efficient energy use. To date, the incentive has helped to promote significant investments in energy intensive sectors such as mining as well manufacturing amounting to about R 3 billion in total. During stakeholder consultations on the carbon tax, there were views that the energy efficiency savings tax incentive should be extended beyond 2020 to ensure that there is long term policy certainty on revenue recycling commitments made under the carbon tax. It was therefore proposed to extend the duration of the incentive to be aligned with the first phase of the carbon tax, ending 31 December 2022.

Comment:

There was broad support by stakeholders for the extension of the duration of the incentive. Some stakeholders were of the view that the incentive should be extended beyond 2022.

Response:

Noted.

- As part of the holistic review of the Section 12L incentive, government will consider the overall design, administration and economic feasibility of the incentive.

CARBON TAX AMENDMENTS

Technical Carbon Tax Amendments in 2019 Draft TLAB

Technical Carbon Tax Amendments

Clauses 83 to 92 of the 2019 Draft TLAB-Sections 1, 3, 4, 5, 7, 8, 9, 13 & Schedules 1 & 2 of the Carbon Tax Act

- **Thresholds applied to be liable for carbon tax** – Proposed amendments to Section 3 of the Act include activities by taxpayers that also meet the thresholds, not only those above the threshold. This is aligned with the Department of Environment Forestry and Fisheries requirements for reporting GHG emissions.

Comment:

Taxpayers request that the DEFF documents are aligned with the Carbon Tax Act.

Response:

Not accepted. The Carbon Tax Act has to be aligned with the DEFF requirements for GHG emissions reporting

- **Amendment of Section 4 for the tax base.** Clarifies that taxpayers can use different methodologies to report emissions to DEFF i.e. tier 1, 2 and 3. For purposes of tier 1 and 2, taxpayers should use the schedules and emission factors set out in Schedule 1.

Comment:

Some suggested that this section is deleted.

Response:

Not accepted. Tax legislation has to define the tax base.

Technical Carbon Tax Amendments

Clauses 83 to 92 of the 2019 Draft TLAB-Sections 1, 3, 4, 5, 7, 8, 9, 13 & Schedules 1 & 2 of the Carbon Tax Act

- **Amendment of Section 4 - the tax base.**

Comment:

Stakeholders were of the view that the calculation of GHG emissions under the carbon tax and GHG emissions reported to the DEFF could produce different results due to the use of different Net Calorific Values (NCV). It is suggested that proposed country specific NCV values of the South African Petroleum Industry Association (SAPIA) in Annexure D of the Technical Guidelines should be considered.

Response:

Partially accepted.

- Based on discussions with the DEFF, the National Treasury proposes that the NCV values for the fuels defined in Schedule 1 of the Carbon Tax Act should also include the IPCC expected NCV values range. This will ensure alignment with GHG Emissions Reporting requirements of the DEFF and cater for scenarios for taxpayers may use an NCV value other than the Default IPCC NCV reflected in the schedule 1 currently.
- To minimise possible tax avoidance under the carbon tax, it is proposed that where NCVs used by taxpayers differ from the Tier 1 IPCC default NCV factors, a scientific report which is assessed and verified by the DEFF should accompany taxpayer returns.

2019 Draft TLAB

Income Tax: Individuals, Savings and Employment

Reviewing the tax treatment of surviving spouse pensions (Clause 48 of the Draft TLAB: Paragraph 2 of the Fourth Schedule to the Act)

- Members of retirement funds can deduct contributions to their retirement funds from their taxable income when determining their monthly employees' tax and annual income tax payable. Upon the death of a member, the surviving spouse may be entitled to receive a monthly spousal pension from the retirement fund. This spousal pension is taxable in the surviving spouse's hands by the retirement fund. If the surviving spouse also receives a salary or other income, that salary or other income is added to the "surviving spouse's pension" to determine his or her correct tax liability on assessment. The result of the assessment is that the surviving spouse has a tax liability that exceeds the employee's tax withheld by the employer and retirement fund(s) during the year of assessment, since the aggregation of income pushes them into a higher tax bracket. It has come to Government's attention that the surviving spouse may not foresee the additional tax liability that creates a cash flow burden and tax debt for the surviving spouse. In order to alleviate the financial burden, it is proposed that the tax rebates should not be taken into account when calculating taxes to be withheld by the retirement funds on the spousal pension.

Comment:

There is no clarity with regard to whom the proposed amendment is meant to apply to, as the draft legislation seems to imply that it would apply to taxpayers other than surviving spouses.

Response:

Noted. The policy rationale regarding the proposed amendment was to assist surviving spouses. Based on the comments received, it has now come to Government's attention that taxpayers other than surviving spouses are also impacted. In order to cater for this, it is proposed that legislative changes be made in the 2019 Draft TLAB to extend this to apply to any taxpayer receiving two or more sources of employment income, provided that one of those sources is from a retirement fund or an insurer.

Reviewing the tax treatment of surviving spouse pensions (Clause 48 of the Draft TLAB: Paragraph 2 of the Fourth Schedule to the Act

Comment:

The proposed amendment would be administratively burdensome for both SARS and retirement funds, and can therefore not come into effect on 1 March 2020.

Response:

Accepted. In order to provide both SARS and taxpayers more time to ready their systems for the changes and implementation required as a result of the proposed amendment, it is proposed that the effective date for the proposed amendment be postponed from 1 March 2020 to 1 March 2021.

Tax treatment of bulk payments to former members of closed funds (Clause 46 of the Draft TLAB: Paragraph 2D of the Second Schedule to the Act)

- In 2009, the Minister of Finance published a notice in Government Gazette No. 32005 approving retirement funds to make tax free payments of “undisclosed secret profits” based on certain criteria. When the notice was published, some retirement funds were no longer registered and these deregistered retirement funds had already paid amounts to the fund administrators but the amounts were not yet paid to the affected members and/or beneficiaries. In order to ensure consistent tax treatment, it is proposed that changes be made in the Act to make provision for the payment of amounts currently held by fund administrators on behalf of deregistered funds to qualify for tax exemption, provided that they meet the criteria to be determined by the Minister in a notice in Government Gazette.

Comment:

The current wording of the proposed amendment, specifically “*held by or under the control of an administrator*” creates the impression that the money held by the funds is an asset belonging to the funds as opposed to the rightful beneficiaries.

Response:

Not Accepted. The proposed words “*held by or under the control of*” makes it clear that this refers to money or assets held in possession. Possession does not imply ownership.

Exemption relating to annuities from a provident or provident preservation fund

(Clause 14 of the Draft TLAB: Section 10C to the Act)

- In 2016, Government introduced some of the broader objectives of the retirement reforms. As a result, contributions by both employers and employees to pension, provident and retirement annuity funds qualify for a tax deduction from employees taxable income, subject to a cap. On the other hand, contributions by employers to pension, provident and retirement annuity funds on behalf on employees qualify as a taxable fringe benefit in the hands of employees. Consequently, members of provident funds receiving an annuity found themselves in a position where any non-deductible contributions could only be off-set against the lump sum received and the balance of the non-deductible contributions in excess of the lump sum received is forfeited or lost. In order to promote uniform tax treatment of all retirement funds, it is proposed that provident fund members who receive annuities qualify for the same tax exemption status that would be applicable to other retirement fund members.

Comment:

The proposed amendment should be applicable to provident and provident preservation fund members irrespective of how much of their retirement benefit is taken as a lump sum upon retirement. Further to the above, the effective date should apply retrospectively with effect from 1 March 2019 instead of 1 March 2020.

Response:

Noted. The requirement for provident and provident preservation fund members to annuitize at least two-thirds of their retirement benefit in order to receive the section 10C exemption shall be set aside until the effective date of the annuitisation provisions, i.e. 1 March 2021. With regard to the comment that the effective date should apply retrospectively with effect from 1 March 2019, this is not accepted. The effective date shall remain unchanged, i.e. will apply with effect from 1 March 2020.

Exemption relating to annuities from a provident or provident preservation fund (Clause 14 of the Draft TLAB: Section 10C to the Act)

Comment:

The current structure of the provision limits the effectiveness of the relief provided under section 10C, as the allowable deduction is rarely exceeded. The relief measure should be amended, and a R500 000 exemption should apply in instances where a taxpayer has not previously received a lump sum in their lifetime and such annuity received is below the tax threshold.

Response:

Not Accepted. Changing the structure of the provision will require further amendments to this section once the annuitisation provisions come into effect, this could result in avoidable complications to the tax system.

