CALL FOR COMMENT: DRAFT TAX ADMINISTRATION BILL ("TAB")

We refer to the above-mentioned call for comment. Please find the SAICA National Tax Committee’s comments below.

We would like to state that we welcome the following provisions of the TAB:

- A single tax reference number;
- The clear indication as to the party who has the onus of proof;
- The reservation of more serious powers to "senior SARS officials";
- The publication of all tax cases;
- SARS assessments to be accompanied by reasons for raising them;
- Hyperlinks;
- The introduction of conflict of interest provisions in respect of SARS officials;
- The section 9(2) limitation of period in respect of which SARS can withdraw a ruling issued.

The principles of Tax Administration

The following comment found on a statement of the principles of tax administration of the State of California Franchise Tax Board, is in our view relevant:

"Administration should be both reasonable and vigorous. It should be conducted with as little delay as possible and with great courtesy and considerateness. It should never try to overreach, and should be reasonable within the bounds of the law and sound administration. It should, however, be vigorous in requiring compliance with law and it should be relentless in its attack on unreal tax devices and fraud"
GENERAL COMMENTS

a) The use of the word “must”

Throughout the TAB the word “must” is often used where “shall” would be more appropriate. This is a deviation from the wording throughout the tax acts. We suggest that this change be effected to align the wording of the TAB to that of the other tax acts.

b) Recommended inclusions or changes

The TAB makes reference to the term “practice generally prevailing” without giving any definition thereof. Although it has been the understanding that the term envisages a SARS practice generally prevailing which practice has been communicated to taxpayers in some form or another, we have experienced cases where SARS has interpreted the term as meaning a practice generally prevailing amongst taxpayers in a specific industry;

Since the TAB intends to take account of the constitutional rights of taxpayers, it is important that SARS is not, as is the case currently, given carte-blanche with respect to the proper administration of the taxpayer’s tax accounts with SARS. In particular we regularly experience difficulties where SARS, autonomously, processes journal entries without any audit trail, or description as to the reason for the journal, resulting in unfounded penalties and interest being imposed or in insufficient interest being paid on late refunds or on tax correctly paid being set off against other tax which was supposedly not paid. Further, we have experienced that SARS is unable to provide taxpayers with a detailed statement of account, reflecting sufficient information for the taxpayer to confirm the accuracy of the accounts (also refer comments in respect of section 157).

c) Value-Added Tax

Neither the Value-Added Tax Act No. 89 of 1991 (“VAT Act”) nor the TAB provides any protection to taxpayers in circumstances where:

- A vendor refuses to issue a tax invoice to a purchaser. This has the result that although the recipient may have paid the vendor in full for the supplies in question, the recipient is not able to claim the VAT paid as input tax. Our experience has also been that SARS is not prepared to exercise its discretion and permit the recipient to claim input tax;
- A vendor (supplier) refuses to refund, on request by the recipient, any amount of VAT excessively charged (e.g. the vendor erroneously charged standard rate, as opposed to zero rate VAT). Section 44(2) of the VAT Act only makes provision for refunds of excess VAT paid to be made to the vendor who charged same.
Thus, should the vendor not be prepared to claim the VAT excessively charged and paid from SARS, the recipient has no statutory recourse on SARS or the supplier;

- Vendor suppliers (e.g. municipalities, Eskom etc) do not, despite numerous written requests, affect changes of trading names; VAT registration numbers, addresses etc. of their clients (vendors). This has the result that the recipient is unable to claim the VAT paid as input tax, on the basis that the tax invoices received from the supplier do not reflect the correct details of the recipient. Again, the VAT Act does not offer any statutory recourse to the recipient.

**SPECIFIC COMMENTS**

1. **CHAPTER 1 - DEFINITIONS**

1.1 “day” - refers to calendar days, rather than business days. We suggest that the definition of “day” should mirror the definition of “day” currently contained in section 83(23) of the Income Tax Act No. 58 of 1962 (“Income Tax Act”), which reads as follows:

“Any reference in this Part and the rules to “day” means any day other than a Saturday, Sunday or public holiday: Provided that the days between 16 December of a year and 15 January of the following year, both inclusive, shall not be taken into account in determining days or the period allowed for complying with any provision in this Part or the rules.”

Throughout the TAB reference is made to a period of 30 days. If these are calendar days, as opposed to business days, the time periods set out in the TAB are significantly reduced. We recommend that, if the reference to calendar days is retained, the time periods set in the TAB be extended to take Saturdays, Sundays and public holidays into account.

Furthermore, we suggest that the reference to days should continue to take into account the period of “dies non”, as indicated in the definition of “day” above.

1.2 “SARS official” – includes a person employed or engaged by SARS. Does this extend to certain entities that SARS contracts with?

1.3 “tax” – means a tax. A definition should not be defined as that of the definition. We suggest that this be reworded.

1.4 “tax act” – for the sake of clarity it is requested that the acts administrated by SARS be listed.
1.5 “taxpayer information” - references to section 59(1)(a) appear to be wrong and it is suggested that it should be section 59(1)(b).

2. CHAPTER 2 – GENERAL ADMINISTRATION PROVISIONS

PART A

2.1 Section 3(2)(a) – the powers here are considered too far reaching. The section grants SARS the ability to raise a request for almost anything (i.e. a fishing expedition), especially with relation to future tax periods. Specific guidance should be provided in this area.

PART B

2.2 Section 6(5) - the section refers to the “senior SARS official”, however the delegation of these powers appears to be too wide. The definition of a senior SARS official in section 6(4) of the TAB should not include subsection (c), i.e. “by any person occupying a post designated by the Commissioner for this purpose” and should be restricted to the Commissioner or a SARS official who has the specific authority from the Commissioner to exercise the power (as contained in subsections (a) and (b) of section 6(4) of the TAB).

2.3 Section 7 – the section makes reference to “policies adopted by the Commissioner”. In order to place the taxpayer in a position to be aware of the Commissioner’s policies, we are of the view that such policies should be published and made available on SARS’s website and that section 7 should make reference to such publication.

2.4 Sections 9(1)(b) & 9(2) - it is not clear whether the reference to “decision, notice or communication” includes rulings as dealt with in Chapter 7 (Advance Rulings). It is also uncertain whether, with reference to subsection (2) of section 9, a “decision, notice or communication” can only be changed going forward with a new decision or whether it lapses at the end of the three year period. If this is the case, section 9(1)(b) authorises SARS to withdraw notices retrospectively.

PART C

2.5 Section 10(1)(3) – the ratification of an act done on behalf of the Commissioner should only be permitted to a certain point.

3. CHAPTER 3 - REGISTRATION

3.1 Section 14 – period within which SARS will register a taxpayer should be clearly indicated. Are SARS systems ready for a single taxpayer tax number?
3.2 **Section 14(2)** – spelling error “subsection”.

3.3 **Section 14(3)(a) and 15(1)** – in terms of the current section 67 of the Income Tax Act, a person has 60 days to register as a taxpayer from becoming a taxpayer and 60 days to notify SARS of any change in details. The new 21 day requirement especially in relation to Income Tax could place undue pressure on taxpayers, who might want to work through an advisor that still needs to be appointed. Also as Income Tax is assessed on an annual basis there appears to be no reason for the strict 21 day requirement.

3.4 **Section 14(4)** – practical implications i.e. foreign VAT registrations with no representative in SA. Will the other existing requirements then be reduced? How would SARS prescribe biometrical information for handicapped persons?

3.5 **Section 16** - this section allows for a single taxpayer reference number to be allocated to each person registered in terms of Chapter 3 of the TAB. However, it does not cater for the possibility of multiple VAT vendors in a single entity. There is a need to clarify how multiple VAT registrations in a single legal entity will be dealt with. VAT registration numbers are very important for the validity of tax invoices, etc.

We also require notification whether the number of digits in the reference numbers will change as this will necessitate system developments for taxpayers, resulting in increased costs.

4. **CHAPTER 4 – RETURNS AND RECORDS**

PART A

4.1 **Section 17** - This section states that the “taxpayer” or his legal representative must sign returns (including VAT, STT, etc). This definition is narrow compared to the existing section 28(5)(a) of the VAT Act, which allows ‘the vendor’s authorised representative’ to sign the returns.

4.2 **Section 17(1)** – appears to be silent on electronic returns and electronic information (including electronic signatures) as previously dealt with in section 66 the Income Tax Act.

4.3 **Section 17(1)** - appears to be silent in situations where the due date falls on Saturday, Sunday or public holiday and the related consequences.

