Dear Davis Tax Committee

COMMENTS ON THE DAVIS COMMITTEE, FIRST INTERIM REPORT ON ESTATE DUTY

1. The National Tax Committee of the South African Institute of Chartered Accountants (SAICA) appreciates the opportunity to present our collective feedback to the Davis Tax Committee (DTC) on the First Interim Report on Estate Duty for the Minister of Finance (“the Report”).

2. We have set out below in the attached Annexure A comments pertinent to policy as well as comments on the specific proposals made by the DTC.

3. Once again, we thank the DTC for the opportunity to comment on its work and, in so doing, play a positive role in the development of our country. We would welcome the opportunity to meet with the DTC to discuss or clarify any of our submissions.

Yours sincerely

Pieter Faber
PROJECT DIRECTOR: TAX
ANNEXURE A

GENERAL

Estate duty as fiscal finance

4. The DTC concludes (pg. 67) that it expects a substantial increase in estate duty collections once the relevant proposals are implemented.

5. However no financial modelling was conducted to support this expectation.

6. The report also does not state how substantial these collections should be to justify this additional type if tax and the administration cost for both taxpayers and SARS to implement it.

7. Following on the DTC’s argument that the Katz commission income target was valid and therefore R10-15 billion should be generated from this tax to justify its existence, the stark reality is that in this period only R1,1 billion was in fact collected and for donations tax only R112 million.

8. For the proposals to be substantial in any sense and justify this tax type, not even a 5 fold increase in collections would result in even coming close to the 1-1.5% target.

9. In addition, though we agree that an exact quantum cannot be determined, we disagree that no modelling should be done to support the conclusion. The lack of modelling based on the assumptions in the proposals in fact makes the DTC expectation of a “substantial” increase in collections highly speculative and fundamentally flawed.

10. Submission: The proposals for the retention of estate duty and its proper contribution to the fiscal pot should be supported by proper financial modelling, including considering the administrative cost. Where the modelling does not confirm that the targets identified will be substantially achieved after the implementation of the proposals, the conclusion should be revisited.

11. The lack of proper research is a common matter in the current report and below becomes a common recommendation as in our view no policy and fundamental proposals can be made without it.

12. It is noted that the International Fiscal Association issued a publication in 2010 which deals with inheritance taxes and estate duties payable on death, yet this publication, which reported on approximately 46 jurisdictions and summarised the same in a general report, is not listed as a reference.

13. Submission: In expanding the scope of its research, the DTC should in our view properly consider comparative work with proper relevance.
SPOUSAL EXEMPTIONS

Spousal exemptions

14. Firstly it must be noted that since 1998 s4(q) of the Estate Duty Act cannot be used in addition to s4(m).

15. The recommendation to withdraw or limit the section 4(q) estate duty exposure on bequests to a surviving spouse may have dire negative effects on the financial wellbeing and maintenance of that individual. A spouse is in many instances dependant on the capital asset base that is bequeathed to him/her. If that asset base is eroded by means of an immediate exposure to estate duty, this will place an undue hardship on that spouse.

16. It is our view that it is sometimes better to be pragmatic as advised by the Katz Commission than being overly academically and technically correct. In this regard the spousal exemption merely defers rather than avoids any liability as with the latter’s death, the full combined estate would be subject to estate duty or would have been subject to other taxes on realisation of those estate assets.

17. Submission: It is proposed that the Section 4(q) exemption from Estate Duty on a bequest to a surviving spouse should remain in effect.

The Inter-Spouse Bequest

18. This proposal ignores the various types of nuptial agreement arrangements which exist, i.e. in community of property and out of community of property, with or without accrual.

19. Submission: The proposal should clearly deal with the various nuptial arrangements and how it impacts practically of on the proposal.

RETIREMENT FUNDS

Contributions to retirement funds

20. The changes in the retirement fund regime will create additional complexity once implemented. The differences between a living annuity and a purchased annuity and a RAF are just illustrations of choices that can be made which have very different tax consequences.