Aligning the effective date of tax neutral transfers between retirement funds with the effective date of all retirement reforms

(Clause 47 of the Draft TLAB: Paragraph 6(1)(a) of the Second Schedule to the Act)

- In 2013, retirement fund reform amendments were effected to the Act regarding the annuitisation requirements for provident funds. These retirement fund reform amendments were supposed to come into effect on 1 March 2015. However, the annuitisation requirements for provident funds have repeatedly been postponed due to discussions that are currently taking place at NEDLAC concerning comprehensive social security. Each postponement of the effective date requires several consequential amendments to various provisions of the Act. In making changes to the effective dates in relation to the several consequential amendments required, an oversight occurred with regard to paragraph 6(1)(a) of the Second Schedule to the Act. Failure to change the effective date in the above-mentioned provision resulted in the non-taxable treatment of transfers from pension funds to provident or provident preservation funds with effect from 1 March 2019. In order to correct this, it is proposed that changes be made in the Act to align the effective date of the tax neutral transfers from pension to provident or provident preservation funds with the current effective date of annuitisation related reforms, which is 1 March 2021.

Comment:

A retrospective effective date places taxpayers who made such transfers in good faith in a “non-compliance” position. Further to the above, the ability to make tax neutral transfers from a more restrictive retirement fund to a less restrictive fund should not be linked to the annuitisation requirements.

Response:

Not Accepted. The proposed amendment intends to rectify an oversight made during the 2018 legislative cycle. The policy intention remains that tax neutral transfers from a more restrictive retirement fund to a less restrictive fund only become possible once the annuitisation provisions come into effect. As a result, any such transfers made between the period when the oversight was made and when it was corrected would have been treated as taxable transfers.

Reviewing measures aimed at avoiding Estate duty (Clause 1 of the Draft TLAB: Section 3 of the Estate Duty Act)

- In 2015, changes were made in section 3(2) of the Estate Duty Act to prevent individuals from avoiding estate duty by making a large contribution into a retirement annuity fund in the year the individual dies. Consequently, this paragraph makes provision for inclusion in the estate any amounts that have not been allowed as a deduction in terms of sections 11(k), 11(n) or 11F of the Income Tax Act (essentially the excess non-deductible contributions created by the large contributions made to the retirement annuity fund). However, section 3(2) (bA) erroneously includes not only excess contributions in terms of sections 11(k), 11(n) or 11F, but also amounts which are not taken into consideration in terms of the Second Schedule of the Income Tax Act. In order to close this loophole, it is proposed that retrospective changes be made to section 3(2)(bA) of the Estate Duty Act.

Comment:

The inclusion of non-deductible contributions in a person's deceased estate is inequitable as contributions used to reduce annuities and lumpsums received at retirement should not be included in estate duty. Further to the above, the effective dates proposed do not have a desirable impact on tax collection.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB to take into account the provisions of section 10C of the Income Tax Act when determining the deceased's tax liability for estate duty purposes. In addition, it is proposed that the effective dates for the proposed amendments be changed as follows:

- The proposed amendments shall be deemed to apply to contributions made on or after 1 March 2016 and will apply in respect of the estate of a person who dies on or after the date of promulgation of the 2019 TLAB.

Extending the scope of amounts constituting variable remuneration (Clause 3 of the Draft TLAB: Section 7B of the Act)

- The Income Tax Act contains section 7B, aimed at matching the timing between accrual and payment of various forms of variable remuneration and deems certain amounts to accrue to the employee when they are actually paid. It has come to Government's attention that the scope of this section is very limited as it does not cater for certain amounts, such as night shift allowance, stand by allowance. In order to address this anomaly, changes are proposed in section 7B so that this section does not apply to specific amounts but applies to amounts bearing certain generic characteristics listed in the Act.

Comment:

The proposed amendment makes it difficult for employers to ascertain which payments qualify as variable remuneration. Further, amounts that previously qualified as variable remuneration are as a result of the proposal no longer taxable as variable remuneration.

Response:

Accepted. Due to the confusion caused by the application of a generic qualification criteria, it is proposed that changes be made in the 2019 Draft TLAB so that the specific list that was available in the Act before the proposed changes be reinstated, and updated to cater for certain amounts that are not currently included in the list.

Income Tax: Business Tax (General)

Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

(Clauses 23, 51 and 59 of the Draft TLAB: Section 22B, Paragraphs 12A & 43A of the Eighth Schedule to the Act)

- The 2019 Budget Review included a legislative proposal under Annexure C to further strengthen the anti-avoidance rules dealing with dividend stripping in order to curb the use of new tax structures being used by taxpayers to undermine the 2017 rules. To curb the use of these new structures, proposed amendments were included in the Draft TLAB and it was further proposed that these further strengthened rules would apply with effect from Budget Day (20 February 2019).

Comment:

The proposed rules are overly broad in their application. These rules have moved away from the original policy at the time that they were first inserted. This has resulted in a situation where any new share issue, no matter how small, would reduce the effective interest of an existing shareholder in the target company, potentially triggering the rules even where there is absolutely no link between the share issue and the relevant extraordinary dividend. Consideration must be given to requiring a link between the extraordinary dividend and the issue of shares.

Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

(Clauses 23, 51 and 59 of the Draft TLAB: Section 22B, Paragraphs 12A & 43A of the Eighth Schedule to the Act)

Response:

Not Accepted. The 2017 legislative amendments were necessary because the pre-2017 anti-avoidance rules were limited in their scope and were, as a result, being undermined by taxpayers. The pre-2017 anti-avoidance rules only applied where the shareholder company held more than 50 per cent of the shares in the target company. This threshold was too high and did not focus on the ability of a shareholder company that wishes to dispose of shares in another company to significantly influence the decisions of whether a dividend will be distributed in respect of those shares to achieve the desired reduction of the value of those shares and its effective interest in the shares of the target company. Secondly, anti-avoidance rules applied if there was a link between the funding of the subscription amount and the dividend declared. In this respect, the anti-avoidance rules applied where such funding was provided for or guaranteed by the prospective purchaser of shares or a connected person in relation to a prospective purchaser. The link between the subscription price and the dividend made the pre-2017 anti-avoidance rules easy to circumvent as taxpayers broke the link by using funders other than the prospective purchaser or connected persons in relation to the prospective purchaser. Even more worrying was the fact that in cases where the target company had distributable reserves to fund the dividend with.

However, the following refinements are proposed in the 2019 Draft TLAB to help limit the application of the proposed anti-avoidance rules regarding dividend stripping to scenarios that pose the most risk to the fiscus:

Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

(Clauses 23, 51 and 59 of the Draft TLAB: Section 22B, Paragraphs 12A & 43A of the Eighth Schedule to the Act)

Providing certainty regarding the use of the term “effective interest”

- Taxpayers have indicated in both their written submissions and during public hearing that the term “effective interest” needs to be clarified. More specifically, clarity is required as to whether taxpayers are required to assess changes in effective interest held by the shareholder company in a target company in the class of shares that the target company issues.
- Government is aware that taxpayers are already developing tax structures that will manipulate the use of different classes of shares to curb the currently proposed rules. It is Government’s position that the current proposed rules require taxpayers to do a “facts and circumstances” analysis when determining whether a shareholder company’s effective interest in a target company has been reduced. In the first instance, where an extraordinary dividend is paid and shares of the same class are issued, the effective interest test is applied by considering the effective percentage held before the share issue to that held after the shares issue. In the instance that an extraordinary dividend is paid in respect of a one class of shares and shares of a different class are issued by the target company, the reduction in the effective interest of the shareholder company must be considered with reference to the reduction of the value of that shareholder company’s interest in the target company across the different classes of shares.
- That being said, where possible and with regard to instances that Government considers the risk of using different classes of shares to avoid the 2019 proposed changes being used to avoid these proposed rules, limitations will be proposed.

Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

(Clauses 23, 51 and 59 of the Draft TLAB: Section 22B, Paragraphs 12A & 43A of the Eighth Schedule to the Act)

Base cost in respect of deemed disposal

- In the instance that the proposed rules are triggered, the shareholder company must include the amount of extraordinary dividends received in its income, where the shares are held as trading stock, or as a capital gain, where the shares are held as a capital asset. However, there is no provision that permits the shareholder to claim a proportional amount of the cost of the shares as a deduction against the income or capital gain. In addition, interaction of the proposed rules with paragraph 19 of the Eighth Schedule result in a situation that when the shareholder company is subject to the inclusions as a result of the proposed rules, paragraph 19 also denies that shareholder company the cost of the shares if those shares are subsequently disposed of.
- In this regard, it should be noted that the anti-avoidance rules dealing with dividend stripping are meant to curb the use of tax structures to avoid tax ordinarily arising on the disposal of shares. As such, the anti-avoidance rules should achieve this by triggering a tax event (i.e. the inclusion of income or a capital gain) and encourage taxpayers to rather enter into share disposal arrangements. As such, parity of the treatment of the cost of the shares between instances of actual share disposal and instances deemed disposal will not be provided for. However, in the instance that a shareholder company disposed of its shares in a target company subsequent to being subject to the anti-avoidance rules dealing with dividend stripping in respect of a deemed disposal, changes a proposed to ensure that the cost of the shares may be used to deduct against the proceeds arising from that actual share disposal.

