ENSafrica draft tax bills update

On 31 July 2020, the National Treasury published the 2020 Draft Taxation Laws Amendment Bill, 2020 ("**Draft TLAB**") Draft Tax Administration Laws Amendment Bill ("**Draft TALAB**")and the 2020 Draft Regulations Prescribing Electronic Services for public comment (by 31 August 2020). We set out below a brief overview of the material proposed changes.

income tax: individuals, savings and employment

- **Narrowing the scope of the deduction for employers in respect of bursaries and scholarships provided to employees or relatives of employees**
    - It is proposed that the scope of the tax exemption in respect of bursaries and scholarships provided by an employer (or in certain circumstances an "associated institution" in relation to an employer) to employees or to relatives of employees be narrowed with effect from years of assessment commencing on or after 1 March 2021, to exclude:
        - in the case of bursaries or scholarships provided to employees or to relatives of employees, scenarios where a salary sacrifice is or may be involved; and
        - in the case of bursaries or scholarships provided to relatives of employees, scenarios where the employer does not also provide similar scholarships or bursaries to enable or assist members of the general public to study.
- **Clarifying the exclusion from taxable income of reimbursements to employees for business travel expenses**
    - The taxable income of an employee currently excludes any amount paid or granted to the employee in reimbursement of or as an advance for any expenditure incurred or to be incurred by the employee on the instruction of the employer in furtherance of the employer's trade, provided that the employee must provide proof to the employer that the expenditure was wholly so incurred and must account for the expenditure.
    - It is proposed that the scope of this provision be expanded with effect from years of assessment commencing on or after 1 March 2021, to include the situation where the employee is allowed by the employer to incur expenditure at his/her discretion, not exceeding an amount determined by way of notice in the Gazette (i.e. in respect of meals and incidental costs), as a tax free reimbursement.

- **Proposed expansion to the deduction in respect of employer contributions to retirement funds**
    - When calculating the taxable portion of a lump sum benefit received from a retirement fund which must be included in the gross income of the taxpayer, one of the applicable deductions is the person's own contributions to such retirement fund which were not deductible for income tax purposes.
    - A retrospective amendment is proposed (effective from 1 March 2016 when the applicable deduction provision was introduced) to allow contributions made to the retirement fund by an employer on behalf of the employee and which were not tax deductible to qualify for deduction against the lump sum benefit.
- **Amendments to provisions dealing with withdrawals from retirement funds upon formal emigration**
    - Members of preservation funds and retirement annuity funds may withdraw from such funds if they formally emigrate from South Africa for exchange control purposes and their emigration is approved by the South African Reserve Bank ("**SARB**"). However, it was announced in the 2020 Budget Review that the concept of emigration for exchange control purposes will be phased out.
    - As a result, the requirement of formal emigration will be removed and a new requirement for the withdrawal of lump sum benefits from these retirement funds is proposed effective from 1 March 2021, namely, that the person is not a resident (i.e. for tax purposes) for an uninterrupted period of three years or longer. It appears that this requirement is intended to apply to three consecutive tax years, although the amendment refers simply to years.
- **Expansion of anti-avoidance provisions relating to the funding of Trust**
    - The provision of an interest-free or low interest loan by a natural person (or at their instance by a company which is a connected person) to a trust or to a company which is a connected person in relation to a trust, can result in an annual donations tax liability for the natural person concerned.
    - The proposed amendment, effective in respect of years of assessment commencing on or after 1 January 2021) brings into the ambit of the anti-avoidance rule the subscription for preference shares in a company which is a connected person in relation to a trust. In this instance, the subscription price for the preference shares will be deemed to be a loan for purposes of the anti-avoidance rule and any dividends declared in respect of the preference shares will be deemed to be interest in respect of the deemed loan.
- **Rollover of Employment Tax Incentive Amounts**
    - Where an employer is not tax compliant, the Employment Tax Incentive ("**ETI**") may only be claimed when that employer becomes tax compliant, and the unclaimed ETI amounts are rolled over until the first month in which the employer is tax compliant.
    - However, tax compliant employers must claim any unclaimed ETI amounts by the last month of each PAYE reconciliation period (i.e. by the end of August and February respectively) or such unclaimed ETI amounts will be forfeited. This has the unintended consequence that non-compliant employers may qualify for a longer rollover period for their unclaimed ETI amounts than tax

compliant employers. It is accordingly proposed that non-compliant employers be subject to the same forfeiture rule at the end of August and February as tax compliant employers.