21. Once the retirement regime is properly in force this could be considered.

22. Submission: It is submitted that the proposal should be deferred until the revised retirement funding regime has been finalised and implemented.
Motive for retirement savings

23. It is suggested that taxpayers contribute substantial amounts to retirement funds purely to achieve estate duty savings. This view is unlikely to be correct as most retirement funds have underperformed when compared to direct investment in similar investment vehicles and the estate duty savings often do not exceed the loss on returns generated by the retirement funds vs. direct investments.

24. The suggestion that these substantial contributions are made to mainly avoid estate duty is in our view unfounded.

25. Furthermore, with the introduction of compelled annuitisation in the new retirement reform, it is our view that even in cases where this was the motive, this factor alone will remove any such motive.

26. Lastly, the contribution of so-called substantial amounts which was disallowed in the determination of taxable income is particularly relevant in respect of self-employed individuals or individuals who, whilst employed, are not offered retirement benefits as part of their conditions of employment.

27. Substantial contributions are in many instances made in order to secure a reasonable annuity once a so-called retirement age is attained as the relevant person could or did not substantially contribute during his or her employment life cycle.

28. Submission: We submit that this proposal should be reconsidered due to annuitisation and again, that the actual incidence and motive at least be investigated and clarified before a policy decision is proposed based on speculation.

TRUSTS

General

29. It is evident that there is a general misunderstanding as to the purpose of trusts. Also, the fact that the term “trust” as defined in the Income Tax Act as “any trust fund consisting of cash or other assets which are administered and controlled by a person acting in a fiduciary capacity, where such person is appointed under a deed of trust or by agreement or under the will of a deceased person”. The definition is much wider than the definition contained in the Trust Property Control Act and include all types of trusts, including foreign structures, irrespective of their legal basis, which have the characteristics as specified in the definition.

30. Examples include asset protection entities, specific purpose trusts, real estate investment trusts, foreign pension trusts, amongst many other. It is further noted that in many jurisdictions, pension funds, provident funds and retirement funds are written under a trust deed.
31. The Report contains a general contention that trusts are used by taxpayers as a tool to avoid/evade tax. It ignores the most important reason for the formation of trusts, i.e. asset protection. Whilst it is true that many wealthy taxpayers make use of the trust to hold the wealth accumulated by them, it is noted that estate duty avoidance is most often not the reason for accumulating wealth in trusts but rather to ensure that their assets are protected in the event of a significant business failure. Professionals such as lawyers, accountants and medical professionals, also use trust to safeguard their assets against any claims which may result as a consequence of incorrect professional advice and professional indemnity claims.

32. As regards the foreign pension trusts, the current Report ignores the fact that the South African Income Tax Act currently exempts lump sums, pensions, and annuities received in respect of employment outside of South Africa, but that the same does not apply to voluntary retirement savings acquired by residents either whilst they were working in a foreign jurisdiction or before they became residents of South Africa. A blanket taxation of distributions from such trusts is inequitable, considering further that no deductions are currently available for contributions made to these foreign pension trusts.

33. Also, South African residents are not contributing to these foreign pension trusts to avoid estate duty but rather to benefit from investments in foreign markets beyond the limitations placed on foreign investments exposure in South African based retirement saving plans.

34. **Submission:** Any revision of the provisions dealing with the taxation of distributions from trusts, be it South African or foreign trusts, will be inequitable if the type of trust and purpose thereof is not considered in detail and provision is made for each of the different types of trusts.

35. We also would like to raise a concern in respect of the effect of the proposals on trusts not in the estate context for example employee share trusts.

36. No discussion is had on the effect of the proposals of these other trusts which will equally be affected by the DTC proposals but which have no estate planning purpose or effect.

37. **Submission:** More consideration should be had as to how these proposals affect all forms of trusts, not just those used in the estate planning sense.

**Avoidance of capital gains**

38. The Committee has ignored the fact that all movements of assets into or out of trusts is subject to donations tax and capital gains tax. This means that since 2001 capital gains tax (CGT) has been collected on transfers into trusts whether they be transferred on loan account or by donation.
39. With the volume of tax information exchange agreements (TIEAs) being signed with non-treaty countries increasing; together with access to exchange of information articles in the DTAs and IGA agreements there seems to be no reason for the revenue authorities not being able to obtain information of taxpayers with offshore assets or trusts.