Addressing abusive arrangements aimed at avoiding the anti-dividend stripping provisions

(Clauses 23, 51 and 59 of the Draft TLAB: Section 22B, Paragraphs 12A & 43A of the Eighth Schedule to the Act)

Extraordinary dividends arising in the course of or as part of a corporate reorganisation transaction

- Taxpayers have indicated that it is not entirely clear whether the proposed rules will apply in respect of extraordinary dividends that are paid in the course or as part of a reorganisation transactions. In this regard, consideration of various corporate reorganisation transactions will be considered and where there is no risk associated with their potential use by taxpayers to avoid the application of the anti-avoidance rules dealing with dividend stripping, the relevant exclusions will be provided for.

Correcting anomalies arising from applying anti-value shifting rules (Clause 28 of the Draft TLAB: Section 24BA of the Act)

- The Income Tax Act contains anti-value shifting rules aimed at ensuring that asset for share transactions are entered into by taxpayers on a value for value basis (i.e. assets are exchanged for shares of equal value). In 2019, a proposal was included in the Budget to clarify the effect of deferred tax on the market value of issued shares. As a result, proposed amendments were included in the 2019 Draft TLAB that was published for public comment on 21 July 2019 to exclude from the application of the anti-value shifting rules in instances where the rules are triggered solely as a result of the market value of an asset being different from the market value of the shares received in return due to a deferred tax asset or deferred tax liability.

Comment:

Various taxpayers submitted written comment requesting that an exclusion should also be made in the instance that the difference in market value is attributable to a deferred tax asset arising. In addition, it was also requested that references to IFRS should be removed as SMMEs do use IFRS for reporting purposes.

Response:

Not accepted. During the public workshops held in Pretoria on 5 and 6 September 2019, it came to our attention that given the use of different reporting standards for accounting reporting (and in some instances to completely not reporting on determine deferred tax), a blanket exclusion will not be possible to include in the draft legislation. In addition, taxpayers indicated that it is not necessary to have an exclusion for market value differences attributable to deferred tax as it is well understood, in practice, that the anti-value shifting rules are meant to apply only where the difference in market value is attributable to value shifting. As a result, it is proposed that this provision be withdrawn from the 2019 Draft TLAB.

Refining provisions around special interest deduction for debt funded share acquisitions

(Clause 30 of the Draft TLAB: Section 24O of the Act)

Amending the special interest deduction in respect of share acquisitions funded by debt to allow for deductions after an unbundling transaction

- The Act contains special interest deduction rules in section 24O that make provision for companies to deduct interest in respect of interest-bearing debt used to acquire a direct or indirect controlling share interest in an operating company. In some instances, a company may be unable to acquire a direct controlling interest in an operating company, but instead may acquire an indirect controlling interest by acquiring the shares in a controlling holding company in relation to that operating company. Legislative amendments were included in the Draft TLAB to allow taxpayers to continue utilising the special interest deduction in instances where an unbundling transaction involving a company (that previously held an indirect controlling share interest in a holding company) results in a direct controlling share interest in an operating company.

Comment:

It may happen that an indirect shareholding in an operating company is transferred to the acquiring company rather than a direct shareholding, continuation of the deduction should also be provided for in such instances.

Response:

Not accepted. The policy rationale for the introduction of the special interest deduction in 2012 was to discourage the use of multiple step debt push down structures that resulted in the acquisition of productive assets. The decision to allow taxpayers to be able to carry on claiming the special interest deduction after acquiring a direct shareholding by way of an unbundling was to encourage the acquisition of the shares of a productive company rather than a holding company in relation to a productive company, thus have a more direct interest in the productive assets. As such, no further concession is being considered in respect of indirect shareholdings.

Refining provisions around special interest deduction for debt funded share acquisitions

(Clause 30 of the Draft TLAB: Section 24O of the Act)

Comment:

Clarity must be provided as to whether taxpayers can continue to claim the special interest deduction after unbundling transactions in respect of which the provisions of section 46 were applied or all unbundling transactions.

Response:

Noted. The unbundling transactions envisaged are local unbundling transactions (i.e. unbundling transaction as defined in paragraph (a) of the definition of “unbundling transaction” in section 46) in respect of which the provisions of section 46 apply. Legislative changes will be made to the proposed amendments contained the 2019 Draft TLAB to reflect this position

Comment:

The proposal should not be limited to changes from indirect to direct shareholding as a result of unbundling transactions, and the interest deduction should continue to be allowed irrespective of how the change from an indirect to a direct shareholding takes place. Particularly with respect to liquidation transactions.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB to extend the proposal to instances where a direct shareholding is acquired as result of a local “liquidation distribution” (i.e. liquidation distribution as defined in paragraph (a) of the definition of “liquidation distribution” in section 47) in respect of which the provisions of section 47 are applied.

Clarifying the interaction between corporate reorganisation rules and other provisions in the Act (Clause 398 of the Draft TLAB: Section 41 of the Act)

Clarifying corporate reorganisation rules relating to exchange items and interest bearing instruments

- The Income Tax Act contains corporate reorganisation rules that make provision for tax neutral transfer of assets between companies that are part of same group. However, these rules do not specifically address how exchange items and interest bearing instruments should be treated during corporate restructuring. In order to provide clarity, it is provided that changes be made in the corporate reorganisation rules to provide that the corporate reorganisation rules should not override the application of sections 24J and 24I of the Act.

Comment:

It is unclear why the instruments identified in terms of section 24I or section 24J should be specifically excluded from the inter-group relief because there is no mischief that may arise. In addition, it is uncertain as to why unrealised gains interest-bearing assets and foreign exchange assets should be excluded as they are no different to any other trading stock or capital asset.

Response:

Not accepted. The proposed amendment was intended to clarify the tax effect in the application of corporate rules regarding the transfer of exchange items and interest bearing instruments and to give effect to the principle that exchange gains and losses arising until the effective date of the corporate restructuring transaction should be reflected in the taxable income of the transferor. In addition, interest-bearing assets and foreign exchange assets are different from trading stock or capital assets as they are taxed on an unrealised basis and their value is influenced by changes to interest rates and exchange rates.

Clarifying the interaction between corporate reorganisation rules and other provisions in the Act (New clause in the Draft TLAB: Section 45 of the Act)

Refining the interaction between the anti-avoidance provisions for intra-group transactions

- Section 45 which provides for tax deferral (i.e. roll-over relief) when companies transfer assets between group companies also contains multiple anti-avoidance rules to ensure that they are not abused by taxpayers. In Annexure C of the 2019 Budget Review, Government proposed that it would make legislative changes in the Income Tax Act to clarify how the multiple anti-avoidance rules applicable to intra-group transactions should interact with each other in order to ensure that they do not give rise to double taxation. During internal consultative meetings on the drafting of the Draft TLAB, the potential for double taxation was regarded as an interpretation issue and that legislative intervention is not required it could be clarified by way of interpretation guidelines and no changes were proposed in the Draft TLAB.

Comment:

It is understood that a de-grouping should only be accounted for once and cannot be triggered again by the operation of another anti-avoidance rule. However, the anti-avoidance rule applicable where assets are transferred on loan account between connected persons which provides that the loan receivable has a zero base cost does not interact well with the de-grouping charge.

Response:

Accepted. The interaction between these anti-avoidance provisions require extensive consideration due to the complex structure of the legislative provisions. As such ,this interaction will be considered for legislative changes in the next legislative cycle.

Income Tax: Business (Financial Institutions and Products)

Clarifying inconsistencies in the current REIT tax regime (Clause 31 of the Draft TLAB: Section 25BB of the Act)

Clarification of the definition of rental income in a REIT tax regime in respect of foreign exchange differences

- The special tax dispensation for listed and regulated property companies (REITs) makes provision for an exemption for REITs of income and capital gains and for dividends to be taxed in the hands of the investor and not in the REITs. In turn REITs may claim distributions to investors as a deduction against its income. This deduction may only be claimed if the distribution is a “qualifying distribution” that is, if more than 75 per cent of the gross income of the REIT consists of “rental income”. At issue is the fact that the definition of “rental income” does not include unrealised exchange gains or losses arising from the forward exchange contracts entered into by a REITs to hedge its exposure to exchange differences in respect of rental income. In order to address this, it is proposed that a REIT or controlled company include foreign exchange gains and deduct foreign exchange losses on exchange items in the definition of “rental income”.

Comment:

The proposed amendment is welcomed however inclusion of exchange differences in rental income should be extended to all exchange differences of a REIT or controlled company which directly or indirectly relate to REIT activities.

Response:

Not accepted. The proposed amendment is intended to assist taxpayers and will for now only cater for foreign exchange differences relating to “exchange items” that hedge amounts defined as “rental income”.

