Dear Madam


1. I herewith present our written submissions on the above-mentioned draft Bills on behalf of the SAICA National Tax Committee.

2. Our submissions include a combination of representations, ranging from serious concerns about the impact or effect of certain provisions to simple clarification suggestions for potentially ambiguous provisions. We have deliberately tried to keep the discussion of our submissions as concise as possible, which does mean that you might require further clarification. In this respect, you are more than welcome to contact us in this regard.

3. As always, we thank SARS and National Treasury for the on-going opportunity to participate in the development of the SA tax law.

Yours sincerely

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4. Section 2(1)(b) proposes to exclude from the SVDP the receipts and accruals from assets which the South African Revenue Service (SARS) have become aware of under an international agreement.

5. A person whose transgression was made known to SARS via an International Exchange of Information Agreement is disqualified to participate in SVDP, while the Exchange Control Circular by the South African Reserve Bank (SARB) is silent on the matter.

6. SARS previously stated that to the extent that they have not notified the person of the transgression, the SVDP and VDP process were, in their view, available to such person/s. SARB representatives in turn indicated that regardless of whether they have notified such persons of the transgressions identified, those persons would not qualify for the SVDP and their applications will be rejected.

7. This contradictory position is quite concerning and, in our view, untenable as there may be many people who would ordinarily apply for the SVDP who will now reconsider due to the uncertainty as to whether their application will be accepted or not.

8. In our view this approach undermines the whole SVDP as taxpayers invariably would not know whether SARS possesses such information or not.

9. Without a formal notification of exclusion from SARS applying, the exclusion remains problematic.

10. As we noted in our previous submission certainty of the process and grounds for relief is the basis for the success of any VDP process and the disparity in views between SARS and SARB on principle creates much uncertainty. The income tax and exchange control cannot, in our view, be contradictory and relevant government agencies should be talking with one voice.

11. In addition it should be noted that taxpayers wishing to apply for relief may not be aware whether SARS is in possession of information that was disclosed under an international tax agreement. It would therefore only be fair to insert a cut-off date by which SARS will have had to notify a taxpayer that his/her affairs are under investigation as a result of disclosures made under an international tax agreement. This would provide more certainty to prospective applicants.

12. Submission: It is submitted that for the purpose of the SVDP, SARB should treat applicants in the same manner as SARS would, i.e. until such time as SARB have
notified transgressors of an investigation into their affairs, the SVDP should be available to these persons.

13. In addition, section 2(1)(b) should, like the section 223 Tax Administration Act (TAA) penalty table and the draft proposals in TALAB16 in respect of section 225 TAA, require notification of the knowledge by SARS and therefore the taxpayers exclusion. It is procedurally unfair that taxpayers will be excluded without due process of having knowledge of such exclusion.

DRAFT RATES AND MONETARY AMOUNTS AND AMENDMENT OF REVENUE LAWS BILL 2016

GENERAL

Indexation for Capital Gains Tax (CGT)

14. Though we appreciate that the increase in the nominal rates of CGT was necessary to balance the budget by the Minister, the continual increase in this rate to nearly 100% has resulted in this tax becoming punitive as it does not provide for indexation.

15. With the introduction of CGT, indexation was excluded on the basis that the included gain would be so low. This policy thinking clearly does not apply anymore.

16. In our view the exclusion of indexation from CGT where nearly 100% of the gain is taxable will result in untended behaviours regarding how taxpayer's treat assets, especially as they are now penalised for holding them for extended periods.

17. The current proposed regime essentially punishes taxpayers for keeping the same assets for long periods compared to those who keep them for shorter periods. This is especially punitive in a high inflation country like South Africa.

18. **Submission**: Indexation should be introduced to ensure that only the real gain is taxed. This will prevent taxpayers from seeking other measures to reset ownership time periods or seeking to exclude ownership, which may be detrimental to the economy. In our view investment decisions in the economy should not be driven by misalignment of policy and law.

VAT registration: E-services

19. Section 23(1A) of the VAT Act imposes an obligation on the person as defined in paragraph (b)(vi) of the enterprise definition of section 1 VAT Act to register as a vendor if the total supplies exceed R50 000.
20. However, unlike section 23(2)(b) and (c), it does not prescribe a time period in which the R50 000 must be made, i.e. preceding period of 12 months.

21. Technically the R50 000 could be done over 20 years and then the obligation is created in year 20, which is unpractical.

22. Submission: Section 23(1A) should be amended to limit the R50 000 threshold to the previous period of 12 months to align it to the other provisions and ensure that it becomes practically implemental for foreign e-services providers to determine when they have a registration obligation in SA.

SPECIAL VOLUNTARY DISCLOSURE PROGRAM (SVDP)

General – Time period

23. We noted previously that the current six months period is too short given the information required to prepare an application. We acknowledge the need of National Treasury (NT) to have a short SVDP term that generates revenue in the short term, but learned from the 2010 VDP process that a longer period would be more beneficial.

24. This short period is also at odd with the Explanatory Memorandum (EM) states as to the reasons for the change that this “will be open for individuals and companies in order to assist them to regularise their affairs before September 2017 i.e. an alignment of the SVDP with the implementation of CRS.