income tax: business (general)

- **Clarifying rollover relief in respect of "unbundling transactions"**
    - Section 46(7) of the Income Tax Act No. 58 of 1962 (the "**Act**") provides that a transaction which otherwise constitutes an "unbundling transaction" as contemplated in section 46(1)(a)(i) of the Act, will be excluded from the "roll-over" provisions of section 46, if immediately after any distribution of shares in terms of an unbundling transaction 20% or more of the shares in the unbundled company are held by a disqualified person either alone or together with any connected person (who is a disqualified person) in relation to that disqualified person.
    - It is proposed that the reference to "connected persons" be removed and that deferral in terms of an unbundling transaction should not be allowed if, immediately after any distribution of shares in terms of an unbundling transaction, 20% or more of the shares in the unbundled company are held, in aggregate by disqualified persons.

Income tax: business (financial institutions and products)

- **Expansion of the definition of "market value", relevant to long term insurers**
    - It is proposed that the definition of "market value" in section 29A of the Act be updated to provide that assets such as intangibles and prepayments, which could not be valued in accordance with the existing definition, will be the amount as disclosed in the financial statements at the end of the year of assessment.
- **Clarification on the interaction of provisions dealing with short-term insurance premiums**
    - It is proposed that the current limitation of deductions in respect of insurance premium expenditure will not apply to the extent that policy benefits must be included in gross income upon maturity, in terms of section 23L of the Act.
- **Alignment of the doubtful debt provisions applicable to "covered persons" applying IFRS9 and non-IFRS9 taxpayers**
    - It is proposed that the amount of debt in respect of which a doubtful debt allowance may be claimed by non-IFRS9 taxpayers be reduced by security

that is available in respect of that debt before the 25% and 40% allowances are applied.
    - Amendments have been proposed to provide that the loss allowances relating to impairments of financial assets under IFRS9 may only qualify for a doubtful debt allowance for IFRS9 taxpayer if it would have been allowed as a deduction under section 11(a) or 11(i) of the Act had they become bad.
    - Amendments have been proposed to both sections 11(j) and 11(jA) to provide that taxpayers applying IFRS 9 for financial reporting purposes are allowed doubtful debt allowances in respect of lease receivables that have accrued to them but not in respect of future lease amounts.
- **Proposed expansion of section 24JB(2) of the Act, applicable to "covered persons"**
    - It is proposed that the exclusion to section 24JB(2) be extended to cover dividends declared by a covered person (as defined) with effect from 1 January 2021 in respect of dividends declared on or after that date.
- **REITs**
    - It is proposed that, with effect from years of assessment ending on or after 1 January 2021:
    - the definition of a “REIT” be amended to exclude preference shares from the ambit of the favourable tax dispensation applicable to REITs and clarify that only the equity shares in a REIT are required to be listed; and
        - that REITs or controlled companies be excluded from qualifying for the participation exemption:
            - in respect of foreign dividends (Section 10B of the Act); and
            - capital gains tax (paragraph 64B of the Act).
- **Refining the anti-avoidance provisions in relation to manufactured dividend payments**
    - Section 64EB(2) deems any amount paid a borrower of shares or a recipient of collateral to be a dividend for purposes of the dividends tax, if that borrower or recipient of the collateral is a person listed in subsection (2)(a), held the share, and received or accrued a dividend in respect of that share. It is proposed that, with effect from 1 January 2021 (and applicable in respect of amounts paid on or after that date in respect of shares that are borrowed or acquired in terms of a collateral arrangement), the requirement that the shares be held by the borrower or the collateral receiver be removed. If the borrower or a recipient of collateral received a dividend or an amount determined with reference to a dividend in respect of that share, then any amount paid by the borrower or recipient of the collateral will be deemed to be a dividend and be subject to the dividends tax if the borrower or recipient of the collateral is a person listed in subsection 64EB(2)(a) of the Act.