Clarifying inconsistencies in the current REIT tax regime (Clause 31 of the Draft TLAB: Section 25BB of the Act)

Clarification of the definition of rental income in a REIT tax regime in respect of foreign exchange differences

Comment:

The proposed amendment should be amended to include foreign exchange gains only and disregard foreign exchange losses because reducing the “rental income” by foreign exchange losses will make it harder for the REITs or controlled company to reach the 75 per cent of “gross income” target needed to make a “qualifying distribution”.

Response:

Accepted. Changes will be made in the 2019 Draft TLAB to exclude foreign exchange losses when determining a “qualifying distribution” for the purposes of section 25BB.

Clarifying inconsistencies in the current REIT tax regime clauses 39, 40 and 45 of the Draft TLAB: Sections 42, 22 and 45 of the Act

Clarification of the interaction between corporate reorganisation rules and REITs tax regime

- A REIT or a controlled company is granted capital gains tax exemption in respect of the disposal by a REIT or a controlled property company of:
 - immovable property of a company that is a REIT or controlled company at the time of disposal;
 - a share or a linked unit in a company that is a REIT at the time of that disposal; or
 - a share or a linked unit in a company that is a property company at the time of that disposal.
- However, corporate re-organisation rules allow taxpayers to transfer assets to a company free of immediate tax consequences provided certain requirements are met. But, certain anti-avoidance provisions may be triggered if the company that acquired the assets, disposes of the assets within 18 months of acquisition by requiring that the rolled over capital gain to be added to the taxable capital gain of the REIT for the year of assessment in which the disposal takes place. This creates a discrepancy because section 25BB(5) of the Act states that disposals of immovable property by a REIT do not give rise to capital gains tax. In order to ensure that the rules for the taxation of REITs are aligned with the corporate re-organisation rules, it is proposed that corporate re-organisation rules do not give rise to capital gains tax on disposal of assets within 18 months after their acquisition by a REIT or controlled company under a corporate re-organisation rule.

Clarifying inconsistencies in the current REIT tax regime clauses 39, 40 and 45 of the Draft TLAB: Sections 42, 22 and 45 of the Act

Clarification of the interaction between corporate reorganisation rules and REITs tax regime

Comment:

The proposed amendment is welcomed on sections 42, 44 and 45. However, section 47 also contains the 18 months ring-fencing rule but no amendments were made to exclude the application of this rule to section 25BB assets.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB to section 47 of the Act.

Comment:

Section 45(4) contains a de-grouping charge which deems there to be a capital gain without a corresponding deemed disposal of the asset and this may result in section 25BB(5) not to apply to such de-grouping charge.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB on section 45(4) to deem the capital gain to arise from a disposal of the asset to ensure that section 25BB(5) applies in this regard.

Taxation of long term insurers

(Clause 33 of the Draft TLAB: Section 29A of the Act)

Refinement to taxation of risk policy funds for long term insurers

- From 2016, risk policy funds were introduced in the tax treatment of long term insurers. In general, a risk policy is defined to exclude a contract of insurance in terms of which annuities are being paid. However, there are instances in which a risk policy may result in the payment of benefits in installments that can only be determined at the time that a claim arises and this does not result in a separate policy that pays annuities. In instances where a policy is initially allocated to a risk policy and pays benefits in the form of annuity, the Income tax Act requires the transfer of assets and liabilities pertaining to the risk policy fund to the untaxed policy fund. It came to government attention that this transfer of from risk policy to untaxed policy fund creates administrative burden for the insurer. In order to remove the administrative burden, it is proposed that changes be made in the Act to remove a contract of insurance in terms of which annuities are being paid from the exclusion in definition of risk policy to ensure that risk policy remains allocated to the risk policy fund even when policy proceeds are paid in a form of annuity.

Comment:

The proposed amendment may cause an additional administrative burden since it may result in establishing two sets of risk policy annuity reserves and therefore the industry request a once-off election to transfer all annuities in payment relating to an annuity benefit from a untaxed policy fund to the risk policy fund or option to continue allocating the annuities to the untaxed policy fund if the insurer has only one pool from which annuities are paid.

Response:

Not Accepted. Firstly, the proposed amendment was intended to assist the insurers on administrative burden and not to create additional administrative burden. Secondly, it became evident during the workshop held on 5 and 6 September 2019 that this issue is not crucial for some of the insurers. Lastly, as general matter, we prefer not to have election in the Act as this may be burdensome to SARS. Therefore, it is proposed that this amendment should be withdrawn from the 2019 Draft TLAB.

Taxation of long term insurers

(New clause in the Draft TLAB: Section 28(3) of the Act)

Alignment of the tax treatment of “deferred acquisition cost” between long term and short term insurers

- Section 28(3) of the Act was revised in 2015 such that a short-term insurer may claim deductions for liabilities in terms of this subsection that were recognised as liabilities for purposes of IFRS relating to premiums and claims reduced by the amounts recognised in accordance with IFRS in respect of amounts ‘recoverable under policies of reinsurance’ and further reduced by ‘deferred acquisition costs’.

Comment:

The reference to amount ‘recognized’ as deferred acquisition costs in accordance with IFRS’ can be interpreted not to include ‘deferred revenue’ for the short-term insurers. However, it is clear that the long-term insurers should take into account both the ‘deferred acquisition costs’ and ‘deferred revenue’ in the “adjusted IFRS value” definition.

Response:

Accepted. Legislative changes will be made to section 28(3) in the 2019 Draft TLAB such that this subsection takes into account ‘deferred acquisition costs’ and ‘deferred revenue’.

Consequential amendments to tax treatment of doubtful debts for banks in terms of section 11(jA)

(New clause in the Draft TLAB: Section 11(jA) of the Act)

- In 2018, an amendment was made to section 11(jA) of the Act as a consequential amendment to the 2017 amendments dealing with tax treatment of doubtful debts for banks. The 2018 amendment made provision for exclusion of controlling companies and clarify the policy intent that any controlling company (that is a controlling company) as defined in the Banks Act is not eligible for the allowance in section 11(jA).

Comment:

The 2018 amendment made in the Act has created unintended consequences because the definition of “holding company” in the Banks Act refers to the definition of “holding company” in the Companies Act, 2008. This results in a situation where a bank that controls a subsidiary is excluded from the ambit of section 11(jA).

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB to clarify that the reference to “holding company” in section 11(jA) will refer to a “controlling company” as defined in the Banks Act to give effect to the original intention.

Income Tax: Business (Incentives)

Refining the Special Economic Zone (SEZ) tax incentive regime (Clause 18 of the Draft TLAB: Section 12R of the Act)

Aligning the provisions of SEZ tax regime with the overall objectives of the SEZ programme

- The SEZ regime was preceded by the Industrial Development Zone (IDZ) programme which was introduced in South Africa in 1993. IDZs were intended to promote new investment in the country by providing focused administrative support as well as some indirect tax benefits to enterprises that operated in designated industrial areas. The SEZ regime was introduced in terms of the Special Economic Zone Act, No.16 of 2014 (SEZ Act) but only came into operation on 9 February 2016. In order to provide further support to the SEZ regime, income tax benefits were introduced to the Act in 2013 for qualifying companies operating within the SEZ.
- Currently, the income tax provisions for qualifying companies operating within an SEZ do not expressly require new investments or an expansion of an existing company to qualify for income tax benefits. The 2019 Draft TLAB contains proposed changes to make provision for qualifying companies to only qualify for the income tax benefits if the companies are:
 - newly established businesses carrying on a new trade or a trade that was not carried on by a connected person; or
 - expansions of existing businesses or businesses originally operating within an IDZ or outside an IDZ where such expansions result in an increase in the gross income of a company that amounts to at least 100 per cent of the gross income of that company before any expansion. The required increase in the gross income of the company should be determined with reference to the highest gross income derived by that company during any of the three immediately preceding years of assessment

Refining the Special Economic Zone (SEZ) tax incentive regime (Clause 18 of the Draft TLAB: Section 12R of the Act)

Aligning the provisions of SEZ tax regime with the overall objectives of the SEZ programme

Comment:

The proposed expansion requirements are very inflexible and do not look into other complexities which are faced by businesses in their growth and expansions prospects.

Response:

Accepted. In order to have a better indicative tool to assess whether an expansion benefits the fiscus, legislative changes are included in the 2019 Draft TLAB to consider the production of goods not previously produced by a company or a connected person in relation to that company or the use of new technology to determine if a qualifying company is eligible for the tax benefits and this will serve as an initial requirement. Alternatively, companies will need to provide evidence of their activities within an SEZ represent an increase in the production capacity in the Republic.

Comment:

Many businesses started their operations in 2013, when the SEZ tax incentives were first introduced into the Act. The test as to whether a taxpayer is carrying on a new business should look back to when the SEZ tax rules were first introduced in 2013. In addition, the test is very stringent as a new business is considered to be one that was never carried on by a connected person, whether in South Africa or worldwide.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB to change the effective date for the new business test to align it with the introduction of the SEZ tax incentives in the Act. In addition, a taxpayer will fail the new business test if it relates to a trade previously carried on in South Africa.