4.4 **Section 17(4)** – based on the assumption that the Tax Practitioners Bill will be enacted in due course, and based on the assumption that SARS and taxpayers would be desirous to ensure that only registered tax practitioners assist taxpayers for reward in
completing tax returns, it is recommended that the section be amended to provide that the practitioner’s tax practitioner number also be disclosed on the return.

4.5 **Section 17(6)** – this section also requires that where a taxpayer becomes aware of an error on an earlier return filed, he is required to file an amended return. Although this section will operate well with income tax, for example, where only one return is submitted per annum, it may create unnecessary administrative difficulties for both SARS and taxpayers with regard to PAYE and VAT. It is assumed that this section is introduced to legislate for proper disclosure by the taxpayer and to ensure that SARS can impose the relevant penalties as envisaged in the TAB.

Nevertheless, where a VAT vendor only realises after say four or five years that he has erroneously not disclosed say exempt or zero rated supplies on his VAT returns, the filing of revised returns are unnecessarily burdensome without any additional revenue being collected. Further, where a VAT vendor identifies an error made on historic returns, in terms of which output tax was effectively under declared or input tax claimed overstated, the requirement to file revised VAT returns for every tax period (assume monthly periods) could potentially amount to 60 revised returns to be prepared, submitted and processed by SARS.

In order to still require from the vendor to make the necessary disclosure, it is suggested that the taxpayer, with regard to at least VAT and PAYE, be given the option to either file revised returns, or to provide SARS with a schedule reflecting per tax period the nature of the error, the amounts etc. This objective may be obtained by introducing wording similar to that used in section 85(4) of the TAB (i.e. if a senior SARS official agrees with the person as to the amount of tax payable as a result of the error, SARS may issue an assessment which is not subject to objection and appeal).

The VAT return does not make provision for any subsequent changes in respect of zero-rated or exempt supplies for example, where a vendor cancels zero rated supplies formerly disclosed on his VAT returns with the result that a negative amount needs to be disclosed on the current VAT return, SARS generally do not accept such disclosures. We recommend that the SARS system be amended to be able to capture negative amounts in respect of zero rated and exempt supplies.

4.6 **Section 17(8)** - the meaning of the sentence “Any extension does not affect the deadline for paying tax” – does this only relate to provisional tax? Surely for assessed income tax you cannot be held liable for a penalty if you received extension from SARS?

4.7 **Section 20(1)(b)** –

   a) The statement of account referred to in section 20 could constitute an audit, but reference to books of account and documents does not align with the definition
of an audit in the Auditing Profession Act. From the wording it appears that SARS is seeking confirmation that the person who prepared the financial statements (the preparer) did and audit. If an audit opinion is sought, reference should be made to a registered auditor, not a preparer, and reliance should be placed of the International Standards of Auditing by such auditor, rather than redefining the extent of an “examination”.

b) This section requires from a person who submits financial statements or accounts prepared by another person in support of that person’s submitted return, to submit a statement which provides details of whether or not the entries in those books and documents disclose the true nature of the transactions, receipts, accruals, payments or debits in so far as may be ascertained by that examination. In this regard we caution that the accounting entries and disclosure are governed by accounting standards and are often not supportive of the “true nature” i.e. the legal nature of the transaction.

4.8 Section 21 – this section requires that a person keeps “records, books of account or documents that enable the person to observe the requirements of a tax act and enable SARS to be satisfied that the person has observed these requirements”. Even after considering the relevant definitions of the words “document” and “information” it is by no means clear what types of information is required so as to enable SARS to be satisfied that the taxpayer observed the requirements of a tax act. In particular this section may be interpreted as suggesting that taxpayers are for example, required to conduct tax compliance reviews and to keep the findings reports on record for SARS inspection. Equally, it may be interpreted as requiring that taxpayers must obtain tax opinions on any aspects in respect of which the taxpayer is unclear as to the correct tax treatment or disclosure to be followed. Clearly these interpretations could not have been intended. It is thus recommended that this section be clarified so as to remove the current extent of ambiguity.

4.9 Section 21(1) – the 5 year period is not in alignment with the ‘new’ Companies Act?

4.10 Section 22(1) – It is not clear whether records can be retained only in electronic form with the approval of the Commissioner? In line with current environmental concerns it is suggested that the retention of documents in electronic form must be an allowed alternative.

4.11 Section 25(1) – what is considered as a “reasonable” period for the purpose of the translation?

PART B

4.12 Section 26 – “arrangement” it is still not clear what an arrangement is.
4.13 **Section 27(1)(c)** – the term “expense” is not defined. The term “Generally Accepted Accounting Practice” is no longer referred to in accounting terminology. Financial reporting standards or Statements of Generally Accepted Accounting Practice is a more appropriate term.

4.14 **Section 29** – problem with the disclosure obligation. SAICA previously sent a submission to SARS regarding the potential wide interpretation of the definition of ‘promoter’ and the practical implications. We enclose a copy of the previous submission which is still applicable.

**PART C**

4.15 **Section 32** – clarity is sought as to the types of taxpayers who will be required to notify SARS of their intention to leave the Republic. This reporting requirement potentially could lead to significant practical problems. It is recommended that the types of taxpayers to whom this will apply be limited. It is quite common practice for South African residents to work abroad for one or two years on contract. If there is no advance notice will it affect the section 10(1)(o)(ii) exemption of the taxpayer?

5. **CHAPTER 5 – INFORMATION GATHERING**

   **General**
   Throughout this chapter, reference is made to a “*person*” or “*another person*”. These terms are not defined for purposes of this part or for purposes of the TAB in section 1.

**PART A**

5.1 **Section 33** – this section seems to have a very wide application and could be construed to be a “fishing expedition” or “witch-hunt” clause. Section 33(1) states that the taxpayer can be “*identified by name or otherwise objectively identifiable*”. A legal process which is based on an otherwise objective method to determine the identification of a subject is not acceptable and may cause considerable harm to the party concerned, especially if there is a case of “mistaken identity”.

5.2 **Section 33(1)** - further provides that “*another person*” may be required to submit relevant material. How is that determined and what remedies are in place for the affected taxpayer in the event that the person referred to provides incorrect relevant information to SARS, other than common law remedies?

   The situation if such “*another person*” is not in a position to provide the relevant material also needs to be clarified.
5.3 **Section 33(3)** - provides that a senior SARS official may request “information” for purposes of revenue analysis or estimation. From whom may the “information” be obtained?

5.4 **Section 33(4)** - states that the relevant material has to be submitted “at the place and within the time specified in the notice”. We have the following concerns with this provision:

- How and where will “the place” be determined?
- The term “within the time specified” is not defined. There should be a minimum time limit specified. Also note that the current 7 – 14 days given in respect of certain requests are generally NOT reasonable.
- What is meant by the phrase “notice”?

5.5 **Section 33(5)** - provides that the “relevant material required by SARS under this section must be referred to in the request with reasonable certainty”. We seek clarification as to whether there is a difference between a “request” and a “notice”? What is meant by the term “with reasonable certainty”? What remedies are available to a person if the request is too broad?

5.6 **Section 34** – the power given to SARS in this section is considered too wide. Section 34(1) provides that a person, whether or not chargeable to tax, may receive a notice to attend in person at the time and place designated in the notice for the purpose of being interviewed concerning the tax affairs of the person or another person. These powers should be limited to situations where reasonable grounds to conduct such interview exist. Further, as is the situation in section 33, reference is made to the “notice”, which is undefined. Also, the reference to “another person” is unclear in the event of that person not having the required information; or the “person” suffers damages – reputational or otherwise – where that person provides incorrect information to SARS.

5.7 **Section 34(3)** - provides that the “relevant material required by SARS under subsection (2) section must be referred to in the request with reasonable certainty”. We seek clarification as to whether there is a difference between a “request” and a “notice”? What is meant by the term “with reasonable certainty”? What remedies are available to a person if the request is too broad?

5.8 **Section 34(4)** - provides that “a person” who must attend and give “information” may be assisted by “any representative” during the interview. Does this extend to “another person” being interviewed in respect of “a person’s” tax affairs?

Further, does the same apply in the case where a “person”, or possibly “another person”, needs to submit “relevant material”? What is meant by the term “any representative”?  

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Other practical considerations include:

- Proximity of the SARS office to the residence or place of work of the “person” or “another person”;
- Costs associated with complying with this provision, such as costs to travel to SARS office, etc.

PART B

5.9 **Section 35** – A SARS official with written authorisation may audit and investigate any relevant material and must produce the authorisation as required. It is easy to produce an official looking document which purports to give authorisation to a “SARS official”. How will taxpayers be able to verify the authenticity of an authorisation document?