Income tax: business (incentives)

- **VCC Survey**

- National Treasury published a survey to be completed by all venture capital companies ("**VCCs**") registered with the South African Revenue Service ("**SARS**") as at 1 March 2020.
- In terms of section 12J(10) of the Income Tax Act, No. 58 of 1962 ("**ITA**"), it is compulsory for all VCCs that were registered with SARS as at 1 March 2020 to complete the survey.
- The information provided will be used in determining the extent to which the VCC tax incentive contributes towards Government's policy objectives of facilitating funding for small businesses that cannot obtain financing from financial institutions, economic growth and job creation.
- This will assist Government in deciding whether the existing sunset clause of 30 June 2021 should be extended or whether the VCC incentive should be discontinued from this date.
- The completed VCC survey must be sent to the National Treasury's tax policy depository at 2020AnnexCProp@treasury.gov.za and SARS at acollins@sars.gov.za by close of business on 31 August 2020.

- **Clarifying administrative provisions of the VCC tax incentive regime**
  - Over the past two years, Government introduced anti-avoidance measures relating to VCC structures. One of the anti-avoidance measures introduced in 2018 had the policy intent that no shareholder may hold, directly or indirectly, more than 20%of the shares of any class in a VCC. This measure is aimed at closing the structural base around which certain abusive schemes were created.
  - It has come to Government's attention that the anti-avoidance measures introduced in 2018 regarding the 20% shareholding limitation on VCC shares have unintended consequences. For example, the VCC shareholders could unintentionally breach the more that 20% ownership of any class of share measure within a VCC structure, especially upon the legitimate unwinding of the underlying investment into a qualifying company related to that class of shares.
  - Therefore, it is proposed that section 12J of the ITA be amended to allow for an exclusion of the application of the 20% ownership provisions, if that VCC, in writing, notifies the Commissioner for SARS of the intent to the cancel a class of shares within that VCC.
  - To ensure the continued protection of the fiscus against abusive structures on an open-ended termination ability, an anti-avoidance measure is proposed where a maximum period of 6 months, from the date of notification to the Commissioner, is allowed for the cancellation of any class of shares. In addition, should that allowable termination period be breached then normal provisions as contemplated in section 12J(3B) be applied.
  - It is proposed that this amendment come into operation on 31 July 2020 and apply in respect of years of assessment ending on or after this date.
- **Reviewing the sunset date of the Special Economic Zone Tax incentive regime (4.1 of the EM)**
  - The Special Economic Zone ("**SEZ**") tax regime was introduced into the ITA in 2013.
  - Tax benefits for this regime are contained under two separate provisions of the ITA, i.e. section 12R (dealing with the criteria determining what

constitutes a qualifying company that qualifies to be taxed at 15% instead of the statutory 28% corporate tax rate) and section 12S (providing accelerated capital allowances for buildings owned and used by a qualifying company in the production of its income within SEZ).
    - Currently, the sunset dates are not aligned for the two aforementioned provisions.
    - In order to provide clarity and certainty, it is proposed that amendments be made in order to provide for a single date for the end of the application of the SEZ tax regime. As such the legislation will be amended to provide that the provisions of the SEZ tax regime will cease to apply in respect of any year of assessment commencing on or after 1 January 2028.
    - It is proposed that this amendment come into operation on 9 February 2016.
- **Refining the tax treatment of foreign donor-funded projects (4.5 of the EM)**
    - In 2006, changes were made in the tax legislation to make provision for the uniform tax treatment of support (for example grants, loans, technical assistance) granted in terms of an Official Development Assistance Agreement ("**ODAA**"). An ODAA is an international agreement in terms of section 231(3) of the Constitution of the Republic of South Africa (the "**Constitution**").
    - Consequently, section 10(1)(yA) of the ITA makes provision for exemption in respect of amounts received by or accrued to any person in terms of an ODAA which is binding under section 231(3) of the Constitution, provided that the following requirements are met:
    - It has come to Government's attention that some ODAAs were entered into a long time ago and the wording in those ODAAs does not specifically make provision for the outright exemption. As a result, those ODAAs may not qualify for exemption in terms of section 10(1)(yA) of the ITA as they do not meet the requirement under section 10(1)(yA)(bb) of the ITA, i.e. that the ODAA agreement must provide that the amounts received by or accrued to the person are exempt.
    - In view of the fact that at the time when South Africa entered into these ODAAs, there was a clear intention that foreign donors offering this support often seek to ensure that their support packages remain free from South African tax as a precondition for funding, it is proposed that changes be made in the tax legislation as follows:
        - With regard to ODAAs entered into until 2006, the requirement under section 10(1)(yA)(bb) that the ODAA agreement must provide that the amounts received by or accrued to the person are exempt should not apply.
        - With regard to ODAAs entered into after 2006, the requirement under section 10(1)(yA)(bb) that the ODAA agreement must provide that the amounts received by or accrued to the person are exempt should apply.
    - It is proposed that this amendment come into operation on 1 January 2007 and apply in respect of years of assessment ending on or after that date.
- **Aligning immunity from taxation of international organisations (4.6 of the EM)**
    - South Africa is a member of several internationally recognised organisations and has entered into numerous international agreements in this regard. In