Refining the Special Economic Zone (SEZ) tax incentive regime (Clause 18 of the Draft TLAB: Section 12R of the Act)

Reviewing the SEZ anti-profit shifting avoidance measures

- In 2015, changes were made to the income tax rules for the SEZ regime to introduce the anti-profit shifting anti-avoidance measure that reduces the risk of having profits of ordinary tax paying companies which are not operating within designated and approved SEZs (thus taxed at the normal corporate tax rate of 28 per cent), to be artificially transferred to qualifying companies operating under the SEZ regime which are taxed at a lower rate of 15 percent. Such transfers are often made between companies which are connected persons to each other. This anti-avoidance measure wholly disqualifies a qualifying company from claiming any of the SEZ income tax benefits.
- To address this concern of the total disqualification, proposed changes to the existing anti-avoidance measure to change the all-or-nothing approach were included in the Draft TLAB to ensure that a company is not wholly disqualified from claiming the income tax benefits for the SEZ regime. In other words, to make a carve out such that income to the qualifying company in respect of transactions with any connected person in relation to that qualifying company which is below 20 per cent threshold to enjoy the 15 per cent preferential tax rate. Additionally, to make a provision for a qualifying company to be treated as carrying on a separate trade outside of the SEZs relating to the income with its connected person in as far as it exceeds the threshold and thus be subject to the normal corporate tax rate of 28 per cent.

Refining the Special Economic Zone (SEZ) tax incentive regime (Clause 18 of the Draft TLAB: Section 12R of the Act)

Reviewing the SEZ anti-profit shifting avoidance measures

Comment:

The currently proposed amendments are administratively burdensome and undermine the tax incentive as most business models make transfers with connected persons. It is submitted that domestic transfer pricing should rather be applicable.

Response:

Not Accepted. The proposed amendments with regard to the anti-avoidance measure contained in the 2019 Draft TLAB will be withdrawn and the current all-or-nothing rule will continue. In the interim, SARS will need to first determine if they have adequate capacity to administer and audit domestic transfer pricing for the SEZ incentive. Should SARS indicate that the necessary capacity is available to conduct domestic transfer pricing and it is a focus area, legislative proposals in this regard will be made in the next legislative cycle.

Reviewing the allowable deduction for investors investing in a venture capital company (Clause 17 of the Draft TLAB: Section 12J of the Act)

- The venture capital company (VCC) tax incentive regime was introduced in the Act in 2008. The main aim of the VCC tax incentive regime is to raise equity funding in support of the socio-economic development of small business which otherwise would not have had access to market funding due to either or both their size and inherent risk. In terms of the VCC regime, taxpayers investing in a VCC are allowed an upfront deduction equivalent to the expenses incurred by a taxpayer in acquiring shares issued to that taxpayer by a VCC. However, the deduction is reversed and included as a recoupment in a taxpayer's income should that taxpayer dispose of those shares in a VCC within 5 years after acquiring them.
- When the VCC tax incentive regime was introduced in 2008, the rules contained very strict criterion including limitations and lifetime limitations on allowable tax expenditure incurred by VCC shareholders. In order to get the VCC regime to gain more traction, over time and specifically in 2015, further changes were made in the tax legislation so as to broaden the scope of the VCC regime. As a result, the uptake of the VCC tax incentive regime has grown significantly since 2015 leading to a telling investment into the economy. It has come to government's attention that a segment of ultra-high net worth taxpayers opts to invest disproportionately high amounts into VCCs before the tax year end thereby reducing their taxable income and as such undermining the progressivity of our personal income tax system. In an effort to balance the benefit and perceived effectiveness of the VCC tax incentive regime whilst still protecting the bottom-line impact of high tax expenditure (as a measure of revenue forgone) on the fiscus, it was proposed that changes be made in the VCC tax incentive regime to limit the upfront amount to be deducted in respect of taxpayers investing in VCC shares to R2.5 million.

Reviewing the allowable deduction for investors investing in a venture capital company

(Clause 17 of the Draft TLAB: Section 12J of the Act)

Comment: The proposed amendment was met with resistance from some taxpayers, especially within the VCC fund manager segment. A plethora of issues were raised including but not limited to:

- Cost to secure capital: The proposed cap would limit the viability of VCC funds through the now required increased number of investors to get to a viable fund size,
- Corporate appetite: The proposed limitation makes it an undesirable investment for corporate investors, including those that target corporate investors in the Enterprise and Supplier Development space (as referred to in the BBEE codes) and as such there shouldn't be a limitation for corporate investors
- Quantifying the average: The calculation of the proposed limitation is flawed in that although the arithmetic average as used by National Treasury is logical it instead should've been a median approach for purposes of the determination of the amount.
- During public workshops held on 5 and 6 September 2019, some commentators suggested that if Government is of the view that the cap should remain, there should be a difference between natural persons and corporate investors or Government should provide accelerated deduction on the amount to be deducted.

Response:

Noted. The proposed cap is a targeted measure to address the disproportionate amount of big expenditure incurred by VCC shareholders and its impact on fiscus. It is aimed at balancing the benefit and perceived effectiveness of the VCC tax incentive regime whilst still protecting the bottom-line impact of high tax expenditure (as a measure of revenue forgone) on the fiscus. That said, it is proposed that legislative changes be made in the 2019 Draft TLAB to amend the limitation of the amount to be deducted in respect of taxpayers investing in a VCC to distinguish between natural persons (R 2.5 million) and corporate investors (R5 million).

Reviewing the allowable deduction for investors investing in a venture capital company (Clause 17 of the Draft TLAB: Section 12J of the Act)

Comment:

The proposed limitation, regardless of limitation value, has a probable negative impact on compliance through the VCC shareholder's 'connected person' anti-avoidance measure, as amended in 2018. Investors who already invested their allocation of e.g. R50 million within a VCC share class (as was allowable at the time of investment and with the understanding / promotion from the VCC that the investment relies on further large capital raises from other taxpayers), are now prejudiced, since they now hold a much larger stake (and carry significantly more risk) in that VCC share class, given the:

- inability of other big potential investors to match the amount due to the cap, or
- VCC's inability to attract a sufficient number of smaller investments in time before the end of the relevant 36-month period which, potentially, can be immanent.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB in order to mitigate any non-compliance risk on the current VCCs as a result of the proposed 2019 legislative amendments.

Refinement of the Employment Tax Incentive Regime (Clause 77 of the Draft TLAB: Section 4 of the ETI Act)

Updating the employment tax incentive to align with the national minimum wage

- The Employment Tax Incentive (ETI) programme was introduced in January 2014 to promote employment, particularly of young workers. The programme aims to reduce the cost of hiring young people between the ages of 18 and 29 (also referred to as qualifying employees) through a cost sharing mechanism with Government, while leaving the wages received by the qualifying employees unaffected. The ETI Act affords employers who are registered for PAYE and hire qualifying employees the ability to decrease their PAYE liability. The amount by which the employer's PAYE liability can be reduced by is prescribed by a formula, and is calculated based on the wages paid to the qualifying employees.
- One of the conditions for claiming the incentive is that the wage paid to eligible employees should exceed the applicable wage regulating measure, specifically a collective agreement, a sectoral determination or a binding bargaining council agreement. If none of these are applicable, a minimum wage of R2 000 per month is required to be eligible for the ETI.
- During 2018 legislation was promulgated to implement the National Minimum Wage. The National Minimum Wage Act (NMW Act) introduced a national minimum wage of R20 per hour or **approximately** R3 500 per month. To ensure that Government policies are aligned, some of the provisions relating to wage regulating measures in the ETI Act should be updated to reflect the provisions of the new NMW Act.

Refinement of the Employment Tax Incentive Regime (Clause 77 of the Draft TLAB: Section 4 of the ETI Act)

Comment:

Wage rate applicable to learnership agreement may differ to that stipulated in NMW Act. As working days vary per month, an effective hourly rate is therefore impacted. This makes it difficult to convert hourly rates to a monthly rates.

Response:

Partially accepted. Clarification on the conversion may be given through guidance by SARS, since a legislative amendment is not the appropriate mechanism to give such guidance.

Comment:

Amendments should only become effective on 1 March 2020.

Response:

Not Accepted. The National Minimum Wage Act came into effect on 1 January 2019. The proposed effective date of 1 August 2019 in the 2019 Draft was the start of the first month after the TLAB was published for comment.

Comment:

Propose that alternative minimum of R2 000 per month rather be expressed as hourly rate, to simplify ETI admin.

Response:

Noted.