40. From experience many South African trusts do not last for more than one or two generations as capital is exhausted and or circumstances of beneficiaries change and the trust is terminated giving rise to CGT collections.

41. The rate increases introduced in 2003 in our view eliminated much if not all of the arbitrage between trusts and targeted natural persons (i.e. high earning or net worth individuals at the 40% marginal rate).

42. It therefore seems odd that the DTC concludes that paying CGT at natural person rates therefore equates to some form of new avoidance, if the targeted anti-avoidance was movement of the income or assets from a natural person to a trust in the first instance.

43. The DTC has acknowledged the lack of statistics to prove that estate duty is being avoided by the use of trusts, more so for capital income. It is therefore unclear why certain changes have been recommended regarding attribution without any certainty of additional income being assured.

44. **Submission**: It is submitted that given the new and more comprehensive trust disclosure return (ITR12T) which was introduced in 2014 and expanded on in 2015, it would not take DTC more than a year or two of data to establish whether in fact meaningful avoidance is occurring. In our view the proposals should be deferred until such data is obtained and analysed.

**Foreign trusts**

45. A proposal is made that all distributions from foreign trusts should be taxed as income. We feel this is completely inappropriate. There may be instances when the distribution from a foreign trust may have already been subject to taxation in South Africa, thus resulting in a position of a double taxation of the same income.

46. It is noted that detailed record keeping and a sound understanding of the law is required to correctly apply the provisions of Section 25B(2A), however that should not be a reason to take such a severe standpoint that will result in the taxation of all such distributions as income, especially when certain components of such distributions may be capital in nature.

47. **Submission**: It is proposed that the current treatment applicable to distributions from foreign trusts should remain intact.
48. In our view the DTC has not considered the implication of DTAs and TIEAs in the context of foreign trusts.

49. In terms of a DTA capital cannot unilaterally be turned into revenue by one State as this would not be in “good faith” and goes against the Vienna Convention on the law of treaties. This in any event could cause double taxation as treaty benefits/credits become unavailable where tax is paid in both states. If trusts are in States where no DTA exists then the TIEA can be used to extract all the information that the revenue authorities require.

50. Using trusts as a matter of obscuring data and money flows is in our view at most a thing of the past with information sharing such as FATCA and CRS 2017.

51. Submission: It is submitted that the proposals be deferred until all the factors mentioned above are properly researched.

Transitional matters

52. Whilst it may be acknowledged that certain taxpayers may have used trusts for inappropriate reasons that are countered by the many instances when trusts are validly used for sound reasons.

53. For this reason, we contend that the proposed amendments to the taxation laws applicable to trusts are severe and we feel inappropriate.

54. The proposed introduction of the proposals with effect from 1 March 2016 would not allow sufficient time for taxpayers to appropriately assess and take action if deemed necessary in response to the proposed amendments.

55. In addition, trusts are governed by their Trust Deeds that are already in place, and in certain instances not open to amendment. By not providing for any appropriate transitional rules or fair lead times prior to implementation, Trustees are not afforded the opportunity to adequately assess how they may continue to fulfil their fiduciary responsibilities and respond accordingly.

56. Submission: It is therefore proposed that added consideration should be given to an appropriate transitional regime, potentially with the ability to allow a window period to address the impacts of a new taxation regime for trust structures.

Special trusts

57. In our view the proposals regarding special trusts are misguided and goes against our constitutional principles are of protecting the weak, disabled and young. In this regard it should be noted that little to no avoidance is in fact suggested by the use of special trusts.
58. At present, the only relief contained in the proposals is in respect of a special trust established for the benefit of a person with a disability.

59. We feel this is too limited when considering the position of, for example, a testamentary trust established by a deceased person for the benefit of his/her successors. In the instance of funds held by a testamentary trust for the benefit of minor children, this relieves a burden on the State where the absence of such a structure may place an unnecessary burden on the Guardian’s Fund to maintain such assets.

