REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

TAXATION LAWS AMENDMENT BILL, 1996

[W.P. 3—'96]

0 621 16546 8

REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM ON THE TAXATION LAWS AMENDMENT BILL, 1996

INTRODUCTION

The Taxation Laws Amendment Bill, 1996, introduces amendments to the Marketable Securities Tax Act, 1948, the Transfer Duty Act, 1949, the Estate Duty Act, 1955, the Stamp Duties Act, 1968, the Value-Added Tax Act, 1991, the Income Tax Act, 1993, and the Taxation Laws Amendment Act, 1994. A substantive provision relating to sales tax, penalty or interest not recoverable in respect of certain goods imported into the former Republic of Transkei is also provided for.

Any reference to the Tax Commission shall mean the Tax Commission of Enquiry into certain aspects of the Tax Structure of South Africa (under the chairmanship of Prof M Katz).

CLAUSE 1

Marketable securities tax: Amendment of section 1 of the Marketable Securities Tax Act, 1948

This clause substitutes section 1 of the Marketable Securities Act, 1948. The following matters are addressed therein—

- the definition of "Commissioner" remains unaltered.
- the definition of "joint account" is deleted as it became obsolete.
- the substitution of the definition of "marketable security" with "marketable securities", limits the scope of the definition to listed securities as defined in the Stock Exchanges Control Act, 1985.
- the introduction of the definition of "member" and the substitution of the definition of "stockbroker" are consequential upon amendments made to the Stock Exchanges Control Act, 1985. That Act previously only permitted natural persons to be stockbrokers and members of a stock exchange. That Act in its amended form now also contains a definition of a "member", which effectively allows certain limited liability corporations to carry on the business of buying and selling listed securities.
- the introduction of the definition of a "stock exchange" is consequential upon the introduction of the definition of "member".

These amendments come into operation on 1 August 1996.

CLAUSE 2

Marketable securities tax: Amendment of section 2 of the Marketable Securities Tax Act, 1948

This clause introduces three amendments.

Firstly, a textual amendment, by substituting the expression "State Revenue Fund" with the expression "National Revenue Fund".

Secondly, the 1996 Budget Review referred to the fact that the rules of the Johannesburg Stock Exchange have been amended to allow dual trading. This *inter alia* has the effect that a member may conduct business either as agent or as principal. Furthermore, concern was expressed in the Review that such a step may have negative implications on the collections for marketable securities tax (MST) as the Marketable Securities Tax Act at present only provides for the levying of MST in respect of transactions where a broker purchases shares on behalf of another person and that consideration should be given to include transactions where a broker acts as principal. To give effect thereto, the proposed amendment—

- retains the right to impose MST on purchases of marketable securities through the agency of a broker; and
- extends the ambit of the charging section to all purchases of marketable securities from a member.

This amendment should, however, be read in conjunction with the amendment proposed in terms of *clause 3(1)(a)*.

In terms of the lastmentioned clause, all purchases by stockbrokers or members for their own account are exempt from the duty. The combined effect of the two amendments, however, is that where a member buys shares as principal and on-sells such shares to a client—

- no MST on either transaction (buying or on-selling) can be levied in terms of the Marketable Securities Tax Act as it reads at present;
- MST will, in terms of the proposed amendments, be payable on the on-selling of the shares, but not on the buying thereof by the member.

The combined MST payable in terms of the proposed amendment, therefore, amounts to the same MST that would have been payable (provided the value of the shares remains the same) had the member acted as an agent in terms of the transaction.

Thirdly, in his Budget Speech on 13 March 1996, the Minister of Finance proposed that the rate of marketable securities tax be decreased with effect from 1 April 1996 from 1 per cent to 0,5 per cent. The amendment introduced by this clause also gives effect to that proposal.

CLAUSE 3

Marketable securities tax: Amendment of section 3 of the Marketable Securities Tax Act, 1948

Subclause (1)(a): The amendment proposed by this subclause is consequential upon the amendments introduced by *clause 2* and exempts a stockbroker or member from the payment of MST. Should he, however, register the securities in his name, stamp duty will become payable.

Subclause (1)(b): The amendment effected in terms of this subclause is consequential upon the introduction of a definition of "stock exchange".

Subclause (1)(c) introduces an exemption in respect of marketable securities purchased by a non-resident of the Republic or a country which forms part of the common monetary area. Stamp duty will, however, apply to the registration of transfer into the name of the non-resident, unless such transaction is exempt from stamp duty in terms of an exemption provided for in that Act.