Refinement of the Employment Tax Incentive Regime (Clause 77 of the Draft TLAB: Section 4 of the ETI Act)

Clarifying the interaction between the employment tax incentive and the special economic zones provisions

- The Income Tax Act rules on SEZs make provision for qualifying companies to be taxed at a reduced corporate tax rate of 15 per cent and claim accelerated allowances over a period of 10 years, on buildings and improvements to buildings owned by them. The ETI was introduced by Government as a mechanism to support employment growth in South Africa with a particular focus on the employment of the youth. The ETI tax incentive can only be claimed by any employer in respect of a qualifying employee if that employee is 18 years old and not more than 29 years old. However, if the employer operates through a business located within an SEZ, that employer can claim the ETI in respect of its employee that renders services to that employer with an SEZ without any regard to the age of that employee.
- The ETI Act, unlike the SEZ rules contained in the Act does not clearly provide a specified criterion for employer companies operating within an SEZ that want to claim the ETI without having the age limit as a restriction. In order to ensure that Government policy to have a limitation that only allows this extended incentive to only qualifying companies is applied in a uniform manner in both the ETI Act and the Act, it is proposed that amendments should be made ETI Act.

Comment:

The effective date should be prospective and not retrospective.

Response:

Accepted. Legislative changes will be made in the 2019 Draft TLAB to postpone the effective date to 1 March 2020.

Repeal of the retrospective approval of tax exempt status for Public Benefit Organisations (PBO's) and recreational clubs (Clauses 34 & 35 of the Draft TLAB: Section 30(3B) and 30A(4) of the Act)

- The Act currently affords the Commissioner the discretion to approve an organisation as a public benefit organisation (PBO) (in terms of section 30(3B) or recreational club (in terms of section 30A(4) retrospectively. Once approved as a PBO or recreational club, the receipts and accruals of such entity are exempt from income tax provided that certain provisions in section 10 are met. In the 2019 Draft TLAB, changes were made in the Act to delete sections 30(3B) and 30A(4) of the Act and to remove obsolete transitional measures initially introduced to provide organisations that were exempt from the Act under the repealed legislation the opportunity to re-apply under section 30 and section 30A of the Act. Organisations were granted until December 2004 to re-apply under section 30 and until December 2010 to reapply under section 30A of the Act.

Comment:

The deletion of the provisions allowing the Commissioner to retrospectively approve a PBO or recreational club as an exempt entity will have adverse financial effects for such entities due to the limited resources available to such entities makes it difficult for them to deal with tax technical issues on a timeous basis.

Response:

Noted. The granting of the retrospective approvals to PBO's and recreational clubs that have been in existence for several years has the consequence that previously taxed receipts and accruals become exempt. This results in refunds having to be paid by SARS with interest, dating back, including years that have already prescribed. As opposed to deleting the relevant provisions, PBO's or recreational clubs seeking retrospective approval as an exempt entity shall be granted such approval, which shall remain at the Commissioner's discretion, subject to meeting certain additional criteria.

Income Tax: International

Reviewing the comparable tax exemption of controlled foreign companies (CFC)

(Clause 10 of the Draft TLAB: Section 9D of the Act)

The CFC rules contain an exemption known as a comparable tax exemption which makes provision for CFCs operating in foreign countries where tax payable in that foreign country is at least 75 per cent of what would have been payable in South Africa, had the South African tax rules applied. The comparable tax exemption excludes that foreign business income from the net income calculation of the CFC. Partly, the comparable tax exemption seeks to protect the South African tax base whilst providing the need for South African multinational entities to be competitive offshore by disregarding all tainted, passive and diversionary controlled foreign company income if little or no South African tax is payable. In light of the global trend towards lower corporate tax rates, a review was conducted and it came to light that the current 75 per cent threshold is no longer comparable. As a result, providing little or no assistance to cater for South African CFCs in the current world order. In this regard, it is proposed that the comparable tax exemption threshold be reduced to 67.5 per cent from the current percentage of 75 per cent.

Comment:

It has become globally acceptable that a corporate tax rates of 15 per cent and higher is not considered to be “low”. Using 15 per cent as a reasonable benchmark, it is the tax payer’s view that an appropriate comparable tax exemption would be 53.5 per cent.

Response:

Not accepted. *Response:* Not Accepted. Currently, South Africa’s major trading partners in which majority of the CFCs are located are covered by the proposed comparable tax exemption of 67.5 per cent. The comparable tax exemption will be assessed each financial year in order to determine its competitiveness and comparability, and necessary legislative changes will be proposed based on such assessment.

Reviewing of the “affected transaction” definition in the arm’s length transfer pricing rules (Clause 36 of the Draft TLAB: Section 31 of the Act)

The Act contains transfer pricing rules aimed at preventing a reduction in the South African taxable income as a result of mispricing or incorrect characterisation of transaction. This is done through the application of the arm’s length principle on transactions entered between “connected parties”. The “affected transaction” definition relating to the arms length transfer pricing rules in the Act only apply to connected persons as defined. The application of these rules to connected persons only has the unintended consequence that the transfer pricing rules in respect of transactions between “associated enterprises” are not captured. On the other hand, in both the OECD and the UN MTC, “affected transaction” applies to associated enterprises and not only to connected persons. In order to address this anomaly, it is proposed that “affected transaction” definition which relates to the arm’s length principle should be aligned with the OECD and UN MTC.

Comment:

The proposed amendment to import the concept of “associated enterprises” into the Act is inappropriate. For example, in the context of the OECD MTC, the term is not defined and is deliberately vague and broadly described to avoid the restricting or overriding domestic law definitions that trigger the application of transfer pricing rules. Therefore, the description of the term “associated enterprise” in the OECD MTC is certainly not intended to represent a standard benchmark definition. Its incorporation into domestic law will create significant uncertainty as to when the transfer pricing rules are applicable. Furthermore, the new definition would require further definitions, elaborations and clarifications of participation, control, management and enterprise.

Response:

Noted. SARS will further provide guidance on the interpretation of the term “associated enterprise”. In order to give SARS and taxpayers more time to consider the interpretation of the term “associated enterprise”, it is proposed that the effective date of this provision be postponed by a year from 1 January 2020 to 1 January 2021.

Reviewing the definition of permanent establishment (Clause 2 of the Draft TLAB: Section 1 of the Act)

- On 7 June 2017, South Africa signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). In line with preserving the sovereignties countries, signatories of the MLI have the right to make a list of their reservations and notifications which will be known as the MLI position of that country. South Africa took the MLI position not to expand the definition of permanent establishment (PE). As a consequence, a misalignment ensued between the South African's tax treaties still using the narrow definition of PE and the Income Tax Act definition using the expanded definition. In order to address this misalignment, it is proposed that changes be made in the Income Tax Act to align the definition of PE with the SA MLI position.

Comment:

It is not clear why this amendment is necessary. Before the MLI, the definition of “permanent establishment” in section 1 of the Act was, in any event, never aligned with the definitions of that term contained in South Africa's DTAs. Consequently, there has always been (and will always be) a “misalignment”. Critically, from a policy perspective, we do not see the rationale for attempting to align what is essentially a domestic law source provision with a DTA concept. SA's reservation out of the MLI simply establishes our “two-way” DTA position. The definition in section 1 focuses solely on inbound activities by non-residents. One would have expected SA to cast the net slightly wider (as the post-2018 definition does) to catch inbound foreign investors in our domestic source rules, before giving them the opportunity to benefit from the potentially narrower DTA provisions

Response:

Noted. The proposed amendment to the definition of permanent establishment will be withdrawn from the 2019 Draft TLAB.

Value-Added Tax

VAT treatment of Foreign Donor Funded Projects (Clauses 66, 68 and 72 of the Draft TLAB: Sections 1 and 50(1) of the VAT Act)

- An Official Development Assistance Agreement (ODAA) is an international agreement that is binding on the Republic in terms of section 231(3) of the Constitution of the Republic of South Africa. ODAA's involve support from foreign institutions in the form of grants / funding, technical assistance, provision of assets for a specific project, etc. ODAA's, if they meet certain requirements of the VAT Act, may be registered (as a "foreign donor funded project") for VAT in order to reclaim any VAT incurred on expenditure, thereby ensuring that the funds provided are not used to pay taxes in South Africa. The requirements of the VAT Act are not very clear on what the policy position is regarding the requirements that must be met to be registered as a "foreign donor funded project" for VAT purposes. The proposed amendments in the 2019 Draft Bill will provide clarity on what these requirements are.

Comment:

The proposed amendments are not clear as to the impact of the proposed amendments on existing projects. Further, clarity is required regarding the process to be followed to register the project as a foreign donor-funded project.

Response:

Accepted. A guideline will be issued by SARS providing clarity on the process to be followed. With regard to the impact on current projects, changes will be made in the 2019 Draft TLAB to provide that the proposed amendments will only be applicable to those projects that apply for registration on or after the 01 April 2020.

VAT treatment of Foreign Donor Funded Projects (Clauses 66, 68 and 72 of the Draft TLAB: Sections 1 and 50(1) of the VAT Act)

Comment:

The proposed amendment states that each project must be registered separately for VAT. This is cumbersome. It is proposed that where one entity manages many such projects, the entity be entitled to register all the various projects under one VAT registration number.