order to enable the recognised international organisations to fulfil their entrusted functions and conduct their operations uninterrupted in South Africa, the international agreements underpinning these memberships make provision for the international organisations to be granted certain privileges and immunities.

   - In particular, these international agreements often contain an article which outlays the status, immunities and privileges of the said international organisation. This article makes provision for the exemption from taxation of any kind and description in respect of the international organisation and its activities in South Africa.
   - It has come to Government's attention that some provisions of the tax Acts are not aligned with the intention of these international agreements. For example, the current provisions of section 10 of Securities Transfer Tax Act, No. 25 of 2007 ("**STT Act**") provide that no exemption provided for by any other law will apply to the tax payable under the STT Act. This implies that the provision for exemption from taxation of any kind and description granted to the international organisation in terms of the above-mentioned international agreement will be nullified by the provisions of section 10 of the STT Act.
   - In order to ensure that South Africa upholds the intention of these international agreements, it is proposed that changes be made in the STT Act to make provision for this immunity from taxation.
   - Effective date: The proposed amendments will come into operation on date of promulgation of the Taxation Laws Amendment Act of 2020.

Income tax: business (mining)

- It is proposed that section 15(a) of the ITA (read with section 36) be amended to include an additional requirement in that the taxpayer must hold a mining right as defined in section 1 of the Mineral and Petroleum Resources Development Act No. 28 of 2002 in respect of the mine where those mining operations are carried on.
- The Explanatory Memorandum on the Draft TLAB, which was released with the Draft TLAB, states that this proposed amendment aims to address the "issue" in the definition of "mining" and "mining operations" for the purposes of claiming capital expenditure deductions, and whether both the contract miner that excavates minerals for a fee and a mining right holder, should qualify for accelerated capital expenditure deductions on expenditure incurred by them in terms of sections 15(a) and 36 of the ITA. By proposing that the taxpayer needs to be the holder of a mining right in respect of the mine where those mining operations are carried on in order to fall into the mining class privileges of the ITA, National Treasury effectively proposed to exclude contract miners who excavate minerals from the soil on behalf of the mineral right holder for a fee from the ambit of section 15(a) read with section 36.
- Please see our extensive discussion of the ramifications in the article here.