60. If unable to continue the application of the existing provisions, this will have a significant impact on the financial asset base that is intended to support the beneficiaries. In addition, existing testamentary trusts would have been carefully planned by the deceased prior to death regarding the financial maintenance of the beneficiaries of those trusts.

61. By amending the rules in the manner proposed, it will hamper the ability of the trustees to adequately uphold the wishes of the deceased regarding the purpose of the trust.

62. An added concern is that extending the relief to a trust where the beneficiaries are minors is still insufficient on the basis that on reaching majority, that beneficiary is still in a position where he/she requires financial assistance, and any funds applied in such a manner should not be eroded.

63. **Submission:** We do not support the proposed changes to the limitation of special trust and submit that this proposal should be withdrawn. Trying to seek insignificant additional revenue for the State from minors who have lost a parent(s) seems morally inappropriate.

**Vested right trusts**

64. The proposed abolishment of the conduit pipe principal regarding the flow through of taxable income on an award of income to a beneficiary is a significant matter. Trust structures have many valid reasons, and such a proposal may place undue pressure on Trustees to fulfil their objectives.

65. As a minimum, the conduit pipe principal should still be upheld in the instance of vested entitlements. In cases where a vested entitlement already exists, it would be inappropriate for that beneficiary to be financially prejudiced by the abolishment of that principal.

66. **Submission:** It is therefore proposed that the conduit pipe principal should at least be upheld in the instance of vested entitlements of beneficiaries such that they will continue to be taxed in their personal capacities.
DONATIONS

Inter-spouse donations - Donations tax

67. The recommendation to limit the exemption in respect of donations between spouses is held to be inappropriate. In a spousal relationship, there may well be commonplace gifting between partners that would fall outside of the separately mentioned donations for the maintenance of a person.

68. By trying to expose such transactions to donations tax there would be an extensive administrative burden created that would not be able to be effectively monitored or complied with.

69. **Submission**: It is therefore proposed that donations between spouses should still be exempt from donations tax. As a minimum, there should be a sufficient value placed on the exemption of such events so as to avoid any inappropriate compliance burdens.

Donations to trusts

70. This proposal ignores the various types of nuptial agreement arrangements which exist, i.e. in community of property and out of community of property, with or without accrual.

71. The Report is fatally flawed as it does not deal with the capital gains tax consequences following the transfer of assets to a trust.

72. One of the concerns raised re specifically exempt donations relate to the exemption from donations tax of a *donatio mortis causa* as provided for in section 56(1)(c) of the Income Tax Act. It is suggested that this exemption allows for the diminution of estates in anticipation of death and should be removed.

73. In our view the contrary exists, as in fact that such donations are specifically included as property deemed to held by the deceased at the time of his/her death in terms of section 3(3)(b) of the Estate Duty Act. Such donations therefore do not allow for the diminution of estates in anticipation of death.

74. **Submission**: The proposal should be withdrawn.

Donations prior to residence

75. The proposal that donations tax position of donations made by a person prior to becoming a South African resident be re-examined is rather far-fetched and the extraterritorial nature of the proposals gives rise to concerns regarding enforcement.
76. The same concern applies to the re-examination of donations tax on property inherited or donated to a South African resident by a non-resident.

77. **Submission:** These proposals and their practicality should be re-evaluated.

**Reasonable maintenance**

78. The practical implications of imposing limitations on the concept “reasonable maintenance” is fraught with complications.

79. The proposal in essence wants to take a good principle and turn it into a rules based regime, which as we have seen with so many other anti-avoidance provisions just leads to an administrative and practical mess for both SARS and taxpayers.

80. **Submission:** There seems in our view to be no rationale for this proposal, especially as we believe no significant avoidance is in fact taking place on the basis of maintenance. Reasonableness is a question of fact at a given point in time and the legislature does not need to impose a fixed and stated concept thereof. This proposal should be withdrawn.