These amendments come into operation on 1 August 1996.

CLAUSES 4, 5, 6 AND 7

Marketable securities tax: Amendment of sections 4, 6, 8 and 10 of the Marketable Securities Tax Act, 1948

The amendments proposed by these clauses are consequential upon the amendments introduced by *clauses 1 and 2* and come into operation on 1 August 1996.

CLAUSES 8 AND 9

Transfer duty: Amendment of sections 1 and 2 of the Transfer Duty Act, 1949

Section 2(7) of the Transfer Duty Act was deleted with effect from 19 July 1995, by section 1 of the Taxation Laws Amendment Act, 1995, in order to address the abuse which was encountered in that many trust deeds which are submitted to the relevant Receivers of Revenue have, in essence, not been established *solely* for the benefit of a natural person. In order to enjoy the benefit of the rate applicable to a natural person, the trust deed is amended in such a way that the sole beneficiaries are natural persons at the time of the acquisition of the property and when the deed is submitted to the relevant Receiver of Revenue. However, once the lower rate has been enjoyed, the trust deed may be amended to its original form after registration of transfer of the property.

The amendment effected by that section did not have the desired effect as further arguments have been raised, namely that—

- as there is no definition of "person" or "trust" in the Transfer Duty Act, a "trust" is not a person for purposes of transfer duty; and
- the trustee, and not the trust, acquires the property, and where such trustee is a natural person the lower rate of duty is applicable.

In order to address these arguments, it is firstly, proposed to insert a definition of "person" and "trust" into the Transfer Duty Act. Secondly, in order to place it beyond any doubt that the corporate rate is applicable where a property is acquired by a trustee or administrator of a trust or any other person acting in a fiduciary capacity, such trustee or administrator of a trust or any other person is deemed, for purposes of section 2, to be a *person other than a natural person.*

Clause 9(1)(a) introduces a textual amendment by substituting the expression "Consolidated Revenue Fund" with the expression "National Revenue Fund".

These amendments come into operation on 1 August 1996.

CLAUSE 10

Transfer duty: Amendment of section 3 of the Transfer Duty Act, 1949

The amendment proposed by this clause is consequential upon the creation of the South African Revenue Service and comes into operation on 1 April 1996.

CLAUSE 11

Estate duty: Amendment of First Schedule to the Estate Duty Act, 1955

The Tax Commission supported the principle of a capital transfer tax, which would encompass the present estate duty and donations tax, but has, however, made no detailed recommendation in this regard.

When compared internationally, South Africa's rates for taxes of this nature are relatively low and the Minister of Finance, in his Budget Speech on 13 March 1996, announced that, as an interim measure, it is proposed that the present rate of estate duty

be increased from 15 per cent to 25 per cent in respect of the estates of persons dying on or after 14 March 1996. The amendment introduced by this clause gives effect to that proposal.

CLAUSE 12

Stamp duty: Amendment of section 5 of the Stamp Duties Act, 1968

The general rule in terms of the Stamp Duties Act is that the payment of stamp duty is denoted by way of adhesive stamps affixed to the relevant instrument. Section 5 of the Stamp Duties Act, 1968, however, provides that the Commissioner may approve the payment of the duty on declaration in respect of *inter alia* the original issue of marketable securities. These provisions are to be extended in terms of the proposed amendment to an instrument of transfer in respect of the registration of transfer of any marketable security.

CLAUSE 13

Stamp duty: Amendment of section 23 of the Stamp Duties Act, 1968

Subclause (1)(a): This amendment is of a textual nature.

Subclause (1)(b): The definition of "broker" is extended to include a member of the South African Institute of Stockbrokers.

Subclause (1)(c) introduces a new definition into the Stamp Duties Act in respect of a "lending arrangement".

It has been submitted that the settlement status in the South African equity markets is not yet on a "rolling settlement" basis as has been adopted by most countries internationally. Apart from a number of other recommendations put forward by an international working committee with a view to drawing up standards for clearance and settlement procedures, such committee recommended that securities lending be encouraged as a method of expediting the settlement of security transactions. An inhibiting factor in this regard is, however, that where shares which have been lent by a lender to a borrower, are transferred back into the name of the lender, stamp duty becomes payable on such registration of transfer.

Research has shown that a number of countries which levy a similar duty on share transfers, exempt such transfers from stamp duty, provided such transfer is effected in terms of a securities lending arrangement.