Income tax: international

- **Expansion of the so-called "exit charge" provisions**
    - Where a South African company with a South African shareholder ceases to be tax resident (and triggers a section 9H deemed disposal of its assets at market value) a tax benefit may be facilitated for the South African shareholder (who thereafter sells the shares in a manner which qualifies for the participation exemption in paragraph 64B of the Eighth Schedule to the Act).
    - Amendments have been proposed with effect from 1 January 2021 to provide that, in addition to the deemed disposal of the company's assets at market value, where a South African company ceases to be a South African resident, its South African shareholders will also be deemed to have disposed of their shares in that company at market value. These changes are proposed from and applicable to companies which cease to be South African tax resident on or after that date.
- **Aligning the income tax exemption provisions in respect of local and foreign dividends**
    - There is a carve out to the income tax exemption in respect of local dividends which denies this exemption where a company incurs an obligation to pay deductible expenditure determined directly or indirectly with reference to an identical share. Amendments have been proposed to replicate this carve out in the foreign dividends tax exemption with effect from 1 January 2021.
- **Expanding the scope of South Africa's transfer pricing rules**
    - It is proposed that, with effect from years of assessment commencing on or after 1 January 2021, the scope of South African's transfer pricing rules be expanded to include scenarios where a tax benefit has been identified for a South African resident shareholder of a controlled foreign company ("**CFC**") (as a result of a lower inclusion in the net income amount of the CFC).
- **Amendments consequential to relaxation of South Africa's exchange control regime**
    - Loop structures are currently prohibited in terms of South Africa's exchange control regime (with limited exceptions). It is proposed that South Africa's exchange control system be overhauled and that the prohibition on loop structures be removed once the relevant tax rules have been appropriately amended. The following such amendments are proposed with effect from 1 January 2021:
        - Currently, where a South African resident holds all of the shares in a CFC which holds all of the shares in a South African tax resident company (SACo), if SACo declares a dividend to CFC, that dividend should be exempt from income tax in South Africa. If a dividend is then on distributed by CFC, that dividend should qualify for the full participation exemption in section 10B for income tax purposes. The proposed amendments will change this by providing that:
            - the dividend received by CFC from SACo is partially taxable at a ratio of 20/28 (amendment to section 10(1)(k) and the CFC rules); and

        - the participation exemption should not apply to the disposal of the CFC shares by the South African shareholder to the extent that the value of those CFC shares is derived from South African assets.
    - The transfer of listed securities from a local exchange to an offshore exchange currently requires exchange control approval. It is proposed that this requirement be removed and replaced by a new section 9K of the Act, which provides for a deemed disposal and re-acquisition of the transferred security by the relevant shareholder at market value for tax purposes.

Value-added tax

- **Amendment to section 72 of the VAT Act and certain consequential amendments:** with the amendment to section 72 that was brought about in Revenue Laws Amendment Act 34 of 2019, section 72 rulings that were issued prior to 21 July 2019 were set to expire in terms of the sunset clause date i.e. 31 December 2021. It was uncertain whether SARS would continue to renew these rulings in terms of the amended scope and application of section 72, or to let these rulings expire or to provide for the general application of these rulings in the VAT Act itself. To this end, the following amendments to the VAT Act were proposed:
    - **Exclusion from the definition of enterprise – relevant to, *inter alia*, aircraft and foreign-owned ships**
        - where certain movable goods (e.g. aircraft, foreign owned ships, etc.) are leased/rented out by foreign lessors that have no physical presence in South Africa (except for the leased goods), to a recipient who is a resident of the Republic, where the recipient uses the movable goods wholly/partly in the Republic, and where the recipient was obliged to import the movable goods into South Africa, there was uncertainty as to whether the foreign lessor were carrying on an enterprise in South Africa and was required to register for VAT in South Africa; SARS dealt with these cases (typically in the case of aircraft leased by foreign lessors) under section 72 of the VAT Act that directed these foreign lessors are not required to register for VAT in South Africa;
        - SARS have proposed an exclusion to the definition enterprise that makes it clear (subject to certain requirements) that the foreign persons are not deemed to be carrying on an enterprise in South Africa, where the said persons make goods available in terms of a rental agreement to a person who is a resident of the Republic;
        - some of the requirements include: the movable goods must be delivered to the recipient outside South Africa and the recipient must be responsible for importing the goods into South and be liable for the payment of any customs VAT and will not be reimbursed for such VAT; the person (i.e. foreign lessor) must be not be a resident of the Republic nor a registered vendor.
    - **Deletion of section 10(22A) – relevant to long term insurers**