**CAPITAL GAINS TAX**

**General**

81. In the Terms of Reference (TOR) of the Davis Committee the following is stated as one of the areas for review:

> “7) The progressivity of the tax system and the role and continued relevance of estate duty to support a more equitable and progressive tax system. In this inquiry, the interaction between capital gains tax and the estate duty should be considered.”

82. The first interim report (in chapter 7) however specifically dismisses and excludes any discussion of capital gains tax which occurs on death, thereby in our view not properly exploring its mandate.

83. The fact that capital gains tax may, in some persons view, not be a wealth tax is also not what the TOR mandated.

84. To correctly quote Roeleveld, she suggested that a more efficient tax, such as capital gains tax could be extended to cover the situation at death more adequately, to compensate for the repeal of Estate Duty. In addition double tax treaties (DTA) cover capital gains tax but estate duty treaties are minimal across the world with only 5

---


2 Page 56 of the Interim Review.
signed by South Africa as opposed to the 73 DTA’s in force on income and on capital gains. None of this was considered by the Committee³.

85. **Submission**: We strongly suggest that more research is required before introducing ad hoc changes which may not be the correct solutions for South Africa. Furthermore, the proposal as made in this submission as well (as also contended by Professor Roeleveld) is that Estate Duty is administratively expensive and burdensome and produces negligible revenue for the fiscus, thus should be replaced with a more efficient tax, whether expanded CGT regime or no.

86. **Submission**: The recommendations proposed by the DTC seem to divert in our view from what the mandate intended. The committee has sought not to consider alternatives to estate duty and to consider all other taxes which also arise on donation, settlement, disposition and on death. This requires more substantial research specifically in the South African context.

87. The mobility of taxpayers and their ability to have assets in various States means that DTAs need to be considered as well as the very old and limited number of death treaties in place. Issues of double taxation cannot be ignored.

**Double tax principle - administration costs**

88. In our view a fundamental omission in the Report is that it does not address the fact that South Africa is currently the only country which levies both estate duty and capital gains tax on the death of an individual.

89. Reference is made to the fact that South Africa faces challenges in reducing its national debt level and that the estate duty system could contribute to alleviate this debt.

90. As noted above there is little evidence to support this speculation.

91. Reducing state debt is a process of proper budgeting of means within the spending and tax capacity of the State and should be dealt with at such level within government.

92. The omission further does not address the fact that this double tax is administratively burdensome and costly for both the State and the taxpayer, reducing the benefit of tax collections and economic activity by increasing costs.

93. Though we accept that this tax type is politically appropriate, it does little to actually empower the State to distribute wealth. This seems not only to be a phenomena of SA wealth transfer taxes, but in fact a global one.

94. **Submission:** The negligible contribution of estate duty and the questionable ability of this tax to raise significant revenue should in itself result in it being removed in favour of a single expanded CGT regime.

**Foreign comparatives**

95. To base conclusions on research or practices in countries that have excellent social security systems and where the elderly have free and proper medical assistance etc. does not make sense for South Africa where cost of proper medical care is extremely costly and has eroded much of the savings of the elderly.

96. The fact that the research shows that collections from estate duty or death taxes worldwide, including developed countries, are minimal also indicates that there is no reason to believe that collections from estate duty in South Africa will increase even with arbitrary ad hoc changes.

97. The pool of taxpayers in South Africa is very small and to extract as much as possible from this group will lead to anti avoidance as the level of taxation is perceived to be unfair.

98. The large reliance on “Piketty” in the report is also cause for alarm. The fact that there may be individuals who live frugally and save intensely is not addressed, yet they will be penalised together with those who inherited.

99. **Submission:** Proper comparatives should be used and to the extent that they are relevant, such as indicating the unsuccessful nature of this tax as revenue generator, this should be given appropriate consideration to the overall conclusion.

**Capital gains tax on death**

100. If the changes recommended for the retention of estate duty are made, then capital gains tax on death (paragraph 40 of the Eighth Schedule) must be repealed together with an insertion for base cost enabling revaluation of assets on death to the value in the deceased estate.⁴

101. We agree with the citation from the European Union on pg.56 that CGT should be only due “when the possession or transfer of the assets results in the realisation of income.”.