The proposed definition, therefore, defines a lending arrangement as an arrangement where a marketable security has been lent by a lender to a borrower to enable the borrower to effect delivery of such a marketable security under a transaction entered into by the borrower to sell such a marketable security. The loan of the marketable security is, however, conditional in the sense that a marketable security of the same kind and of the same or equivalent quantity and quality must be returned to the lender within a period of six months.

Subclause (1)(d): This amendment is consequential upon the introduction of the definition of "member" in the Marketable Securities Tax Act.

Subclause (1)(e): This amendment is consequential upon the amendment proposed in terms of *subclause (1)(c)* and introduces a control measure in the sense that where the return leg of a scrip lending arrangement is to be registered into the name of the lender, the relevant transfer secretary may not register such transaction unless the underlying instrument of transfer bears an appropriate endorsement by the borrower or his agent. See also *clause 17(1)(e)*.

Subclause (1)(f): Section 23(7A) of the Stamp Duties Act provides that marketable securities sold in Namibia prior to 1 October 1969 would be subject to

stamp duty under the laws of that country. As South Africa has no jurisdiction over the levying of stamp duty in Namibia, these provisions have become obsolete and it is proposed that they be deleted.

Subclause (1)(g): This amendment is consequential upon the introduction of section 23(4)(b)(viiB). See *subclause (1)(e)*.

Subclause (1)(h): This amendment is consequential upon the deletion of section 23(7A) of the Stamp Duties Act, 1968.

CLAUSE 14

Stamp duty: Amendment of section 24 of the Stamp Duties Act, 1968

In terms of the provisions of section 24(10) of the Stamp Duties Act, 1968, an insurer may, subject to conditions imposed by the Commissioner, elect to pay the duty on various types of dutiable policies on declaration without using revenue stamps, franking machines or receipts.

This option has been available for many years and has not been abused, because such declarations are accompanied by an external auditor's certificate verifying various minimum requirements.

In terms of the penal provisions a penalty of 10 per cent for each month, or part thereof, is payable on all late payments made after the 14th day of a particular payment period in respect of which the liability is determined. It is proposed that this period be extended to 21 days with effect from 1 August 1996, as payments are often delayed due to delays in the postal service.

CLAUSE 15

Stamp duty: Amendment of Item 6 of Schedule 1 to the Stamp Duties Act, 1968

In terms of the proposed amendment the stamp duty on a debit entry posted to a cheque account, a credit card scheme account, a transmission account or a Post Office telebank account is increased from 15 cents to 20 cents. The amendment is effective from 1 June 1996.

CLAUSE 16

Stamp duty: Amendment of Item 13A of Schedule 1 to the Stamp Duties Act, 1968

In terms of Item 13A of Schedule 1 to the Stamp Duties Act, stamp duty is leviable on the execution of certain instalment credit agreements as defined. The duty is determined in accordance with a progressive scale and is dependent on the amount payable in terms of the agreement in terms of which the goods are purchased. In his Budget Speech on 13 March 1996, the Minister of Finance proposed that the existing rate structure be substituted with effect from 1 June 1996 to provide for a maximum rate of R100 in respect of agreements where the amount payable under the agreement exceeds R200 000. The amendment introduced by this clause gives effect to that proposal.

CLAUSE 17

Stamp duty: Amendment of Item 15 of Schedule 1 to the Stamp Duties Act, 1968

Subclause (1)(a), (b), (g) and (h): Stamp duty at the rate of 1 per cent (ie 10 cents for every R10 of the consideration, or part thereof) is payable under Item 15(3) of Schedule 1 in respect of the registration of transfer of any marketable security.

The Minister of Finance proposed in his Budget Speech that the duty be decreased to 0,5 per cent (ie 5 cents for every R10 of the consideration, or part thereof) with effect from 1 April 1996. The stamp duty payable under Item 15(4) (cancellations and redemptions) and Item 15(5) (acquisitions where nominees are involved) of Schedule 1 is similarly decreased. The amendments introduced by these subclauses give effect to this proposal.

Subclause (1)(b) introduces a further amendment which is consequential upon the amendments introduced to the Marketable Securities Tax Act, 1948, in terms of *clauses 2 and 3(a)* of the Bill. Where a broker buys marketable securities on his own account he is not liable for MST, but should such shares be registered in his name, he will be liable for stamp duty. In terms of the proposed amendment, the single rate of duty (0,5 per cent) will apply to such a registration of transfer if it is registered into the broker's name after 1 August 1996 and such registration of transfer takes place within three months from the date of execution of the relevant instrument of transfer. However, if such registration of transfer is effected after the expiry of such period of three months, the treble rate of duty will apply.