    - the management of a superannuation scheme is specifically excluded from the ambit of section 2(1)(i), in terms of the proviso to that section in the VAT Act; the corollary is that it is a taxable supply and no longer regarded as financial services. Section 10(22A) currently provides that the consideration in money for the supply that comprises the management of a superannuation scheme, is the greater of: (i) the cost of making that supply; or (ii) the consideration for such supply;
    - SARS published Binding General Ruling (34) ("**BGR 34**") that set out the manner in which the "cost of making that supply", envisaged under section 10(22A), is to be determined in instances where, for example, a long-term insurer levies a consolidated charge (i.e. premium) and does not split the charges relating to the component parts (i.e. insurance premium and fees/commissions for the superannuation services). It is understood that the application of BGR 34 was onerous and that the current section 10(22) of the VAT Act would come into play, in instances where the long-term insurer did in fact charge a fee that was embedded in the premium, for such superannuation services;
    - In effect, **where no fee is embedded in the premium charged by the long-term insurer**, the entire premium is exempt; **if a fee is embedded but not separately reflected on the tax invoice issued by long-term insurer**, then the supply is deemed to be for such part of the consideration as is properly attributable to it, in terms of section 10(22) of the VAT Act – the understanding is that the long-term insurer is best placed to determine this fee; hence section 10(22A) and BGR 34 is no longer necessary.
- **VAT treatment of telecommunications services (insertion of paragraph (y) into section 11(2))**
    - the amendment provides for the zero rating of services provided to International Telecommunications Service Providers by Telecommunications Service Providers registered in South Africa (in terms of the applicable legislation), owing to the fact that South Africa is a signatory to the International Telecommunication Union Regulations, concluded at the World Conference on International Telecommunications in Dubai, 2012.
- **VAT corporate reorganisation provisions**
    - section 8(25) provides for VAT relief for corporate reorganisation transactions between companies that form part of the same group of companies. Currently proviso (i) to section 8(25) provides that in the case of a supply under section 42 or section 45 of the Income Tax Act, the supply must comprise that of an enterprise/part thereof which is capable of separate operation, where the supplier and recipient have agreed in writing that the enterprise/part thereof is disposed of as a going concern;
    - at issue is where a vendor elects/does not elect to apply the provisions of section 42 or section 45 to some of the assets that form part of that enterprise or where certain assets would fall within the

ambit of section 42 or section 45 and certain other assets do not. As section 8(25) requires compliance with the provisions of section 42 or section 45, and it was unclear if section 8(25) would apply to the supply of the enterprise as a going concern; it was further unclear if the supply of that going concern would qualify for relief under the general going concern provision of section 11(1)(e).
    - the amendment addresses this uncertainty and, essentially, gives the supplier and recipient vendors the option to "opt" out of section 8(25) and apply the provisions of section 11(1)(e), in cases where the supply is of an enterprise/part thereof that takes place under the corporate rollover provisions of section 42 or section 45 of the Income Tax Act.
  - **Claw-back provisions – amendment to section 22(3) proviso (ii)**
    - the claw-back provision, essentially, provides that (subject to certain exclusions) where a vendor has claimed an input tax deduction (for a supply made to that vendor) and the vendor has not paid the full consideration for that supply within a 12 month period after the expiry of the period within which such deduction was made, the vendor must "claw-back" the VAT to SARS based on the tax fraction (15/115) of the consideration that remains outstanding;
    - in cases where the estate of a vendor is sequestrated or a vendor is declared insolvent, etc., there was an anomaly in the VAT Act as the current legislation did not make reference to the claw-back being computed/determined by applying the tax fraction to the portion of the consideration that remained outstanding (as is the case of vendors that do not fall into the specific circumstances of proviso (ii)) - the amendment corrects this anomaly.
  - **Electronic services - allowing "Intermediaries" to register for VAT on the payments basis (amendment to section 15(2)(a)(vii))**
    - in light of the fact that foreign suppliers of electronic services were allowed to apply to SARS to register for VAT on the payments basis, similar treatment is now afforded to an "intermediary" (the activities of which were specifically included in the definition of "enterprise") – the amendment puts both the foreign service provider and an intermediary on equal footing in terms of the manner in which it accounts for VAT.
  - **Effective date for amendments**
    - The proposed effective date for all VAT amendments is 1 April 2021.

Customs

- It is proposed that amendments to the tariff structure between 1 October 2019 to 31 October 2020 be confirmed.
- The provisions on the introduction, withdrawal and amendment of export duties and related provisions are proposed to be amended for the effective administration thereof.

- A new export duty on scrap steel is proposed.
- From an administrative perspective, it is proposed that:
    - Provision be made for sharing information with the Department of International Relations and Co-operation (DIRCO) on duty free goods purchased by diplomats for the better control thereof.
    - Provision be made for the publication of tariff determinations
    - It is clarified that container depots and terminals must be located in South Africa.
    - Clarity be provided as to when bills of entry can be amended and how.
    - The meaning of free on board in the definition of export value is defined.