5.10 **Section 37(1)** - provides that “reasonable prior notice” must be given to a person to make available any relevant material at the person’s premises. What constitute “reasonable prior notice”?

5.11 **Section 37(2)(b)** - of the TAB, dealing with field audits, reads “... except where this may prejudice the outcome of the audit”. A taxpayer has a right to know what the “initial basis and scope” of a field audit is, and limiting this right in the manner suggested by subsection (2)(b) is unacceptable as it may lead to an abuse of power by SARS officials intent on a “fishing expedition” without due cause for a field audit initially.

5.12 **Section 38(1)** - requires that “appropriate facilities, to the extent that such facilities are available” will be made available. What comprises “appropriate facilities” and what is the procedure if appropriate facilities are not available? Further, what is considered “reasonable assistance” as regards the submission of “relevant material as required” (section 38(1)(c))?

Will the taxpayer be advised of the right to recover the photocopying charges as provided for in section 38(3)?

5.13 **Section 39(2)** - provides for certain actions to be taken by SARS “upon conclusion of the audit”. What procedures will be in place to ensure that the fact that the audit has been concluded is communicated to the person concerned? Certain time restrictions are placed on SARS to communicate with the person “upon conclusion of the audit”.

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What remedies are available to a person if those time limits are not adhered to by SARS?

5.14 **Section 39(2)(b)** - makes provision for “further period that may be required based on the complexities of the audit”. How is this period determined and what are the criteria to classify audit “complexities”.

5.15 **Section 39(3)** - also makes provisions for extension of periods based on the “complexities of the audit”. As per the comments above, what will the criteria be to determine the “complexities of the audit”? It is our view that the provisions of section 39(5) limits a person’s right to administrative justice and gives SARS the right to unilaterally ignore due process and fast-track the result of an audit. This is dangerous and enables overzealous SARS officials to ignore due process. A suitable remedy to enable a person to claim compensation from SARS should be given in circumstances where the application of this section is found to be unreasonable. We further fail to see how the application of the provisions of sections 39(1) and 39(2) can impede or prejudice the purpose, progress or outcome of an audit.

5.16 **Section 40(1)** - provides that “the investigation of the offence must be referred to a SARS official responsible for criminal investigations”. This provision seems to be “out-of-line” with the other provisions which require the involvement of a “senior SARS official”. The provision should be amended to require that the matter be referred to a “senior SARS official responsible for criminal investigations”.

5.17 **Section 40(2)** - provides that “(A)ny relevant material gathered during an audit after the referral, must be kept separate from the criminal investigation and must not be used in any criminal proceedings instituted in respect of the offence”. How does SARS propose that this process be monitored?

5.18 **Section 40(3)** - provides that “the information and files relating to the case must be returned to the SARS official responsible for the audit”. Is our understanding correct that no “relevant material” gathered during an audit prior to the referral will be submitted to the “SARS official responsible for criminal investigations” and that only “information” will be submitted?
5.19 **Section 41** - forms part of Part B and deals specifically with the gathering of “relevant material” and not the gathering of “information”. Section 41(1) states that “..., SARS must then apply the information gathering powers in terms of this Part with due recognition of the taxpayer’s constitutional rights as a suspect in a criminal investigation”. Also, no reference is made to “taxpayer” in this Part, but rather a “person”. We are of the opinion that section 41(1) must be amended to read that “..., SARS must then apply the relevant material gathering powers in terms of this Part with due recognition of the person’s constitutional rights as a suspect in a criminal investigation”.

5.20 **Section 41(2)** - provides, amongst others, that “… any information obtained during the audit thereafter wherein the taxpayer does incriminates himself or herself”. As noted above, no reference is made to “taxpayer” in this Part, but rather a “person”. The grammar is also not correct and should be amended as follows: “… any information obtained during the audit thereafter wherein the person incriminates himself or herself”.

5.21 **Section 41(3)** - provides that “Evidence obtained during a criminal investigation may be used for purposes of audit as well as in subsequent criminal proceedings”. We are of the opinion that this is too broad and should be restricted to “subsequent related criminal proceedings”.

**PART C**

**General**
It is not clear what the legal status of the “inquiry” is, i.e. is it akin to a court of law, and if so, which level of the judiciary?

5.22 **Section 42** – section 42(4)(b) refers to “relevant information”, an undefined term, whereas the term defined, and used in the other sections are “relevant material”. Section 42(4)(c) also refers to “relevant information” whereas the term defined and used in the other sections are “relevant material”.

5.23 **Section 43** – section 43(1) provides that the “presiding officer determines the conduct of the inquiry as the officer thinks fit”. As the term “presiding officer” is defined, should the provision not read that “presiding officer determines the conduct of the inquiry as that presiding officer thinks fit”. It is also unclear what is meant by the “conduct of the inquiry”? It would appear that the correct term to be used is the “scope of the inquiry”.

5.24 **Section 43(3)** - provides that a “decision by a presiding officer in respect of the inquiry is not reviewable except an order that imposes a fine or commits a person to jail”. We are of the opinion that this provision in unconstitutional as it limits a person’s right to have any dispute that can be resolved by the application of law
decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

5.25 **Section 44** – the practical considerations as regards section 44(1) include:

- Proximity of the SARS office to the residence or place of work of the “person” or “another person”;
- Costs associated with complying with this provision, such as costs to travel to SARS office, etc.

5.26 **Section 45** – it is not clear whether or not the “legal representative” only needs to be a lawyer or whether or not the “legal representative” needs to be an advocate.

5.27 **Section 46** – see comment made under “General” above.

5.28 **Section 47** – see comment made under “General” above.

5.29 **Section 48** – the provisions of the Bill of Rights must be adhered to with specific reference to the provisions that “(E)vidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice”.

5.30 **Section 49** – section 49(1) provides that a “person may not refuse to answer a question during an inquiry on the grounds that it may incriminate the person”. This is in direct contravention of the Bill or Rights which provides in section 35(3) that “(E)very accused person has a right to a fair trial, which includes the right”, amongst others, “to be presumed innocent, to remain silent, and not to testify during the proceedings” and “not to be compelled to give self-incriminating evidence”.

**PART D**

5.31 **Section 51** – section 51(1) provide that an application for a warrant to enter “a premises” if relevant information is kept may be authorized. Would these “premises” include the premises of auditors of the person?

5.32 **Section 52** – the provisions of this section seems very wide as it suggests that a warrant may be applied for without any effort made on the part of SARS to obtain the relevant material or information by way of “non-confrontational” means. Surely this type of action should be limited to extreme situations or where all other avenues to obtain the relevant material or information have been exhausted.

5.33 **Section 52(2)** - provides that “(A) warrant issued ... must as far as reasonable contain
the following information.” The term “information” in this instance clearly refers to the general meaning and not the term as defined in section 1. Consideration should be given to substitute the term with a synonym of “information”.

5.34 **Section 53** – reference is made to “the official” in subsections (2), (3), (4), (5), (7) and (8). It would appear that the official referred to is indeed a “SARS official” as defined. The references to “official” should be replaced with “SARS official”.

5.35 **Section 53(3)** - gives far-reaching powers to the “official” as regards the seizure of relevant material as well as any computer which may contain relevant material which may be retained “for as long as is necessary to copy the information required”. No provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS liable for negligent, gross negligent or malignant behaviour.

In addition, no provision is made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS.

The provisions of section 53(3)(d) deals with both “information” and “relevant material”.

We suggest that a requirement be included in section 53(3) of the TAB to the effect that SARS provide the taxpayer with an inventory of the relevant materials which are seized, so as to avoid confusion and legal disputes as to the exact nature, type, condition and value of any seized materials. This inventory should be signed by both the SARS official and the taxpayer concerned.

5.36 **Section 54** – all the other provisions of this Chapter make provision that the search of any premises has to be executed by a “SARS official” where as this section provides that “SARS may search the premises”. This provision needs to be amended to be provide that a “SARS official may search the premises”.

Further, as noted above, no provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS liable for negligent, gross negligent or malignant behaviour. In addition, no provision is made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS.
Section 55 – all the other provisions of this Chapter make provision that the search of any premises has to be executed by a “SARS official” where as this section provides that “SARS may search the premises”. This provision needs to be amended to be provide that a “SARS official may search the premises”.