Subclause (1)(c): The amendment proposed by this subclause is consequential upon the amendments introduced by *clauses 1 and 2*.

Subclause (1)(d): The amendment introduced in terms of this subclause is of a consequential nature and also deletes certain obsolete provisions.

Subclause (1)(e): This amendment is consequential upon the amendment proposed in terms of *clause 13(1)(c)* and provides for an exemption from stamp duty in the case where the shares lent in terms of a lending arrangement as defined, are registered back into the name of the lender.

Subclause (1)(f): The amendment introduced in terms of this subclause is of a consequential nature.

CLAUSE 18

Definitions: Amendment of section 1 of the Value-Added Tax Act, 1991

Subclause (a): The amendment proposed by this clause is consequential upon the creation of the South African Revenue Service.

Subclause (b): This amendment is consequential upon the repeal of the Territorial Waters Act, 1963 (Act No. 87 of 1963), and the enactment of similar provisions in the Maritime Zones Act, 1994 (Act No. 15 of 1994).

CLAUSE 19

Financial services: Amendment of section 2 of the Value-Added Tax Act, 1991

Since the introduction of value-added tax in 1991, the supply of financial services has been exempt from VAT mainly as a result of the difficulties in identifying and measuring the value added, particularly as regards interest. Although this principle is in line with the practice followed by most countries, there is no reason why value added in respect of financial transactions should be treated differently from value added in other sectors of the economy. Financial services are furthermore consumed mainly by businesses and the more affluent section of the population.

This principle was recognised by the Tax Commission and it was therefore recommended by them that all fee-based financial services, including those in respect of life insurance and other superannuation funds, should be brought into the VAT net.

The first step in taxing fee-based financial services was taken in November 1994, when paragraph (m) of section 2(1) was deleted and the words "or arranging" deleted from paragraph (n), resulting in the taxing of debt collection services and commissions

received by long-term insurance agents, stock brokers and other financial intermediaries. This amendment came into operation on 1 April 1995.

The following additional amendments are necessary to give effect to the recommendations of the Tax Commission:

Subclause (1)(a): In terms of section 2(1)(e) the underwriting or subunderwriting of the issue of an equity security, debt security or participatory security is deemed to be a financial service. As this is clearly the supply of a service, namely the acceptance of a risk for which a consideration is paid, the paragraph is deleted in terms of the amendment and the supply of such services will now be taxable. The actual issue of the securities to the underwriter or subunderwriter, albeit at a discount, will remain exempt from VAT in terms of section 2(1)(d), read with section 12(a) of the principal Act.

Subclause (1)(b): This amendment is consequential upon the amendment introduced by *subclause (c)* of this clause.

Subclause (1)(c): Section 2(1)(g) provides that the renewal or variation of a debt security, equity security, participatory security or credit agreement constitutes a financial service. The deletion of this paragraph will result in any fee payable for such service becoming taxable.

In terms of section 2(1)(h) the provision, taking, variation or release of a guarantee, indemnity, security or bond in respect of the performance of obligations under a cheque, credit agreement, equity security, debt security or participatory security, or in respect of the activities specified in paragraphs (b) to (g) constitutes a financial service.

The deletion of this paragraph will result in any premiums or any other fee for the provision of such services becoming subject to VAT. Such services will therefore be treated on the same basis as short-term insurance. As the premium becomes subject to VAT, the indemnity payment received by the vendor in terms of a contract of this nature is, in terms of the provisions of section 8(8), deemed to be consideration received for a supply of services in the course or furtherance of an enterprise. Output tax must therefore be accounted for by the vendor. The provisions of section 16(3)(c), whereby the insurer is entitled to a deduction equal to the tax fraction of any indemnity payments made to another person in terms of any contract of insurance will, similarly, apply.

Subclause (1)(d): Section 2(1)(*i*) provides for the provision, or transfer of ownership, of a life insurance policy or the provision of reinsurance in respect of any such policy, to be a financial service.

The amendment is aimed at ensuring that the management of superannuation schemes (for example pension funds) by life insurers is treated as a taxable service as the provision of such services by other intermediaries will, as a result of the amendment to section 2(1)(j), become subject to VAT. Where the cost of such services is included in the premium payable, the consideration for the service of the management of the superannuation scheme shall, in terms of the new section 10(22A), be deemed to be the greater of the cost of making such supply or any consideration for such supply.