25. The success of the SVDP is dependent on taxpayers being able to receive proper advice timeously. Should the proposed six month period be retained, this becomes even more of an imperative.

26. It should be noted that new revised proposals for determining the taxable inclusion that invariably requires 5 years of valuations, contributes even further to this problem.

27. Submission: It is submitted that the need for cash resources should be balanced with that of ensuring that as many people as possible can use this opportunity which financially maximises the benefit for the fiscus and taxpayers. The application period should at least be equal to the 2010 VDP of 12 months and aligned to CRS implementation in September 2017.

General - Compulsory reporting obligations

28. We emphasise that in terms of both the Financial Intelligence Centre Act (FICA) and the Audit Professions Act, advisors who are accountable institutions (including banks and brokers) or registered auditors are obliged to disclose their clients’ financial transgressions for tax and exchange control in respect of those compulsory disclosure regimes.
29. This will discourage any person who is only enquiring as to his/her possible transgressions or wanting to enquire of the process and consequences of using the very persons who are most accessible to advise him/her. This, in our view, would substantially detract from the possible success of the SVDP which was considered in both the 2006 and 2010 amnesty and VDP.

30. In addition, section 29(2) of FICA states:

“(2) A person who carries on a business or is in charge of or manages a business or who is employed by a business and who knows or suspects that a transaction or a series of transactions about which enquiries are made, may, if that transaction or those transactions had been concluded, have caused any of the consequences referred to in subsection (1) (a), (b) or (c), must, within the prescribed period after the knowledge was acquired or the suspicion arose, report to the Centre the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.”

31. Therefore invariably not only accountable institutions face a dilemma as to the obligation to report under FICA consultations on the possible application of the SVDP, but also non accountable institutions.

32. For the purpose of the 2010 VDP, communication was issued by FICA excluding compulsory disclosure where the affected person intended to use the VDP, in order to ensure the success of that VDP. Similarly, in 2006 (in respect of the SARS Small Business Amnesty) and 2010, concessions were made to exclude registered auditors from the obligation to disclose their clients’ financial transgressions where that client was contemplating using the VDP.

33. It is our view that the broader more formal exclusion as was done in the 2006 amnesty should be considered which would provide the most incentive to use all available advisers in promoting compliance.

34. Submission: It is unclear why from a policy standpoint NT and SARB are reluctant to agree a similar exclusion to facilitate the success of the SVDP. In our view the Auditing Profession Act should be amended to exempt registered auditors from disclosing their clients’ financial transgressions where the client has approached the auditor for assistance in making a SVDP application. Similarly, compulsory disclosure exclusions should be issued under FICA. In our view, these amendments will aid the success of the SVDP and should be implemented before the provisions relating to the SVDP become effective.

General – Permanent EXCON VDP

35. The success of the tax VDP implemented by SARS should in our view serve as encouragement for a permanent VDP for exchange control as well.
36. There seems to be no policy reason why a permanent mechanism should not exist to allow taxpayers to voluntarily disclose their previous transgressions and face a punitive system that is clear, transparent and fair to all.

37. In addition, the exchange control and Tax VDP’s should be aligned to ensure that the same transgression for the same amount does not result in double the penalty and interest.

38. **Submission:** The current SVDP provides an opportunity to introduce a permanent system that can ensure that persons are always encouraged to voluntarily rectify their affairs and know that they will be treated fairly (and consistently as compared to others) in a clear and transparent manner.

### VAT & Other Taxes in default

39. We have noted that the second draft of the bill has reiterated that only income tax, donations tax and estate duty will be subject to the SVDP.

40. However no explanation has been given as to why VAT, employees’ tax, SDL & UIF have been excluded, the latter even more so given that it eventually is income tax on assessment.

41. We had the same concern with the 2003 amnesty legislation and it was only at the very end of that process that some provision was made.

42. **Submission:** We submit that the SVDP should apply to all taxes that would have applied had the monies been legally remitted from SA and no policy decision seems to exist as to why these other taxes should be excluded. At the very least the EM should be clarified providing the policy reasons why these other taxes are excluded from the SVDP.

### Regulations

43. The nature of the SVDP is such that the implementation thereof may need additional operational provisions to ensure it can accommodate circumstances not initially identified.

44. **Submission:** We propose that the Bill allow for regulations to be published as was the case with the 2003 amnesty.

### Transfer of VDP applications

45. The implementation of the proposed SVDP should ensure that all persons are treated equally under the law.
46. In such an instance those who volunteered their non-compliance under the more punitive TAA VDP should not be worse off for exactly the same transgressions, especially where those applications have not as yet been finalised.

47. **Submission:** It is submitted that the Bill should cater for VDP applications made under the TAA which have not been finalised by 24 February 2016 (i.e. when the draft bill was released) to be dealt with under the current proposed SVDP regime.

**Market value - Inclusion amount**

48. Section 16 provides that the amount to be included in taxable income is an amount equal to 50% of the highest aggregate market value of all assets situated outside South Africa between 1 March 2010 and 28 February 2015 that were derived wholly or partly from undeclared income.