Further, as noted above, no provision is made to protect a person against an abusive SARS official nor are there any provisions which would hold SARS officials/SARS liable for negligent, gross negligent or malignant behaviour. In addition, no provision is made for compensation should it be found that the seizure of relevant material was unwarranted and caused financial and other losses for the person affected by the unwarranted actions of SARS. Further, it is not clear why this section is required as warrants can be issued within hours provided proper grounds for the warrant exists.

Section 56 – The professional privilege should be extended to include that of auditors, i.e. it should not be restricted to the legal professional only. This has resulted in numerous articles published which suggest that tax opinions and other tax related professional services enjoy legal privilege if supplied by Tax professionals who are practicing attorneys. These publications resulted in numerous clients being reluctant to consult with any tax professional in the accounting profession. It is considered obscure in this day and age to suggest that taxpayers will inevitably be protected by certain privileges if they use practicing attorneys as tax advisers, as opposed to tax advisers resorting under a different profession. The reality is that both professions have been providing tax advisory and support services in competition with one another for decades, with the only difference that tax professionals of the accounting profession do not get involved in tax litigation matters. Consequently, the said obscure suggestion has the effect of creating unfair competition. Given the fact that the concept of legal privilege is governed by settled legal principles, it is suggested that this section be amended to provide more specific criteria, based on the settled principles, of the circumstances and requirements of legal professional privilege.

In addition, how will the services of “an attorney independent from both parties” be obtained? Who will pay for the services?

Section 56(2) - refers to “taxpayer” whereas the term used through out the Chapter is “person”. The section should be amended accordingly. The provisions of this section should also apply to section 55 – Search without warrant scenarios.
5.40 **Section 57** – this section should not be limited to “information” only but should apply to “relevant material” as defined.

5.41 **Section 58** – what is the purpose of section 58(4)?

6. **CHAPTER 6 – CONFIDENTIALITY OF INFORMATION**

6.1 **Section 59(1)** - the definition of “SARS information” specifically excludes “taxpayer information”, whereas the definition of “taxpayer information” includes information provided by a taxpayer or obtained by SARS. The intended extent of these definitions is unclear. SARS information is everything prepared by or disclosed to SARS, but does not include any information provided by a taxpayer or disclosed to SARS. Thus any information disclosed to SARS in respect of a taxpayer (albeit by the taxpayer or by a 3rd party) would be excluded from SARS information despite the fact that it was “obtained by SARS”. This leads to “SARS information” having a narrow extent and “taxpayer information” having a very wide extent.

Given our comments with regard to section 60 below, these definitions should be tightened and clarified. In this regard, we recommend that the reference in the definition of taxpayer information to “information obtained by SARS” be removed.

6.2 **Section 59(4)** - the wide power of the Commissioner to disclose information in terms of section 59(4) of the TAB should be limited to such information which is required to rebut false allegations or information disclosed which is published in the media or in any other public manner. To this end, we recommend that the wording of section 59(4) of the TAB be amended to read as follows:

“(4) The Commissioner may, for purposes of protecting the integrity and reputation of SARS as an organisation, disclose information to counter or rebut false allegations or information disclosed by a taxpayer, the taxpayer’s representative or other person acting on behalf of the taxpayer which is published in the media or in any other public manner only to the extent necessary to counter or rebut such allegations.”

6.3 **Sections 60 and 61** - Section 60 of the TAB offers very wide protection to SARS in respect of “SARS information”. We believe that similar protection should be extended to taxpayers and taxpayer information.

6.4 **Section 61** - the disclosure of taxpayer information under the circumstances described in section 61(1) and (2) of the TAB seems reasonable and is well founded in terms of the law of evidence and procedural law. The section should, however, contain a prohibition in respect of the disclosure of information by one SARS official to another SARS official where such disclosure is in contravention of a confidentiality agreement which the SARS official may be subject to in respect of proprietary information belonging to a former employer of such official.
Section 61 of the TAB is designed to replace the secrecy provisions in section 4 of the Income Tax Act. Sections 4(2B)(3) and (4) of the Income Tax Act prescribe certain penalties in respect of the non-compliance with such secrecy provisions. Although the TAB contains penalty provisions in Chapter 15 relating to the Income Tax Act as a whole, we recommend that the penalty provisions currently contained in section 4(2B)(3) and (4) of the Income Tax Act relating to non-compliance with such secrecy provisions be included as a subsection in section 61 of the TAB. In the absence of such penalty provisions, the intended protections in section 61 will be wholly ineffective.

Furthermore, in terms of section 61(4) of the TAB, a person who is not a SARS official and who obtains information relating to the tax affairs of a taxpayer or class of taxpayer must not disclose the information to another person unless the disclosure is necessary to perform the functions of the person who obtained the information. The ability to transfer information to “another person” for the purposes of performing his functions is too wide and should be limited to a specific office for a specific function.

6.5 **Section 64** - deals with self-incrimination and effectively allows for admissions of guilt by taxpayers to be used against them when a competent court directs that this may be done. Whilst we appreciate the initial protection afforded to a taxpayer, a court would in all probability direct that such a statement is admissible. This would in our view frustrate certain of the initiatives often embarked upon by SARS, such as the previous amnesty for the admission of income not disclosed to SARS and the non-submission of returns.

7. **CHAPTER 7 – ADVANCE RULINGS**

7.1 **Section 67** - section 80 of the TAB refers to a “non-binding private opinion”, which is not defined in section 67. Section 76B of the Income Tax Act contains a definition for “non-binding private opinion”, which definition should be reproduced in section 67 of the TAB.

7.2 **Section 70(5)** - of the TAB provides that a private or class ruling has to be signed by a senior SARS official. A taxpayer may not be in a position to verify that such “senior SARS official” status has been met, therefore there should be a statement in the ruling confirming that the SARS official who signed the ruling is a “senior SARS official” with the required authority. While the validity of a ruling hangs in the balance, a taxpayer is not always aware whether such powers have been delegated or not. We recommend that an additional criterion be included in section 70(5) of the TAB, to read as follows:
“(5) A ‘private ruling’ or ‘class ruling’ may be issued in the manner and in the form that the Commissioner may prescribe, as long as it is signed by a senior SARS official and contains the following:

... (i) a statement confirming that the signatory of the ‘private ruling’ or ‘class ruling’ is in fact a senior SARS official.”

7.3 **Section 70(6)** - we agree with the contents of section 70(6) of the TAB, however we are concerned that it may lead to civil litigation between class members or a member and the body representing the class of which a taxpayer is a member.

7.4 **Section 71** - section 71(4)(d) of the TAB requires that an application must contain a complete description of the tax effect of a proposed transaction on the applicant, class members or any connected persons in relation thereto if relevant. Furthermore, section 71(4)(e) requires an applicant to provide a complete description of any transaction entered into prior to or after the application which may have a bearing on the tax consequences of the proposed transaction. These requirements are extremely wide and onerous and require the taxpayer to envisage all possible scenarios in which their normal operations and transactions could potentially impact on the transaction proposed in the ruling application. We recommend the far reaching consequences of these requirements be limited.

7.5 **Section 72** - section 72(1)(a)(vi) of the TAB makes reference to the instance where SARS may reject an application for an advance ruling where the application requests or requires the rendering of an opinion, conclusion or determination regarding a matter which can be resolved by SARS issuing a directive. The term “directive” has not been defined. We recommend that this term be defined and that the parameters within which a directive is appropriate and those, within which it is not, be clearly disclosed, as well as the circumstances where one would apply for a directive rather than a ruling.

7.6 **Section 74(5)** - effectively nullifies the doctrine of legitimate expectation where SARS has issued publications (including Practice Notes and Interpretation Notes), as same are specifically deemed not to have binding effect unless contained in an “advance ruling”.

7.7 **Section 75** - the section only addresses the applicability of “class rulings” and “private rulings”. The applicability of “general rulings” should also be addressed.

7.8 **Sections 77(1)(b) and 78(7)(b)** - these sections determine when a ruling ceases to be effective. It is often a matter of subjective opinion whether facts in a court case align to the facts of a taxpayer’s own circumstances or whether a circumstance which a Judge pronounced a view on was an ‘obiter dicta’ or not. In the absence of SARS
reviewing all rulings which have previously been granted in light of new case law and stipulating which rulings cease to be effective as result of such new case law, taxpayers do not have certainty in relation to their rulings. Whilst this may be to a taxpayer’s advantage if he/she has a different interpretation to SARS, and it would appear that the taxpayer may apply the contra fiscum doctrine, this does corrode the certainty which taxpayers seek when obtaining a ruling.