Response:

Not Accepted. Each project has its own terms and conditions, its own implementation plan, its own funding requirements, end date, etc. For these reasons, each project will be required to be registered separately in order to remain separately identifiable. Further, the VAT system does not permit a vendor to be issued with more than one VAT registration number, unless it is registering different branches. By including this proposed amendment to section 50(1), it is proposed that each project be registered as a branch of the vendor that is the “implementing agency” of the various projects.

Reviewing section 72 of the VAT Act (Clause 73 of the Draft TLAB: Section 72 of the VAT Act)

- Section 72 of the VAT Act permits the Commissioner the discretion to make arrangements and decisions to overcome difficulties, anomalies or incongruities that taxpayers may face in applying any provision of the VAT Act. These difficulties, anomalies or incongruities would have arisen as a result of the manner in which a vendor or class of vendors conducts his, her or their business, trade or occupation. Over the past years, challenges arose regarding the application of the mandatory wording of the other provisions of the VAT Act versus the discretionary wording of the provisions of section 72 of the VAT Act. The proposed amendment in the 2019 Draft TLAB seeks to clarify and amend the section so as to align section 72 with the policy intent of the other VAT provisions.

Comment:

Clarity is required on how the proposed amendments will impact on current rulings, including whether vendors can apply for an extension of current rulings.

Response:

Accepted. Transitional rules will be implemented to deal with current rulings, including applications for extensions of current rulings.

Reviewing section 72 of the VAT Act (Clause 73 of the Draft TLAB: Section 72 of the VAT Act)

Comment:

The proposed amendment states that the decision of the Commissioner may not be contrary to the construct and policy of the VAT Act as a whole or of any specific provision of the Act. The policy as it relates to the various provisions of the Act is generally unknown, save for the published SARS documents which are (for the most part) general in nature.

Response:

Not Accepted. The policy intent may be determined by the reference to overall scheme of the Act and to secondary aids to interpretation, such as Budget Speeches, Budget Reviews and the Explanatory Memoranda that are published with legislative amendments. SARS also publishes various guidelines, Interpretation Notes and rulings

Ad Valorem Excise Duty on motor vehicles

Ad-valorem excise duties on imported motor vehicles (Main reference: Section 65 of the Customs and Excise Act: clause 63 of the First Draft TLAB – 21 July 2019)

Comment: Proposed Ad Valorem formula change does not offer a counter measure for the negative financial impact in the plant's operations. We do not see any chance where the formula can be changed in such a way that it is revenue/cost neutral and does not negatively impact competitiveness. The proposed changes undermine the competitiveness and future investment decisions in South Africa's automotive manufacturing sector. The benefits (incentives & duty rebates) offered by the APDP contribute to the competitiveness of SA's OEM exports. Reduced incentives under SAAM, combined with a further benefit reduction in rebates on excise duties will substantially impair production competitiveness to the disadvantage of local volume production intended for both the local market, but mostly for the global market.

Response: Accepted: National Treasury had further consultations from 16 Sept to 17 Oct 2019 with the motor industry on the revised ad valorem formula and its impact on individual OEMs. It has become apparent that the ADPD incentive structure enables OEMs plant global competitiveness, and proposed amendment and formula revision will have negative impact on OEMs plant global competitiveness and further investment opportunities in the country. National Treasury has therefore decided to withdraw the proposed amendment.

2019 Draft TALAB

Declarations and written undertakings with regard to withholding taxes (Clauses 2, 3,5 and 6 of the Draft TALAB: Sections 49E, 50E, 64G and 64H of Income Tax Act)

- A foreign person, to or for the benefit of whom an interest or royalty payment is made, is required to submit a declaration to the local payor to permit a reduced rate of tax or an exemption to be applied as a result of the application of an agreement for the avoidance of double taxation. An example would be the case of a beneficial owner of a royalty payment who is a resident in the United States of America, where the double taxation agreement between the USA and South Africa provides for a lower withholding tax rate than that prescribed in the Income Tax Act.
- It was submitted that this requirement creates an administrative burden for local persons that enter into multiple transactions with a single foreign person during the year. This would then mean that a declaration would have to be obtained by the local person from the same foreign person with regard to each and every transaction entered into.
- The proposed amendments aim to alleviate this administrative burden by requiring that where more than one payment is made to the same foreign person within a period of two years from the date of the first payment, the written undertaking need only be submitted once, namely before the first payment to that foreign person, provided the conditions affecting the rate at which the royalty tax or withholding tax on interest is paid do not change and the payment of the royalty or interest is still made to or for the benefit of that foreign person.
- For consistency it is proposed that a declaration and written undertaking in respect of dividends tax will similarly no longer be valid after a period of two years.

Declarations and written undertakings with regard to withholding taxes (Clauses 2, 3,5 and 6 of the Draft TALAB: Sections 49E, 50E, 64G and 64H of Income Tax Act)

Comment:

The existing undertakings in respect of dividends are open ended and without time limitation. The proposed amendment to insert a two year validity will add to the administrative burden of taxpayers and withholding agents. Withholding agents will be required to review all declarations and written undertakings, manually record the date of the declarations and written undertakings and request, on an ongoing basis, updated documents for the declarations and written undertakings that are older than two years. The two year validity period should be removed or alternatively extended to five years or at least three years.

Response:

Partially accepted. The two year period will be extended to three years to reduce the frequency of requiring updated declarations and undertakings. Coupled with the change proposed below, this will reduce the compliance burden on withholding agents.

Declarations and written undertakings with regard to withholding taxes (Clauses 2, 3,5 and 6 of the Draft TALAB: Sections 49E, 50E, 64G and 64H of Income Tax Act)

Comment:

The introduction of a two year expiry period for declarations and written undertakings with regards to dividends tax provisions creates an extensive administrative burden on regulated intermediaries. At the time that dividends tax was introduced, regulated intermediaries implemented processes and procedures so as to obtain the required declarations, as well as the existing undertakings. These processes and procedures include measures to contact or re-confirm the validity of the original declarations should a change in circumstances occur of which the regulated intermediary is aware. To require regulated intermediaries to obtain new declarations on a bi-annual basis would put an unreasonable administrative burden on these entities as it is not only a burdensome exercise to contact all clients and obtain responses from all clients but it is also a very costly exercise that would increase the costs of administration and require system enhancements and additional resources to facilitate a daily monitoring and to follow up the ageing of thousands of such declarations.

Response:

Accepted. If a regulated intermediary applies the Financial Intelligence Centre (FIC) legislation or the Common Reporting Standard (CRS) regulations in relation to the declarations, i.e. the content of the declarations is monitored under or subject to the anti-money laundering, “know your client” or CRS requirements, no time limitation will be imposed on the validity of the declarations and undertakings.

Declarations and written undertakings with regard to withholding taxes (Clauses 2, 3,5 and 6 of the Draft TALAB: Sections 49E, 50E, 64G and 64H of Income Tax Act)

Comment:

It is noted that the proposed amendment will come into operation on date of promulgation of the Tax Administration Laws Amendment Bill, 2019. This effective date will not afford withholding agents sufficient time to review and request updated declarations and written undertakings. Consequently, on or after date of promulgation of the Act, any dividend or interest payments made to a beneficial owner based on an invalid declaration and written undertaking (i.e. dated more than two years before) would be a contravention of the Income Tax Act, 1962, or, if the withholding agent processed the payment without applying the relevant exemption or reduced rates, the withholding agent will be required to process refunds and correct the SARS reporting once the client's updated declaration and undertaking are received. This would place a substantial administrative burden on the withholding agent.

Response:

Accepted. Regulated intermediaries that apply FIC legislation or the CRS regulations will not have to undertake this exercise in view of the change proposed above. A deferred implementation date of 1 July 2020 will be proposed, which will provide other withholding agents an adequate opportunity to refresh the declarations and undertakings that they hold, while not requiring withholding agents that are obtaining a declaration for each payment to continue doing so for an extended period.

Sharing of information required to administer carbon offsets and greenhouse gas emissions reporting (Clause 10 of Draft TALAB: Section 4 of Customs and Excise Act)

- The proposed amendments to sections 4(3) and (3A) provide the authorisation for the sharing of information required to administer carbon offsets and greenhouse gas emissions reporting with the Department of Mineral Resources and Energy and the Department of Environmental, Forestry and Fisheries Affairs.

Comment:

Neither the Carbon Tax Act, 2019, nor the draft Carbon Offset Regulations requires an officer to disclose any information to the Department of Mineral Resources and Energy (DMRE). The process requires the DMRE to issue a taxpayer who has retired carbon credits into the South African carbon offset system with a certificate. The taxpayer must include this certificate in their submission to SARS as part of their self-assessment. No part of the process requires information to be sent from SARS or National Treasury to the DMRE. The amendment is therefore unnecessary.