The amendment to this subclause should be read with the amendment discussed in the portion of this Memorandum dealing with *clause 21*.

Subclause (1)(e): Section 2(1)(j) provides for the provision, or transfer of ownership, of an interest in a superannuation scheme, or the management of a superannuation scheme to be a financial service.

In line with the recommendations of the Tax Commission that all fee-based income should be subjected to VAT, the service of managing a superannuation scheme by a financial intermediary will become a taxable service.

Subclause (1)(f): Section 2(1)(n) provides for the service of agreeing to do any of

the activities specified in paragraphs (a) to (l) to be a financial service, provided that the service of providing advice directly in connection with any of those activities, for which a separate fee is charged, shall not be deemed to be a financial service.

In line with the recommendations by the Tax Commission that all fee-based income should be subjected to VAT, the service of agreeing to perform a financial service will become a taxable supply. Charges such as raising and commitment fees will, similarly, become subject to VAT.

Subclause (1)(g): The addition of this proviso will result in any fee, commission or similar charge payable for any of the services contemplated in paragraphs (a) to (d) and (f) becoming taxable with effect from 1 October 1996.

Section 2(1)(a) provides for the exchange of currency (whether effected by the exchange of bank notes or coin, by crediting or debiting accounts, or otherwise) to be a financial service and therefore exempt from VAT in terms of section 12(a).

The underlying activity, namely the supply of money, will remain exempt from VAT. For example, the commission or other fee charged for the supply by a travel agency or bank of US dollars to a customer will be taxable, being consideration for a service rendered. The rand value given for these dollars is, however, payment for the supply of money and is not taxable. Any difference between the buying and selling rates (the margin) is consideration for the exchange of currency and, therefore, exempt from VAT.

In terms of section 2(1)(b) the issue, payment, collection or transfer of ownership of a cheque or letter of credit is deemed to be a financial service. These services will remain exempt from VAT, but in terms of the proviso bank charges will become subject to VAT. Merchants' discounts or commission on credit card transactions will also remain exempt from VAT under the new proviso as this cost represents interest.

Paragraphs (c) and (d) provide, respectively, for the issue, allotment, drawing, acceptance, endorsement or transfer of ownership of a debt security and the issue, allotment or transfer of ownership of an equity security or a participatory security to be a financial service. These services will remain exempt from VAT.

In terms of the new proviso, any fee (eg the initial charge in regard to unit trusts), commission or similar charge payable in respect of such services will become subject to VAT. Where a discounting cost is payable in respect of a service contemplated in paragraph (c) or (d), such discounting cost will, however, remain exempt from VAT. The discounting cost (eg the consideration for the factoring or discounting of debtors) represents mainly interest in respect of monies advanced and should, therefore, in line with the Tax Commission's proposals, not be brought into the VAT net at this stage.

The trading in certain financial assets is exempt from VAT in the circumstances contemplated in section 2(1)(k). Where the financial asset is, however, not a future or option contract as envisaged in section 2(1)(k), the dealing could nevertheless be exempt if covered by one of the other paragraphs of section 2(1). For example, the activity of the transfer of ownership in a debt security or an equity security falls under section 2(1)(c) or (d).

Subclause (1)(h): The definition of "life insurance policy" has been replaced with the term "long-term insurance policy" as this term includes any policy (including a sinking fund policy) issued in the ordinary course of carrying on a long-term insurance business as defined in section 1(1) of the Insurance Act, 1943 (Act No. 27 of 1943). The references to a funeral policy, a home service policy and an industrial policy are deleted as the term long-term insurance business is defined in the Insurance Act to include such policies.

Subclause (1)(i): This amendment is consequential upon the replacement of the definition of "life insurance policy".

The amendments to this clause should be read with the amendment discussed in the portion of this Memorandum dealing with *clauses 22 and 31.*

To allow institutions concerned sufficient time to adjust their accounting systems these amendments will, in terms of *subclause (2),* come into operation on 1 October 1996.

CLAUSE 20

Secrecy: Amendment of section 6 of the Value-Added Tax Act, 1991

Subclause (a): The amendments proposed by this subclause extend the provision of information by the Commissioner to the Chief Executive Officer, as well as providing that the Chief Executive Officer is bound by the secrecy provisions.