7.9 **Section 77(2)** - the possibility of an advance ruling ceasing to be effective in circumstances where the Commissioner does not publish a notice of withdrawal, will lead to unnecessary uncertainty. The onus of determining whether a ruling remains effective appears to be placed solely on the taxpayer, which is contrary to the collaborative nature in which a ruling is obtained in the first place, i.e. both the taxpayer and SARS agree to the terms of the ruling, however SARS is not a party to determining the effectiveness of the ruling thereafter.

7.10 **Section 78(2)** – the section merely requires that a notice of withdrawal or modification “be published in the manner the Commissioner deems appropriate”. At the very least, it should be required that such notice be sent to the applicant by registered mail.

7.11 **Section 78(5)** - section 78(5) states that the date of withdrawal or modification of the ruling must not be earlier than the date the ruling is delivered to the applicant. It would appear that the reference should rather be to the date of the notice of withdrawal, otherwise retrospectivity of withdrawals is allowed, which may result in uncertainty. We recommend that the wording be amended to read as follows:

“(5) SARS may specify the effective date of the decision to withdraw or modify the ruling which date must not be earlier than the date the notice of withdrawal or modification is delivered...”

7.12 **Section 78(7) & (8)** - these subsections duplicate the provisions of section 77 of the TAB. Our comments above with regard to section 77(2) apply equally in this regard. We suggest that subsections (7) and (8) of section 78 be deleted.

7.13 **Section 80** - the term “non-binding private opinion” requires a definition (see comments with regard to section 67 of the TAB).

7.14 **Section 80(4)** - it does not seem to be the intention of the TAB to provide a blanket ratification of existing rulings and past experience shows that SARS simply does not have the capacity to review all existing rulings / statements to confirm the portions that will be binding after the TAB is promulgated. This effectively means that one has to go through the entire re-application process again. But, unlike 2007 (when all previous VAT rulings were unilaterally withdrawn with effect from 1/1/2007), there is no mechanism in place this time for such rulings to remain valid until SARS has an opportunity to review them. Besides, re-applications are inevitably risky and resource
intensive. It is simply not fair that a ruling issued since the implementation of the ATR Unit becomes meaningless when the TAB is promulgated.

7.15 **Section 81** - subsection (4) is in conflict with section 74(5) of the TAB. In this regard, the TAB does not contain any provisions to the effect that Interpretation Notes or Practice Notes constitute “general rulings”. (It merely states in section 81(4) that a general ruling may be issued as an interpretation note). The TAB should specifically provide that Interpretation Notes and Practice Notes will constitute “general rulings”, and thus “advance rulings”. Otherwise section 74(5) would have the effect that Interpretation Notes and Practice Notes which do not specifically state that they are general rulings made under section 81, would not have binding effect.

8. **CHAPTER 8 - ASSESSMENTS**

8.1 **Section 87** – this section provides for SARS to issue reduced assessments in the following three circumstances namely:

• successful objection; appeal; settlement etc.;
• a processing error by SARS;
• an error by a taxpayer in a return.

Section 31A of the VAT Act contains two other scenarios where SARS can issue reduced assessments without any objection or appeal having been lodged. Section 31A(1)(b)(i) and (ii) provide that where it is proved to the satisfaction of the Commissioner that in issuing that assessment any amount which:

• was taken into account by the Commissioner in determining the liability for tax, should not have been taken into account; or
• should have been taken into account in determining the liability for tax, was not taken into account by the Commissioner.

It is thus suggested that section 87 be amended to also include the circumstances envisaged in section 31A of the VAT Act. Further, it is recommended that some sort of procedure be prescribed on the manner in which the taxpayer has to approach SARS with the view of relying on the section. In this regard our experience has been that although the legislation specifically states that the section can find application without any objection or appeal, SARS insists on the taxpayer completing an ADR1 Form and often try to rely on the timeframes prescribed in the Rules.

8.2 **Section 88** - we suggest that a definition of “jeopardy assessment” be included in this section. We further suggest that well defined parameters of the instances where SARS may issue a jeopardy assessment be included, as it may lead to abuse.
8.3 **Section 92** – this section describes the circumstances under which an assessment is to be considered final. These include the scenario where an assessment was issued and no objection has been made or the scenario where a decision in respect of an objection has been made but no appeal has been filed. However, this section does not seem to appropriately consider the provisions of sections 96(4) and 99(2) of the TAB, which grant discretion to a senior SARS official to extend the period in which objections and appeals must be made. We thus recommend that the said circumstances referred to in section 92 be subjected to section 96(4), in the case of objections, and section 99(2), in the case of an appeal.

9. **CHAPTER 9 DISPUTE RESOLUTION**

**PART A**

9.1 **Section 94(1)** – this section provides that the burden of proof as to whether an amount, transaction, event or item is not taxable or an amount or item is deductible or a lower rate of tax than the maximum applies or an amount qualifies as a reduction against tax payable is upon the taxpayer. Despite this specific legislative provision dealing with burden of proof, these principles have generally been applied in practice. However, difficulties are being experienced by taxpayers where SARS performs predictive or reasonability tests (e.g. turnover reconciliations) to test the reasonability of a taxpayer’s income declared for income tax purposes and the reasonability of supplies declared for VAT purposes. SARS normally does not endeavour to take any valid reconciling items (i.e. specific deemed supplies for VAT; deemed timing rules for VAT and income tax; the ledger accounts used to account for VAT on things like discounts, returns, etc.) into account, nor does it recognise the timing differences resulting from the accounting treatment required by accounting statements. This most often results in the tests being totally unscientific and inaccurate. Nevertheless, our experience is that SARS would generally invite the taxpayer to explain the differences noted within a short space of time, and to then raise assessments if any differences are still remaining (i.e. an income tax assessment if the supplies per the VAT return are greater than those in the income statement or a VAT assessment, if the turnover per the income statement is greater than the supplies declared per the VAT returns). To date SARS has relied on the fact that the burden of proof is on the taxpayer and contends that the taxpayer should have sufficient records to ensure that it can perform the reconciliation without any remaining differences, failing which tax or VAT must have been under paid.

Since the wording of section 94(1) broadly refers to “an amount” without any reference to what the amount relates, we are concerned that this section will give a legal basis for SARS to assess taxpayers in circumstances described above. We thus recommend that consideration be given to confine the application of the section to amounts in respect of specific transactions.
PART B

9.2 **Section 97** – this section provides that a taxpayer may not dispute an assessment in any court or other proceedings, except in proceedings under Chapter 8. Apart from the question whether this type of provision is constitutionally fair, it has the result that taxpayers are forced to follow the lengthy, and often very costly process of objection, appeal to ADR, appeal to tax court, further appeal to a higher court. In circumstances where an assessment is issued based on SARS’ interpretation of a contract; transaction or interpretation of a particular section in a statute, it is often much cheaper and quicker to have the matter settled through a declaratory order. In order not to confine SARS and the taxpayer to a lengthy process, it is recommended that, at the very least, a senior SARS official be given discretion to agree to a process other than that envisaged in Chapter 8.

PART F

9.3 **Section 136(1)** – this section clearly states that the “settlement” procedure is informal. However, it is still recommended that some form of process being prescribed for example, that a taxpayer has to formally inform/request SARS /senior SARS official that he is desirous to follow the settlement procedures envisaged in Part F of Chapter 8.

10. **CHAPTER 10- TAX LIABILITY AND PAYMENT**

**General comment**

This chapter has specific definitions that are applicable to it. Three of these definitions are at the beginning of the chapter and the rest are in separate sections. In line with other provisions in the TAB, the definitions should be in one section.

10.1 **Section 145** - this section defines a “representative taxpayer”. In terms of this section, a reference is simply made to other definitions in the Income Tax Act, VAT Act and Fourth Schedule to the Income Tax Act. As the TAB seeks to deal with tax administration matters, the definition of a Representative Taxpayer in the TAB should not just be merely referred to in various other Acts. The TAB should combine all these definitions into one definition in order to make it easy for people who are reading this Bill.

The section states that when a person becomes a Representative Taxpayer that person must notify SARS within 21 days in the form that the Commissioner may prescribe. The section does not outline how one notifies SARS when one ceases to be a Representative Taxpayer. In addition, the section fails to indicate what the penalty is in the event that a person fails to notify SARS when that person becomes a Representative Taxpayer.
10.2 **Section 147** - according to this section, a Representative Taxpayer is personally liable for tax payable if, while it remains unpaid, the Representative Taxpayer disposes of or parts with funds or moneys, which are in the Representative Taxpayer’s possession or come to the Representative Taxpayer after the tax is payable.

