South African Institute of Taxation

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To: The Standing and Select Committees on Finance
Parliament
Cape Town
Western Cape
8000

Via email: Parliament of South Africa:(awicomb@parliament.gov.za and tsepanya@parliament.gov.za)

RE: SUMMARY OF THE SAIT PRESENTATION ON THE DTLAB and DTALAB, 2023

At the outset, we would like to thank you for the opportunity to engage you on matters arising from the 2024, Draft Taxation Laws Amendment Bill and the 2024, Draft Tax Administration Laws Amendment Bill as these were released for public comment by both the National Treasury and the SARS on 1 August 2024.

As a supplement to our parliamentary presentation, we set out herein commentary regarding the matters raised therein. Please see below.

1. Prescription Period for Input VAT Tax Claims

The proposed changes to the prescription period for input VAT tax claims present several practical challenges. Vendors may find themselves needing to re-open multiple tax periods, which significantly increases administrative burdens. This is particularly problematic for vendors who process high volumes of low-value claims in bulk, as they often delay claims until after a thorough document review. Additionally, we are concerned that the current SARS systems will not be able to support an increase in input deductions for past periods, necessitating costly and time-consuming system updates.
To address these issues, in our written submissions to the National Treasury we have recommended the introduction of a separate reporting field that allows vendors to declare unclaimed input VAT in their current returns within six months of entitlement. This would streamline the process and reduce the need for re-opening past returns. Furthermore, SARS should modify its e-filing system to facilitate the easy submission of past claims. Implementing a de-minimis threshold could also be beneficial, as it would exclude low-value claims from strict requirements, allowing vendors to consolidate claims across multiple periods.

2. Controversial Amendments to Section 24I

The proposed amendment is seen as unprincipled because it unfairly ring-fences currency losses against currency gains. Cross-border business inherently carries significant risks, and the government's approach appears to favour gains without equally bearing the losses, which are often beyond the taxpayer's control. The broad application of this amendment could negatively impact trading companies with net exchange losses, as it prevents them from offsetting these losses against ordinary income.
To mitigate these issues, our written submission recommended that the National Treasury maintain the current framework of Section 24I and amend Section 20 to specifically target non-business currency losses. Alternatively, the focus should be on ring-fencing susceptible gains and losses to prevent abuse, particularly in cases involving passive currency losses and transactions with connected persons.

3. Trust in Turmoil: Navigating the Maze of Anti-Avoidance Measures

The current issue revolves around low- or no-interest loans being excluded from trust anti-avoidance measures, which creates conflicts with transfer pricing rules when the arm's length interest rate is below the official rate.

The proposed amendment introduces a "higher of" test between sections 7C and 31, which is considered unprincipled and in violation of international treaties. This amendment could lead to potential double taxation, as the foreign country counterpart will only accept an arm's length rate. Additionally, the commercial viability of such loans is questioned, as current examples in the draft Explanatory Memorandum are not realistic, given that arm's length rates are rarely below the repo rate. The proposed amendments extend beyond trust anti-avoidance and create unfair distortions for legitimate cross-border loans.

4. Appointment of Public Officers

The proposed changes to the appointment of public officers are generally welcomed. The removal of the mandatory one-month period for appointing a public officer allows newly formed companies to have their directors and public officer in place at formation. Additionally, the default appointment rule, which designates senior officials as the public officer if one is not appointed during formation, is seen as a positive development.

However, there are concerns regarding the ability to remove oneself from the role of public officer, especially if automatically appointed. Recent rulings have emphasised greater scrutiny of public officers' actions, with decisions increasingly subject to judicial review, leading to potential civil and criminal liabilities. This growing risk may deter individuals from accepting the role of public officer.

5. Natural Persons in the Tax Court Battlefield

The introduction of a provision allowing individuals (not legal practitioners) to represent taxpayers in the Tax Court raises several concerns. There is a lack of clarity on how strictly the "fit and proper" criteria will be enforced compared to enrolled legal representatives. Questions also arise about the qualifications and ability of untrained individuals, including those with questionable backgrounds, to represent taxpayers effectively. Furthermore, there is uncertainty about whether taxpayers will be held to the same ethical standards and court etiquette as legal practitioners, creating a disparity in expertise between SARS legal professionals and taxpayer representatives.