49. The determination of a market value on an annual basis for the five year period will also be very onerous on a taxpayer as it will be a cost expensive exercise. In addition, the practical difficulty regarding determining the market value of the asset is the fact that, many taxpayers wishing to apply for relief have assets in countries which only report values of assets as at 31 December each year and not at the end of February of each year.

50. This exercise is especially burdensome for immovable property and unlisted shares and the cost of getting these valuations will be seen as part of the total penalty, which increases the penalty substantially.

51. In addition section 16 of the Bill refers to the “… highest amount determined in terms of subsection (2) in respect the aggregate value of all assets referred to in section 15 …”. The underlined suggests that a taxpayer needs to determine the highest market value on a collective basis and not determine the value of each asset, respectively.

52. **Submission:** In our view the valuation should be done on a single date whether that date is during the 5 year period, at its end or on the start of the SVDP as the current proposal is impractical and highly punitive to persons who don’t have listed shares or other assets where market value is not easily determinable.

**Market value - Pre-tax funds and post-tax funds**

53. During our initial submission, concerns were raised regarding the fact that those taxpayers who partially invested post-tax funds would be at a disadvantage when making application under the SVDP, in relation to those who invested pre-tax funds. Our submission has seemingly been addressed to a certain extent by SARS referring to “… receipts and accruals not declared to the Commissioner … from which an asset ….. was wholly or partly derived...”.
54. However, no mention of apportionment on this basis is noted as being intended in the EM and how such apportionment should be done.

55. Another concern that arises is where the income that should have been declared is exempt from income tax (for example, foreign dividends that are exempt in terms of section 10B of the Income Tax Act). Though it seems that as section 15(1) exempts amounts from “tax imposed” which is also our understanding of what is intended, the amount to be quantified is done in subsection 15(2) which in turn refers to “not declared”.

56. Submission: The amount to be included should be clarified in the EM with an example to ensure that a taxpayer who funded his/her assets out of pre and post-tax/exempt tax funds can apply apportionment and how.

57. Furthermore, the inclusion should be based on amounts undeclared in a return and not properly taxed (i.e., section 15(1) and (2) read together) and this intention should be made clear in the test of the legislation possibly by defining “undeclared”.

Lockdown of SARB penalties for the duration of the SVDP period

58. Previously, concerns were raised regarding the fact that those who invested post-tax funds would be at a disadvantage when making application under the SVDP, in relation to those who invested pre-tax funds. Hence such affected taxpayers must utilise the normal VPD process.

59. Currently affected taxpayers who would like to apply for the exchange control relief and regularise their unauthorised foreign assets would need to go through the ongoing SARB regulation process. This may potentially be a disadvantage to affected taxpayers on the basis that there would be no certainty regarding the quantum of the penalty payable which ranges from 5% to 40%, where such affected taxpayers used post-tax funds.

60. Certainty of the outcome is one of the most important features of the SVDP and normal VDP. We also cannot understand why in principle NT and SARB would want to subject those who are more compliant to a harsher or more uncertain process than those who were more non-compliant.

61. In our view, this approach will discourage affected taxpayers from making the application for regularisation under the normal rules.

62. Submission: To the extent that the affected taxpayers do wish to use the standard regularisation process, we propose that there be a lockdown on the penalties imposed to those taxpayers who make an application during the SVDP period that is equal to the exchange control penalties and conditions which would have been imposed if they had applied for the SVDP. From a practical perspective it is also important that the SARS processes and SARB regulatory framework in terms of the
SVDP e-filing process allows such taxpayers to apply for exchange control relief only to the extent that it is required.

Section 17(2)(a) - Assets of non-resident trusts on loan account

63. It appears that the SVDP would not provide relief for a discretionary trust if a discretionary trust acquired an asset through an interest-free loan from a South African resident.

64. The reason for this conclusion is the requirements in section 17(2) which require the asset to have been acquired by the trust by way of donation (which does not technically include an interest-free loan) and which amount had not been declared to SARS.

65. It does not appear from the media release that the SVDP process in respect of foreign discretionary trusts was intended to be as restrictive as proposed in the Bill.

66. Submission: The manner in which the asset was acquired for less than market value should extend beyond pure donations to allow other transactions to be disclosed in terms of the SVDP.

Draft Bill does not cater for facilitators

67. The 2003 amnesty legislation contained a mechanism whereby so-called facilitators could apply jointly with a primary applicant for relief under that legislation. We have been informed that in numerous cases where a South African company, for example, imported goods from abroad it pays an amount of, say, R100 000 therefor and at the same time the oversees supplier pays a commission into the personal foreign bank account of the director or shareholder of that South African company of, say, R5 000.

68. It does not appear that the SVDP or indeed the normal VDP caters for these situations which clearly require both the company and the natural person individual to apply for SVDP relief thereby regularising the defaults committed both by the company and the individual who owns the assets.

69. Submission: The SVDP should be expanded to cater for the regularisation of such unauthorized assets held by the private individuals but stemming from what amounts to an over deduction on the part of the company insofar as its imports are concerned.