It is recommended that the section should also deal with how this liability is dealt with if, for example, a third party pays or acknowledges the liability. This would be the case with PAYE, where an employee would prepare and submit a tax return and acknowledge the amount received as gross income.

10.3 **Section 153** - this section deals with security that should be provided by the taxpayer to SARS. Given the broad definition of a taxpayer for the purposes of this chapter, the provisions of this section would negatively impact the cash flow position of a number of taxpayers and introduces an administrative burden.

For example, a senior SARS official may require security from a person who is a taxpayer if the person is under the management or control of a person who has repeatedly failed to pay amounts of tax due. This means that if a holding company who owns, for example 60% of subsidiary has defaulted, the subsidiary could be affected by the provisions of this section even if its tax affairs are in order (as it is under control of its holding company).

In addition, a senior SARS official may require any or all of the members, shareholders or trustees involved in the management of the person (who is not a natural person) to enter into a contract of suretyship in respect of the person’s liability for tax which may arise from time to time. This is against the principle of limited liability in respect of companies.

10.4 **Section 154** - this section empowers a senior SARS official to require the taxpayer to pay the full amount of a tax liability immediately upon receipt of a notice of assessment, if there are reasonable grounds to believe that the taxpayer will not pay the full amount. This could negatively affect the cash flow position of the taxpayer, in particular if the taxpayer is merely a representative taxpayer.

10.5 **Section 155** - the provisions of this section are onerous on the taxpayer. We do not believe this provision is necessary in the light of sections 154(3) and 169. This introduces uncertainly and this is against the fundamental principles of taxation.

Paragraph 6 of this section should be amended to allow for notices to be sent to taxpayer by e-mails and sms as well.

10.6 **Section 156** - this section does not appear to deal with objections based purely on errors made by assessors. Our experience is that when errors have been made by
assessors, the taxpayer is requested by SARS officials to complete the objection form. This can be complicated particularly in respect of taxpayers who do not have access to e-filing.

Therefore, we recommend that tax should only be payable after the objection option has been explored. In order to ensure that the objection is not used to delay payment, this section should stipulate clear time-frames in dealing with objections.

10.7 Section 157 - this section provides that SARS must maintain a taxpayer account, and it prescribes the level of detail required in terms of this account. It needs to provide that the statement of account must be made available to the taxpayer upon request, and that SARS will attend to any queries raised in respect of the account within a reasonable time frame.

10.8 Section 158 - it seems that subsections 2 and 3 of this section are covering one and the same concept. Paragraph 3 should be deleted.

Whilst a rolling balance system of tax would simplify the tax administration process, it would, in our view, lead to significant problems relating to the different forms of tax. For example, the payment of VAT could be used to settle oldest outstanding penalties and interest incurred in relation to income tax, which would then result in VAT not being paid within the prescribed period of time and hence penalties and interest being raised in respect of the VAT due. Accordingly, we suggest that the current distinctions be retained.

11. CHAPTER 11 - RECOVERY OF TAX

PART A

11.1 Section 161 – subsection 4 of this section is not properly worded. This should be reworded as follows:

“If a taxpayer fails to pay a tax debt when due and payable, the costs that are incurred by SARS in collecting the debt may be recovered by SARS from the taxpayer.”

11.2 Section 162 - according to this section the production of a document issued by SARS purporting to be a copy of or an extract from a notice of assessment is conclusive evidence of making an assessment. We are of the view that an assessment is an official document. Therefore we recommend that it should have minimum requirements such as date of assessment, the amount due, the date by which a taxpayer can object if (s)he does not agree with assessment etc.

PART B
11.3 **Section 164** - this section states that SARS is not required to grant the taxpayer prior notice if SARS is satisfied that granting notice would prejudice the collection. We recommend that the section states clear circumstances under which SARS should not give notice. This would provide tax advisors, taxpayers and assessors with clarity of when notice will or will not be given.

11.4 **Sec 164(1)** – this section provides that SARS may, under certain circumstances, take civil judgement against a taxpayer to recover any tax due to SARS. As is the case with SARS not always being successful in recovering tax due, taxpayers often have similar difficulties with SARS with respect to refunds due to a taxpayer. Consequently, it is suggested that similar powers be offered to taxpayers under similar circumstances.

**PART C**

11.5 **Section 169** - this section allows SARS to institute proceedings for the sequestration or liquidation of a taxpayer for a tax debt. In order to institute proceedings for the sequestration of a natural person, the applicant has to demonstrate that there is an advantage to creditors in instituting such proceedings. This section needs to make it clear that SARS may only institute proceedings in accordance with the relevant Act, e.g. the Insolvency Act, in order to ensure that SARS follows due process.

**PART D**

11.6 **Section 171** - this section requires the person who holds the assets of a taxpayer to transfer over the asset or pay the amounts to SARS in satisfaction of the taxpayer’s tax debt. This provision could destroy the relationship between the taxpayer and its suppliers. We believe that this provision is not necessary and should be deleted. The provisions of section 169 which empower SARS to institute proceedings for the sequestration or liquidation of a taxpayer for a tax debt should cover any tax debt exposure for SARS.

11.7 **Section 171** - section 171 of the TAB enables SARS to require a person which, *inter alia*, administers a pension fund, to surrender such monies in the pension fund, to SARS. These powers also appear to include attaching a taxpayer’s salary in the absence of a duly acquired garnishee order. We submit that this section is too wide and provides SARS with powers which may be obtained without due process, such as the issuance of an order from a High Court.

11.8 **Section 173(2)(b)** - There is a missing word before the phrase “a tax act” at the end of the sentence. It should perhaps read “in terms of a tax act”.

11.9 **Section 174** - the provisions of this section require a person (referred to as a transferee) who receives an asset from a taxpayer who is a connected person in
relation to the transferee without consideration or for consideration below the “fair market value” of the asset to be liable for the tax debt of the taxpayer. This section should exclude transfers made under the Corporate Rules.

12. **CHAPTER 12 - INTEREST**

12.1 **Section 179(2)** - Refer to comments on sections 153 and 156.

13. **CHAPTER 13- REFUNDS**

13.1 **Section 182** - The provisions of subsection 2 appear to be grossly unfair in the sense that SARS does not repay the amount overpaid. For example, if a taxpayer realizes that (s)he did not pay donations tax or did not withhold 12% in respect of royalties paid to a non-resident, these provisions could encourage non-disclosure by taxpayers as any overpayment may not be refunded by SARS.

14. **CHAPTER 14: WRITE OFF OR WAIVER OF TAX DEBTS**

**General comments**

This chapter essentially deals with rules currently embodied in Regulations—specifically Government Notice 316, published in the Govt Gazette 29788 on 13 April 2007. The existing section 91A contained in the Income Tax Act is simply the enabling legislation through which the Regulations are effected. The wording of the existing Regulations has been largely replicated verbatim into the draft TAB’s Chapter 14.

One overall change is that the delegation rules in paragraph 17 of the existing Regulations (“Exercise of power”) is not separately replicated into the new draft TAB provisions, but rather the current reference to “the Commissioner” (exclusively) is proposed to be extended to “or a senior SARS official delegated by him”.

**PART C**

14.1 **Section 189** - interestingly, the requirement in the existing Regulations paragraph 6(2) - for the Commissioner’s notification to be “in writing” is omitted from the new section 189(2) of the TAB. Where a tax debt is permanently written off, the SARS notification to the tax debtor must be in writing.

14.2 **Section 190** - With regards to the provision that the tax debt is not considered irrecoverable unless and until recovery action has been explored against certain other parties, the proposed section 190(2) of the TAB targets a broader group of other parties (as contemplated in Part D of the TAB’s Chapter 11, i.e. sections 171-175).
PART D

14.3 Section 192 - interestingly, whereas the existing rules set the main criterion for a compromise as being “to secure the highest net return” (from the tax debt), the new section 192 of the TAB adds an alternative criterion as being “or to avoid serious hardship”. Presumably the potential hardship being referred to is that of the tax debtor and is thus to be applauded.

14.4 Section 195 - certain factors which, under the current rules (paragraph 12 of the Regulations), are considered to render the compromise “not appropriate” are proposed to be omitted from the new section 195 of the TAB. In other words, the following factors will (it is proposed) no longer automatically disqualify the tax debtor from the compromise:

- If the tax debtor’s net asset value exceeds the proposed compromise payment;
- If the only basis for the compromise is the tax debtor’s claim of “hardship” —see also section 192 above;
- If the basis for the compromise is to (i) assist an over-indebted debtor; (ii) save a business; (iii) mitigate a harsh/unfair tax outcome; or (iv) charity or benevolence on SARS’s part; and
- If the tax debtor was recently (previous 5 years) either (i) involved in a tax compromise, or (ii) sequestrated/liquidated, or (iii) subject to a section 311 creditors compromise.