To address these concerns, we recommend that the "fit and proper" criteria be defined in alignment with the Legal Practice Act[1] to ensure consistency. Additionally, natural representatives should be required to register with a professional body or be recognised as tax practitioners. Enhancing Tax Court rules to implement clear procedures for assessing and confirming a representative's fitness to appear in court would also be beneficial.

[1] No. 28 of 2014

6. Objection Against Assessment or Decision – Moving the ADR Earlier in the Process

The proposed amendment to move the Alternative Dispute Resolution (ADR) process earlier in the objection phase is aimed at enhancing the efficiency of the dispute resolution process. This change facilitates earlier resolution through improved document exchange and engagement. It is crucial to ensure that ADR is headed by truly independent arbitrators, rather than SARS employees, to maintain neutrality.

Furthermore, to ensure the effectiveness of this amendment, we have recommended that clear, specific timeframes related to the ADR process be updated to align with the proposed expanded process.

7. Unlisted Real Estate Entities: A Step Forward but Not Far Enough

The draft Bill provides tentative relief for unlisted property investment vehicles, but only upon conditions set by the Financial Sector Conduct Authority (FSCA) and approved by the National Treasury. This relief is contingent on the COFI Bill, which may take years to come into effect.

The transitional relief provided by the draft Bill delays the anti-avoidance interest limitation of section 23M of the Income Tax Act and the hybrid debt rules, but it is too narrow and fails to cover the majority of unlisted property investment structures. Unlisted real estate investment vehicles remain at a longstanding competitive disadvantage compared to listed real estate entities, which benefit from a special tax dispensation to prevent double taxation.

8. Fuelling Confusion: Unravelling the Retrospective Amendments

The proposed retrospective amendments raise several questions. There is a need for clarification on the policy reasons for taking this amendment back so far, as well as uncertainties regarding licensing and compliance requirements.

Additionally, insight is needed on the implications of distilling beyond 210°C and whether Additional Note 1(g) will apply, allowing for classification under 2710.19 to provide certainty to traders.

9. The ETI Enigma: What's Behind the Abuse?

The government proposes amendments to prevent abuse of the Employment Tax Incentive (ETI) scheme by training institutions falsely claiming incentives for non-existent employee payouts.

However, the identified behaviours may not be considered abuse without specific legislation. Collaboration is needed to address youth unemployment instead of imposing punitive measures. Previous amendments did not highlight clear abuses as now referenced.

To improve the ETI scheme, it is recommended to limit penalties and proposing collaborative sessions to enhance ETI implementation would also be beneficial. Stakeholder input should be considered to enhance the scheme's effectiveness. Consideration should be given to issuing regulations to adapt the scheme and to address unintended consequences is also recommended.

10. VAT B2B Exclusion

The proposed amendment to the VAT B2B exclusion is seen as too generous and may become unsustainable in the future. There is ambiguity over whether a mix of electronic and normal service supplies will trigger VAT reporting requirements. The open-ended nature of the amendment creates uncertainty and should be limited to group companies and connected persons, which will be easier to track for both parties.

Consideration should be given to introduce a *de minimis* rule allowing non-VAT registered supplies up to R1 million in 12 months before triggering VAT registration. Suppliers should also be allowed to apply to remain on the VAT register, even if their supplies qualify for the exclusion.
Legislative clarity is needed to ensure no section 8(2) adjustments are required upon deregistration due to the new rules.

11. Proposed VAT Amendment: Supplies by Educational Institutions

The proposed VAT amendment for supplies by educational institutions required careful reconsideration. Our SAIT submission recommended to retain the phrase "solely or mainly for the benefit of learners" to prevent widening exemptions.
The current wording of the proposed amendment may broaden the scope of exempt supplies, potentially allowing many goods and services to qualify, thus complicating VAT treatment. Discussions with the educational sector are essential to address potential financial impacts on educational institutions.

End.