---

102. In this regard no income is realised on transfer on death, hence the current deeming provisions are more akin to a wealth tax.

103. Submission: In our view the base cost should merely be rolled over and the capital gains taxed once income is realised from those assets by the beneficiary. In our view there is no income loss to the fiscus and less hardship for the beneficiaries in having to forego cash to receive the assets under the current position and proposals.

TAX AVOIDANCE

General Anti-Avoidance Regulations

104. The basis for conclusion reached that section 80 of the Income Tax Act as well as judicial precedent do not currently act as an effective deterrent against the wide range of estate duty saving mechanisms that exist, is unclear.

105. Section 3(3)(d) of the Estate Duty Act exists to counteract the situation where the deceased still has beneficial ownership in assets even although they were given away. This section has rarely been used. It connects to s7(6) of the Income Tax Act where the donor is still taxed regardless of the disposal. This is just to highlight that there are anti-avoidance measures in place but which have not been enforced. If they are difficult to enforce then they should be reworded and clarified.

106. In our view there is reluctance on the part of the South African Revenue Service to pursue so-called impermissible arrangements and they have found it more convenient to annually legislate for each and every specific event that they perceive to be tax avoidance.

107. Submission: The success of an avoidance measure cannot be determined from mere speculation and can only be had from seeing SARS factually fail or succeed when they pursue matters under these provisions. As can be seen in the income tax context, continual addition of specific anti avoidance rules just leads to more and more complexity, provides more barriers to SARS in enforcing the law and provides further opportunities to circumvent these measures. In our view, complexity is sometimes its own downfall.

RATES

Abatements and Rates

108. Should estate duty be retained, the abatements need to be increased significantly to a minimum of the suggested levels.

109. Submission: In our view provision must also be made for an adjustment based on an inflation factor to increase the abatement annually.
110. Submission: The estate duty rate should be reduced to ensure that the aggregate of the rate of applicable to the capital gains tax payable on death and the estate duty do not exceed 20%.

TAX ADMINISTRATION

Administration and revenue collections

111. It has already been noted that estate duty is an expensive and administrative burdensome tax.

112. In this regard, the legislation should be streamlined to allow closer working relationships between the Masters office, Department of Home Affairs and SARS. The closer working relationships could ensure that more compliance in terms of Estate Duty.

113. As a recent example of this, where payment of the estate duty was erroneously made to the Masters Office and not SARS, no transfer of the funds could be achieved without reopening an estate that had been finalised 6 years earlier (in this special case the executor and beneficiaries were also all deceased).

114. Submission: The administration of the estate and the corresponding taxes are a single process and should in law also be treated as a single process, notwithstanding that various government departments are involved.

Voluntary disclosure

115. Page 45 of the First Interim Report on Estate Duty states as follows:

“SARS has now implemented a permanent mechanism for all taxpayers to amend their taxation declarations through the Voluntary Disclosure Programme contained in sections 225 to 233 of the Tax Administration Act, 2011. Thus the DTC is of the view that there is no need to consider a further offshore amnesty programme. Indeed such a programme would undermine the effectiveness of the voluntary disclosure programme.”

116. Taking account of the number of persons approaching tax practitioners for assistance in completing applications under the Voluntary Disclosure Programme, it is apparent that many South Africans have not yet regularised their foreign assets with both the Commissioner: South African Revenue Service and the Financial Surveillance Department of the South African Reserve Bank.

117. Whilst it is accepted that South Africa cannot introduce a further amnesty similar to that which was conducted during 2003/2004, it is unfortunate that no clarity exists as
to the process to be followed in regularising offshore funds held in violation of the exchange control regulations and the cost to applicants to do so.

118. It is unfortunate that it appears that applicants for regularisation of offshore assets held in contravention of the exchange control regulations are subjected to a levy which may depend upon the tax practitioner assisting the applicant or alternatively the official who happens to deal with the matter at the South African Reserve Bank.

119. In our experience there are reports of applicants being subjected to levies imposed by the South African Reserve Bank ranging from 5% to 25% of the value of foreign assets at the time the assets are declared to the South African Reserve Bank.