Response:

Not accepted. The draft carbon tax rules under the Customs and Excise Act, 1964, which have been published by SARS for public comment for a second time, require the carbon taxpayer to provide any documents substantiating that taxpayer's self-assessment on its carbon tax account at the request of the Commissioner. Such substantiating documents could include the carbon offset certificate from DMRE. SARS will verify the validity of carbon offset allowance claims and carbon offset certificates against the third party data accessed from DMRE. SARS may need to share taxpayer-specific information with DMRE as part of that verification process. SARS, by virtue of its role in the implementation of the carbon tax, has an obligation to inform DMRE of any clients that it encounters who may be non-compliant with DMRE's carbon offset administration requirements.

Sharing of information required to administer carbon offsets and greenhouse gas emissions reporting (Clause 10 of Draft TALAB: Section 4 of Customs and Excise Act)

Comment:

The proposed amendment should not refer to the National Atmospheric Emissions Inventory System but rather to National Greenhouse Gas (GHG) Emissions reporting.

Response:

Accepted. The provision will be amended to refer to greenhouse gas emissions reporting.

Comment:

The current reporting process for greenhouse gas emissions is manual, but it is expected to be the same once the automated system is in place. In this process, the data provider reports to the Department of Environment, Forestry and Fisheries (DEFF) and the taxpayer (being the same entity) separately submits the carbon tax self-assessment to SARS. The verification of data reported against carbon tax liability submitted is a request for confirmation from SARS to DEFF. There is no part of the process that requires any official of SARS or National Treasury to provide information to DEFF. This amendment is therefore unnecessary.

Response:

Not accepted. SARS will access third party data from DEFF for its enforcement of carbon tax licensing, accounting and payments. During such vetting and auditing processes, SARS may need to share taxpayer-specific information with DEFF. For purposes of the enforcement of the carbon tax, SARS has to assist in ensuring that the DEFF third party database is complete.

Written notice of intention to institute legal proceedings against Commissioner (Clause 25 of draft TALAB: Section 11 of Tax Administration Act)

- A one week notice period has proven to be impractical in practice to give effect to the rationale for the notice, i.e. to enable SARS an opportunity to investigate the matter further and to decide how to resolve the dispute, for example by exploring a dispute resolution process, thereby avoiding litigation at the public's expense. The proposed amendment increases the current one week period to 21 business days in order to afford SARS sufficient time to investigate the matter to see if it can be resolved without resorting to litigation, unless a competent court directs otherwise.

Comment:

Most proceedings instituted by taxpayers in these instances are to compel SARS to comply with its obligations as set out in the Tax Administration Act, 2011, when SARS fails to do, for example rejection of an application to suspend payment or refusal to pay a refund. In the case of a rejection of an application for suspension of payment SARS may institute enforcement proceedings to recover a tax debt, once 10 business days have passed since the date the application is rejected. Therefore, it is imperative that a taxpayer, whose application has been rejected, has the option to institute urgent proceedings in the High Court to review SARS' decision before the period of 10 business days has elapsed.

Written notice of intention to institute legal proceedings against Commissioner (Clause 25 of draft TALAB: Section 11 of Tax Administration Act)

Hence, the extension of the time period for SARS to reply will be to the detriment of taxpayer's rights, and could result in a surge of urgent applications against SARS. This will also put further pressure on the already overburdened State Attorney's offices. One week is sufficient time to resolve the majority of issues and no amendment is required. Alternatively, it is proposed that the notice period be reduced to 10 business days to ensure fairness to both SARS and the taxpayer and to ensure that a taxpayer can timeously institute legal proceedings without having to resort to a court order to institute legal proceedings on shorter notice.

Response:

Partially accepted. A revised period of 10 business days will be proposed and the situation will be monitored.

Mandatory non-disclosure penalties (Clauses 37 and 38 of Draft TALAB: Sections 210 and 212 of Tax Administration Act)

- It has emerged internationally that offshore structures and arrangements are being designed in an attempt to circumvent financial account reporting under the OECD's Common Reporting Standard ("CRS"). The standard is used for the exchange of financial account information between countries. Subject to the approval of the Minister, the OECD's model Mandatory Disclosure Rules are to be implemented in South Africa in proposed new CRS regulations. These will be issued in respect of the OECD Standard for Exchange of Financial Account Information in Tax Matters under section 257 read with paragraph (a) of the definition of "international tax standard" in section 1 of the Tax Administration Act, 2011. The Mandatory Disclosure Rules will require certain persons to report such structures and arrangements, and the proposed amendment of section 210 aims to enforce this reporting obligation by means of similar penalties to those currently in force for non-compliance with the reportable arrangement scheme under the Act.

Comment:

It is not clear whether the penalty will apply separately in relation to each account that is not reported or whether it will apply in aggregate for each reporting period. The legislation should clearly stipulate on what basis the penalty is proposed to be levied.

Response:

Noted. The penalty is triggered where there is a failure to report the arrangement or structure and is not account based.

Mandatory non-disclosure penalties (Clauses 37 and 38 of Draft TALAB: Sections 210 and 212 of Tax Administration Act)

Comment:

The title of section 212 refers to “Reportable arrangement and mandatory disclosure penalty”. The proposed amendment to section 212(1)(b) reads as follows “.....who fails to disclose the information required to be disclosed under the regulations.” As there is a difference between the terms “mandatory and “required” it is proposed that the term “required” be deleted and the subsection be amended to read as follows: “....who fails to disclose mandatory information under the regulations”.

Response:

Not accepted. The term “mandatory disclosure” is used for consistency with international model legislation. The information is required to be disclosed under the regulations (rather than being optional), which is a formulation used throughout the Tax Administration Act, 2011.

Comment:

The regulations issued under section 257 should refer to the ‘static’ definition of “intermediary” i.e. as defined at a given date, in order to avoid problems similar to those that necessitated the proposed change to the definition of “permanent establishment” in Clause 2(1)(i) of the Taxation Laws Amendment Bill, 2019.

Response:

Comment misplaced. A full definition of intermediary is provided in the draft CRS Regulations made available for public comment in May 2019.

Criminal sanctions for erroneous, incomplete or false documents submitted to SARS

(Clause 40 of Draft TALAB: Section 234 of Tax Administration Act)

- The proposed amendment clarifies that any document required to be submitted under a tax Act to SARS that is erroneous, incomplete or false, is subject to criminal sanction under section 235.

Comment:

The Memorandum of Objects states that a criminal sanction would now be imposed if any document required to be submitted to SARS is erroneous, incomplete or false. It fails to mention that this sanction is only relevant if the person wilfully and without just cause submits such documents.

Response:

Accepted. The Memorandum of Objects will be amended as proposed, since these existing requirements make it clear that *bona fide* inadvertent errors are not subject to criminal sanction.

Update of provisions relating to confirmation of taxpayer's tax compliance status to take account of recent system developments (Clause 43 of Draft TALAB: Section 256 of Tax Administration Act)

- The proposed amendments update the provisions relating to a taxpayer's tax compliance status to take account of recent system developments that speed up the process. It furthermore enables the Commissioner to, by public notice, insert a *de minimis* for the amount of outstanding tax debt that will contribute to a taxpayer's tax compliance status as being indicated as non-compliant.

Comment:

The wording of section 256(2) appears to exclude the possibility of a taxpayer applying for a TCC him/herself. Section 256 should clearly distinguish and/or clarify what the procedures and implications are, for both a taxpayer and a taxpayer's client applying for a taxpayer's tax compliance status, should they be different.

Response:

Comment misplaced. A taxpayer always has access to his or her tax compliance status through the eFiling platform. The section regulates third party access to this information.

Comment:

A distinction should be made in the subsection between the provision of access to a taxpayer's compliance status and the actual confirmation (determination) of the taxpayer's compliance status as they are two distinct processes. The 21 business days appears excessive if it relates merely to third party access to a taxpayer's tax compliance status – and not to the actual confirmation of the tax compliance status as is alluded to in the latter part of the subsection. Providing access to a taxpayer's tax compliance status should be instantaneous once the status has been confirmed (determined).

Update of provisions relating to confirmation of taxpayer's tax compliance status to take account of recent system developments (Clause 43 of Draft TALAB: Section 256 of Tax Administration Act)

Response:

Not accepted. The 21 day period refers to the time-period SARS requires to verify or confirm internally whether or not there are circumstances that may preclude SARS providing the taxpayer with the ability to grant third party access to the taxpayer's tax compliance status.

Comment:

It is requested that consideration be given to exclude tax debts subject to a request for suspension in terms of section 164(2). Pending a decision from a senior SARS official to suspend payment, after such a request has been made, a taxpayer's tax compliance status should not be adversely affected for the period commencing on the day that SARS receives such a request and ending 10 business days after notice of SARS' decision to the taxpayer.

Response:

Accepted. The proposed amendment will be reworded to include the period for which SARS may not proceed with collection steps under section 164(6).

Thank You

QUESTIONS?