The existence of any of these factors does NOT automatically mean that the compromise must be considered. Rather, it simply means that the compromise is not automatically denied.

Importantly also, whereas the current regulations paragraph 12(j) only insist (i.e. otherwise the compromise is “not appropriate”) on pursuing the personal assets of directors and trustees (etc) if such individuals have a history of fraud or company failures (etc.), the proposed new section 195(g) requires the targeting of these individuals as matter of course, i.e. irrespective of their history, albeit still within the confines of the rules on tax collection from third parties (Chapter 11, Part D).

15. CHAPTER 15 – PENALTIES

PART B

15.1 Section 202(1) – this section provides that if SARS is satisfied that the “factual basis” for non-compliance by a person exists, SARS must impose the appropriate penalty envisaged in section 203. In the context, it is unclear what meaning is to be adopted to the phrase “factual basis”.

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Further, since the general penalty provisions are presumably intended for all taxes (except customs and excise) administered by SARS, it is unclear why the “Table: Amount of Administrative Penalty” uses the value of taxable income or assessed loss as the parameters for the different penalties. If a person is registered for VAT for example, but has no tax liability in South Africa, this table will effectively have the result that the general penalties envisaged in section 202, cannot find application to such vendors.

It is also not clear why the list of non-compliance events cannot be written directly into the main text of the legislation (as opposed to being kept separately in a SARS notice). It is submitted that the existing paragraph 4 of the Regulations should be replicated into the new section 202 of the TAB.

15.2 **Section 204** – this is a new provision essentially replacing section 80S of the Income Tax Act, which is currently the penalty provision housed within the Reportable Arrangement (“RA”) rules in the Income Tax Act (Part IIB of Chapter III). However, section 204 of the TAB is substantially different from the existing section 80S of the Income Tax Act.

Whereas section 80S of the Income Tax Act imposes a single R1million penalty (for failure to report a RA), section 204 of the TAB proposes to impose repeating monthly penalties, accumulating for up to 12 months. The monthly penalty amount depends on whether the “offending” person is the “promoter” or some other “participant” other than the “promoter”, and on whether the tax benefit exceeds R2million or R5million, as included in the “Table: Amount of Administrative Penalty”.

The proposed new penalties are considered to be harsh and unfair in relation to tax benefits that are perceived to exceed R2million (even if the RA rules were entirely clear). And in the light of the ongoing uncertainty around the application of the RA rules (e.g. when precisely an arrangement becomes “reportable”, how is the “main” benefit determined, how is the tax benefit quantified, etc.), these penalties are considered to be even harsher. The suggestion that failure to report could also be criminalised under section 218(c) of the TAB is also addressed separately.

**PART D**

15.3 **Section 206** – there appears to be some duplication in the text of section 206(2) & (3), in that subsection (2) is repeated (verbatim) in subsection (3)(a), before a new para (b) is added to subsection (3). Subsections (2) and (3)(a) both require that the penalty must be paid by the “due date stated in the notice of the penalty assessment”.

Section 206(2) should be deleted since it is a superfluous duplication of section 206(3)(a). The only new provision (i.e. section 206(3)(b)) is an alternative payment
date, i.e. if the penalty is combined in an assessment for “tax”, then the penalty is payable on the date of such tax assessment.

PART E

15.4 **Sections 208 to 212** - it appears as though a taxpayer cannot approach the court for a remittance of penalties, which is completely within the discretion of the Commissioner. Furthermore, there no longer appears to be an avenue to argue for remittance of penalties if the liability is brought to the attention of SARS and it was never the intention of the taxpayer to avoid the payment of the tax.

15.5 **Section 208** – a significant change is that the failure to “notify SARS of a change-of-address” is omitted from section 208. So even if the taxpayer remedies the situation before SARS becomes aware of the non-notification, it seems that the penalty will no longer be remittable. It seems harsh to withdraw the remittance-provision where there is a delay in notifying SARS of a change-of-address. It is submitted that remittance attached to the current Regulation paragraph 9(a)(ii) should be retained.

15.6 **Section 209(1)** – this section envisages a scenario where SARS will be permitted to remit penalties within certain limits, but no reference is made that same will be done only on request by the taxpayer. Will this discretion be exercised by SARS without any request from the taxpayer?

Whereas the current regulations permit the remittance of the full penalty, the new section 209 permits the remittance of no more than R2,000. In the case of a section 204 penalty (RAs), the remittance limit is R50,000. The R2,000 limit on remittances is unfair and potentially meaningless. It is submitted that the ONLY basis for the remittance should be the compliance history of the taxpayer (e.g. first incidence, remedied within 7 days, etc.) so that the full penalty should be remittable in the case of exemplary taxpayer behaviour. Consider, for example, an employer with hundreds of employees who submits a PAYE reconciliation a day or two late and ends up triggering, say, R1million penalty (per section 205(b)). If the employer’s exemplary compliance history demonstrates clearly that a remittance-of-penalty is appropriate, then the maximum remittance of R2,000 (out of R1million) renders this remittance provision meaningless.

15.7 **Section 210(2)** – this section lists the circumstances in terms of which SARS may remit the penalty in terms of section 210(1). Although sub-paragraph (2)(b) makes reference to a civil disturbance or disruption in services, it does not include disturbance or disruption caused by load shedding, systems crashes strikes etc.

15.8 **Section 211** – This section applies if SARS is satisfied that a penalty was not assessed in accordance with this Chapter. Can it thus be assumed that the taxpayer will have to satisfy SARS before the section can be invoked?
15.9 **Section 212(3)** – this section gives the tax court the power to also increase additional tax imposed by SARS. This power has the effect of a tax court, is given authority, in addition to the Commissioner for SARS, to administer tax acts. In this regard it is suggested that tax acts are, in terms of their specific provisions, only to be administered by the Commissioner and not any other party. It is also the Commissioner who has the burden of proof in providing the facts on which additional tax is imposed. In any event, if SARS imposed additional tax which SARS considers to be sufficient, on what basis would a tax court, which is not tasked to administer any one of the tax acts, be able to increase the additional tax imposed.

16. **CHAPTER 16 – ADDITIONAL TAX**

16.1 **Section 214** – Reference is made to a “standard case” in the table. What is meant by a “standard case”? All voluntary disclosure before notification of an audit should be absolved from any additional tax.

16.2 **Section 214** - with regard to the table in section 214 of the TAB, it is not clear how the behaviours in the second column of the table will be determined. We suggest that some guidance be provided as to the characteristics or factors which may be taken into account, since the test appears to be too wide and subjective on the part of SARS. In addition, clarity is required as to how SARS will determine the extent to which column 1 will apply.

Furthermore, in the instance of a “repeat case”, it is unclear whether a repeat case will be viewed in respect of a single taxpayer, or whether, in the case of numerous companies within a group, the individuals responsible for the companies. For example, where a company, which does not form part of a group of companies (but whose administration is controlled by person A), fails to submit a return, will it be viewed together with numerous other companies which are within the same group and which have also failed to submit returns, and are also controlled by the same individual (person A) - will the scenarios be viewed in the same light?

16.3 **Section 216**

**General observations** – The interaction or link between sections 213; 214; 215 and 216 is by no means clear and in some instance ambiguous or give rise to obscure results, for example:

- Where a taxpayer discovers a “substantial” underpayment which resulted due to a bona fide error where an amount was erroneously not included on his return and he voluntary discloses same to SARS, it appears as if item 6(i) of the additional tax percentage table (“ATPT”) will apply i.e. 0% additional tax. However, if the taxpayer discovers a similar bona fide error the second time round and equally makes disclosure, it seems as if item 4(i) of the ATPT will apply namely, 50%.
This percentage equates to a scenario (described in column 5(iv)) of gross negligence where voluntary disclosure is made after notification of an audit or the scenario (described in column 2(ii)) where reasonable care was not taken in completing the return. Given the clear differences in circumstances, it could certainly not have been the intention to impose 50% additional tax in the case of the second offender of a bona fide error who makes voluntary disclosure to SARS, especially considering that the additional tax is imposed over and above the other penalties envisaged in the TAB;