120. It would be far preferable if the South African Reserve Bank had a unit similar to the voluntary disclosure unit located within the Commissioner: South African Revenue Service to deal with the regularisation of funds held abroad in contravention of the exchange control regulations.

121. Applicants should also be aware at the outset as to the levy which is required to be paid to the South African Reserve Bank to regularise assets held abroad in contravention of the exchange control regulations.

122. Insofar as the Voluntary Disclosure Programme under the Tax Administration Act is concerned, it is most unfortunate that the Tax Administration Act does not specify the number of years that a taxpayer is required to regularise. It would appear that there are many taxpayers who have transferred funds abroad in one way or another such that the funds were either previously not taxed in South Africa or were previously subjected to tax and the income on the amounts invested offshore have not been declared to the South African Revenue Service.

123. There are numerous cases where taxpayers have not disclosed the income as required for 25 to 30 years and also possibly donated the foreign funds to a foreign trust and if they were to declare all transactions going back say 20 to 25 years, the interest payable thereon would far exceed the foreign funds held abroad.

124. The Voluntary Disclosure Programme enshrined in the Tax Administration Act does not contain some cap on the interest (i.e. in duplum rule) required to be paid by a taxpayer wishing to regularise their tax affairs under the TAA.

125. Furthermore, it would be far preferable if the TAA specified the period for which taxpayers are required to make disclosure in order to regularise their affairs such that the taxpayer is not obliged or expected to deal with those years exceeding the specified years in the legislation.

126. As South Africa is an early adopter insofar as the automatic exchange of information is concerned, many South Africans with funds invested in Switzerland and other countries are being advised by foreign financial institutions that they must regularise
their offshore assets to the extent required, failing which the financial institution will no longer be able to assist those South African investors.

127. It is difficult to quantify the extent of funds held abroad by South Africans in contravention of the exchange control regulations and on which tax has not been paid.

128. If the Voluntary Disclosure Programme was clarified insofar as the number of years to be dealt with by a taxpayer, it would encourage more taxpayers to regularise their affairs, thereby increasing the tax base of South Africa such that income tax and capital gains tax would be declared on the foreign assets held by the taxpayer. Furthermore, those foreign assets would then be known to SARS and would clearly constitute a part of the estate of a taxpayer upon their death, thereby enhancing the collection of estate duty in South Africa.

129. Whilst not condoning the conduct of those taxpayers who have chosen not to comply with their fiscal obligations and have chosen to disregard the exchange control regulations, it is a fact that taxpayers will not regularise their affairs where the combined cost of tax payable to SARS and the levy payable to the South African Reserve Bank to regularise their offshore assets exceeds a certain amount or in fact could exceed the capital held by the taxpayer abroad.

130. During the Voluntary Disclosure Programme administered in terms of the Voluntary Disclosure Programme and Taxation Laws Second Amendment Act, No. 8 of 2010 the applicants knew their exposure to SARS to regularise their affairs and indeed also the amount required to be paid to the South African Reserve Bank to regularise any exchange control violations.

131. The 2010/2011 VDP required the applicant to pay a levy of 10% where the levy was paid from foreign funds or 12% where the levy was paid from domestic funds. In addition, the amount levied on an individual was reduced by the R4 million of the foreign investment allowance not utilised by the individual but it would appear that currently the South African Reserve Bank disregards the foreign investment allowance not utilised by applicants and the quantum of levy payable to the South African Reserve Bank appears subject to some degree of negotiation.

132. Submission: Whilst it is accepted that the TAA contains a permanent Voluntary Disclosure Programme, it is submitted that the programme is deficient in that it does not address how many years a taxpayer is required to go back and regularise and furthermore, applicants are uncertain as to the extent of levies required to be paid to the South African Reserve Bank. It would therefore be far preferable if the VDP dealt with the issues of interest being limited to a particular number of years and the legislation also set out how many years back a taxpayer must go back in order to regularise their affairs. The South African Reserve Bank should create a Voluntary Disclosure Unit to deal with VDP applications similar to the case at SARS.