Carbon Tax

- The carbon tax on fuel and its collection will be done through the fuel levy mechanism. In order to create the necessary explicit link between the carbon fuel levy rate and the carbon tax rate, it is proposed that the relevant carbon tax formulas be amended.

Other proposed amendments

- **Amendments relevant to section 18A approved public benefit organisations ("PBOs")**
    - Amendments are proposed to clarify that the decision whether or not to approve a PBO for purposes of section 18A should be subject to objection and appeal.
    - Currently, in order to qualify for approval in terms of section 18A of the Act, a conduit PBO may only provide funds and/or assets to another approved PBO. It is proposed this eligible recipient category be expanded to include government (local, provincial and municipal), provided that the relevant department has been approved for these purposes by SARS.
    - It is proposed that the audit certificate requirements applicable to section 18A approved PBOs be added to the listed requirements where non-compliance may give rise to the taxation of donations in the hands of the PBO and ultimately the invalidity of section 18A certificates (affecting the tax position of the donor).
- **Technical amendments relevant to the taxation of trusts**
    - It is proposed to clarify that amounts of a capital nature be excluded from the ambit of section 25B of the Act.
    - Amendments have been proposed to paragraph 80 of the Eighth Schedule to the Act to ensure that a non-resident trust that has a South African resident beneficiary is treated in the same way as a South African resident trust, i.e. that when a capital gain is vested in a resident beneficiary during the same

year of assessment, the gain is disregarded in the hands of the trust and taken into account in the hands of the beneficiary.

- **Aligning the definition of "immoveable property" in section 9J and the Eighth Schedule to the Act**
  - Amendments have been proposed to align the definition of "immoveable property" in section 9J (which extends the source rules to non-residents holding immovable property as trading stock) with the definitions contained in the Eighth Schedule to the Act.
- **Cryptocurrency references have been updated to the broader term, Crypto Assets**

Tax Administration

- It is proposed that:
  - SARS be entitled to issue estimated assessments if additional information requested from a taxpayer has not been provided after more than one request has been sent (section 95(1)(c) of the Tax Administration Act, 2011 "**TAA**");
  - SARS be entitled to withhold refunds from a taxpayer if criminal investigations are ongoing in respect of that taxpayer (section 190(2) of the TAA); and
  - that the reference to "wilfully" be deleted from provisions rendering non-compliance with tax Acts to be a criminal offence (section 234 of the TAA, paragraph 30 of the Fourth schedule to the Act and section 58 of the VAT Act).
- Currently the latter provisions require that a taxpayer must have acted "**wilfully and without just cause**" in order to be found guilty of having committed an offence.
- The view expressed in the Explanatory Memorandum is that the use of the term "wilfully" in respect of a statutory crime is not correct for the following reasons:
  - In South African Law there are two types of culpability, namely intention (dolus) and negligence (culpa). Intention has a positive character i.e. the person willed and knew and foresaw something. Negligence on the other hand, always has a negative character i.e. the person did not will or know or foresee something, although according to legal standards he or she should reasonably have known or foreseen it.
  - A reference to wilful conduct must necessarily exclude negligent conduct. It is not notionally possible for a person to wilfully neglect to do something. Hence the reference to "a person who wilfully and without just cause" fails to do something as required in a tax Act may be problematic. Furthermore, whereas the test for intention is subjective, the test for negligence is objective. In other words, in the latter instance the person's conduct must be measured against the standard of a reasonable person.
  - The current wording of this section requires the State to prove that the conduct was "wilful and without just cause". This is purely subjective and there can be no reference to what a reasonable person would have done in the circumstances.

    - The National Prosecuting Authority ("**NPA**") is of the view that the current wording relating to criminal offences substantially undermines the ability of SARS to ensure compliance based on the objective standard expected of the reasonable person. Consequently this may hamper the criminal prosecution of non-compliant taxpayers by the NPA in seeking to prove the elements of the crime.
- ENSafrica and various representative bodies will be making submissions on this proposal, which is generally regarded as highly problematic, in addition to submissions on various other aspects of the Draft TLAB and TALAB.

For more information, please contact ENSafrica's tax team.

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