- Where an underpayment constitutes a so-called substantial underpayment, the ATPT has no regard to the circumstances giving rise to the underpayment (i.e. whether reasonable care in completing the returns was taken or not, whether reasonable grounds for the tax position existed, whether gross negligence etc.);
- The ATPT makes reference to “standard case” which is not defined. Since columns 4; 5 and 6 make reference to “obstructive”; “disclosure after notification” and “disclosure before notification”, it seems as if standard case seems to mean where SARS has identified the error and informed the taxpayer;
- Where a taxpayer submits a VAT return and erroneously due to a bona fide error includes input tax in respect of a transaction for which an incomplete tax invoice was received, and the VAT returns so happens to reflect a refund due to the taxpayer, section 215 (b) will find application (i.e. if a taxpayer fails to perform a duty or omits to do anything required with the effect of causing a refund by SARS of an amount which is in excess of the amount properly refundable, the taxpayer must pay the highest applicable additional tax i.e. presumably 200%). However, if the same error was made but the taxpayer was still in a VAT paying position for that month, no additional tax will be imposed until such time that either SARS or the taxpayer discovers the error, in which case the additional tax will in all probability be less than 200%;
- Section 215 has no regard to the circumstances giving rise to the underpayment, but merely considers the effect thereof. Further, one of the effects considered is “evading” the payment of tax. Since SARS has to date not accepted the difference between evasion and avoidance, and since the term “evading” as used in the section is not defined, this section is hugely ambiguous and will most probably lead to the inappropriate application thereof which in turn will lead to obscure and unfair results;
- Section 215 essentially deals with additional tax on default, omission or evasion. It is assumed that “default” is to be interpreted as meaning no return was filed, “omission” as meaning an entry/entries omitted from a return and “evasion” an intentional wilful act with the objective of evading the payment of tax. Since both default and omission could result from pure bona fide errors, these could hardly attract the same additional tax as intentional tax evasion;
- Section 215 (2) provides that the penal provisions in that section do not apply to an “understatement” of tax within the meaning of section 216. Section 216 deals with additional tax on understatement. The term “understatement” is defined in section 213 as meaning any prejudice to SARS as a result of “default” in
rendering a return; “omission” from a return and an “incorrect statement” on a return. As is thus evident, both sections 215 and 216 seem to essentially deal, inter alia, with “default” and “omission” with the only apparent difference that section 215 envisages the effect of evasion and causing an excessive refund, whereas section 216 merely considers the fact that an amount of tax was understated on a return. However, with the exception of two scenarios, both sections impose the highest additional tax as per the ATPT;

- The references in section 215 and 216 to the “highest applicable additional tax” in accordance with the table in section 214 is also unclear in the sense that if the legislator envisaged 200%, there is no need to make reference to the ATPT. However, the behaviours described in rows (i) to (v) of column 2 and the circumstances described in columns 3 to 6 do not lend themselves to determine the amount of “highest applicable additional tax” to be anything different than 200%;
- Section 214 defines “understatement” as meaning any prejudice to SARS, which presumably includes an interest prejudice to SARS. This means that if a taxpayer defaulted in rendering a return, an subsequently renders the return, the taxpayer will be subject to the general penalties, potentially percentage based penalty, interest and additional tax of presumably 200% if a self assessment return.

16.4 **Recommendations** – Sections 213 to 216 are, as illustrated above, unacceptably ambiguous; lacking in proper and sufficient definition and circumstances with the result that we strongly recommend a fresh look at these section in their entirety.

17. **CHAPTER 17 – CRIMINAL OFFENCES**

17.1 **Section 219(1)** – the section reads “A person who with the intent to evade or to assist another person to evade ..”. It is suggested that the wording be amended to make it clear that, in the event of a person assisting another person, the section will only apply if the person rendering the assistance, renders same with the intent to evade liability of tax.

17.2 **Section 221** – the number “2” at the end of subparagraph (c) of this section must be replaced with the word “two” in order for the section to be similar to the other sections where reference is made to a specified number of years.

18. **CHAPTER 18 - REPORTING OF UNPROFESSIONAL CONDUCT**

18.1 **Section 223** – section 105A of the Income Tax Act contains only a definition of “controlling body”, which is largely replicated into section 223 of the TAB. However, the new section 223 of the TAB definition omits the issue of the “purpose” of the controlling body, but rather is concerned only about whether the body has the “power to take disciplinary action” against professionals who contravene their code of conduct.
In addition, section 223 has two new definitions, namely the “Regulation of Tax Practitioners Act” and an “accredited tax practitioner”.

18.2 Section 225 – Subsection (b) makes reference to a scenario where, in the opinion of a senior SARS official, a tax practitioner has, without exercising due diligence, prepared or assisted to prepare a return or other document relating to matters affecting the application of a tax act. Uncertainty exists with regards to the meaning to be adapted to the words “due diligence” in the context. In particular, it is unclear whether the practitioner is required to conduct some review of the facts presented or whether he/she is merely required to exercise due care and consideration with regards to facts presented.

Tax practitioners are most often provided with information by a taxpayer and engaged to merely prepare a return based on the information provided. Equally, taxpayers often provide the tax practitioner with a set of facts, without necessarily disclosing the identity of the taxpayers, with the result that any form of due diligence will not be possible.

19. CHAPTER 19 - MISCELLANEOUS

19.1 Section 228 – new provisions (section 228(3) & (4) permit SARS to extend deadlines when certain extenuating circumstances exist). However, the taxpayer must apply for the extension before the deadline expires. Whilst this proposal is certainly welcomed, it should be extended to recognise that the extenuating factors referred to in section 228(4) (i.e. section 210(2)(a) – e.g. hospitalisation) may in fact also prevent the taxpayer from applying for the extension in advance of the deadline.

19.2 Section 230 - this section makes reference to a “company” which is defined as meaning “company” as defined in the Income Tax Act.

That Act defines the term as including any association formed for a specified purpose, beneficial to the public or a section of the public. These include for example associations not-for gain. Sub-section (2)(c) of section 230 of the TAB provides that the representative to be appointed by such associations must also be “called public officer of the company”. Should these representatives not rather be called “tax representative”?

19.3 Section 234 – section 234(2) of the TAB appears to be a new provision, which provides that where any submission to SARS is, or purports to have been, made on behalf of a taxpayer is deemed to have been made by the taxpayer, and the onus is upon the taxpayer to prove that such submission was not in fact made or signed by or on behalf of the taxpayer.
19.4 **Section 235 and section 236** – Both sections deal with the scenario where documents are sent by post. Given the fact that no proof exists when a document is send by ordinary post, and given the postal difficulties experienced, it is suggested that all documents sent by post need to be registered post.

Section 106(2)(a)-(cA) of the Income Tax Act are replicated into section 235 of the TAB, with some textual and consequential changes. Interestingly, the current reference in section 106(2)(d) to “if left with some adult person …” is proposed to be replaced with “if left with another person over 16 years of age…”.

Presumably the reference in section 236(b) to “person over 16” means 17 or older, but in any event we would question why the proposals don’t simply adhere to the current age-of-majority of 18.

19.5 **Section 238** - this provision attempts to exonerate SARS from procedural inefficiencies or mistakes on a type of substance-over-form basis. This is a most objectionable proposal that does not exist in the law at present, and even more worrying when considered in the light of the fact that the Explanatory Memorandum claims that are “no major changes” proposed in Chapter 19.

**Section 238(1)** - proposes to overlook problems with “delivery” (see sections 235 and section 236 above) — essentially that if the taxpayer had “effective knowledge” then the rules of notice-delivery are not important.

**Section 238(2)** – proposes to overlook all “defects” as long “substance and effect” is in accordance with the Act.

Strong exception is raised against the proposed section 238, and it should be withdrawn in its entirety. In effect it proposes to exonerate SARS from the “defective” carrying out of its administrative duties. This goes against the taxpayers’ rights to administrative justice. Taxpayers are entitled to administrative action that conforms (both in substance and form) with the law and it is inappropriate to grant SARS licence to disregard the provisions of the law.

19.6 **Section 240** - this a new provision aimed at setting out the rules around the application and issuing of clearance certificates. In section 240(2), it imposes a 30-day deadline on a response from SARS (issuing the certificate or rejecting the application). Section 240(3) lists (a) outstanding tax debt and (b) outstanding tax returns, as the main preventions against the issue of a clearance.

Matters like the form of the certificate, confirmation of validity and withdrawal are addressed in section 240(4)-(6).

20.1 **CHAPTER 20- TRANSITIONAL PROVISIONS**
We have no comments in respect of the transitional provisions.

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

MUNEER HASSAN CA(SA)  
PROJECT DIRECTOR: TAX  
The South African Institute of Chartered Accountants

cc:  ftomasek@sars.gov.za  
csmit@sars.gov.za