Subclause (b): In terms of the secrecy provisions contained in section 6 of the principal Act, the Commissioner is prohibited from disclosing any information regarding the tax affairs of any person to any other person, except in the exercise of his powers or the performance of his duties. As a result of numerous enquiries received from intended recipients an amendment is proposed to allow the Commissioner to confirm whether or not a person is registered under the Act with regard to a supply or intended supply of goods or services. It is considered that the recipient, who ultimately bears the tax, could have an interest in such information.

CLAUSE 21

Value of supply of goods and services: Amendment of section 10 of the Value-Added Tax Act, 1991

Subclause (1)(a): In terms of section 10(4), when a supply is made by a vendor, who is a connected person in relation to the recipient, for no consideration or for a consideration in money which is less than the open market value and the recipient would not be entitled to a full input tax deduction had he paid a consideration equal to the open market value, the consideration in money for the supply is deemed to be the open market value.

The substitution of the word "vendor" for the word "person" is aimed at ensuring that the valuation rule contained in section 10(4) is applicable not only to vendors who are already registered under the Act, but to any person making a supply of goods or services in the circumstances envisaged in section 10(4).

The effect of the amendment is that the supplier would be required to register as a vendor if the open market value of supplies exceeds the registration threshold of R150 000, irrespective of the amount of consideration actually received, unless the provisions of the proviso to section 23(1) apply.

Subclause (1)(b): A valuation rule is introduced by this subsection whereby the consideration for the service of the management of a superannuation scheme by a life insurer, which service will be taxable as from 1 October 1996 as contemplated in section 2(1)(i), shall be deemed to be the greater of the cost of making such supply or any consideration for such supply. This rule will apply even where an all-inclusive premium for the policy, which includes the service of managing the superannuation scheme, is charged, or where no consideration for such service is charged.

The provisions of this subclause will, in terms of *subclause (2),* come into operation on 1 October 1996.

CLAUSE 22

Exempt supplies: Amendment of section 12 of the Value-Added Tax Act, 1991

In terms of section 12(a) the supply of any financial services, including any other goods or services incidental to and necessary for the supply of those financial services,

is exempt from VAT. As recommended by the Tax Commission in its Third Interim Report, the supply of all fee-based financial services should be brought within the VAT net. In terms of the amendment the incidental supply of any other goods or services supplied by the supplier of the financial services will no longer be exempt from VAT.

The result of the amendment is that only the underlying financial services, as defined in section 2 of the principal Act, will be exempt from VAT in terms of this subsection and any goods or services incidental to and necessary for those financial services, for instance the supply of a cheque book by a financial institution to a client, will become subject to VAT in terms of section 7(1)(a).

This amendment should be read with the amendments discussed in the portion of the Memorandum dealing with *clauses 19 and 31* and will in terms of *subclause (2)* come into operation on 1 October 1996.

CLAUSE 23

Calculation of tax payable: Amendment of section 16 of the Value-Added Tax Act, 1991

Subclause (1)(a) amends section 16(3)(a)(i) to limit the input tax deduction in the case of fixed property supplied after 6 June 1996.

Subclause (1)(b): This amendment is of a textual nature.

Subclause (1)(c): Section 16(3)(a) has been amended by the addition of subparagraph (iiA) to provide that in the case of the taxable supply of fixed property, the input tax deduction may be claimed only to the extent of any consideration actually paid by the recipient.

Subclause (1)(d): This amendment is consequential upon the amendment introduced by *clause 25*.

Subclause (1)(e): This amendment is of a textual nature.

Subclause (1)(f): Section 16(4)(a) has also been amended by the addition of subparagraph (ii) to require a vendor who accounts for tax on the invoice basis to account for output tax on the supply of fixed property only to the extent payment of consideration for that supply has been received by him.

Subclause (1)(g): This amendment is of a textual nature.

These amendments are necessary in view of the fact that fixed property is often acquired with only a small deposit being paid and the remainder of the purchase price being paid over an extended period. In the absence of this amendment, suppliers of fixed property can experience severe cash flow problems. The amendments are also aimed at preventing abuses.

The amendments introduced by *subclause (1)(a), (c) and (f)* shall be deemed to have come into operation on 6 June 1996.

CLAUSE 24

Adjustments in consequence of acquisition of going concern wholly or partly for purposes other than making taxable supplies: Amendment of section 18A of the Value-Added Tax Act, 1991

Section 18A, by means of a deemed supply, provides for a liability for tax in certain circumstances where a vendor has acquired an enterprise or part thereof *as a going concern* wholly or partly for purposes other than the making of taxable supplies.

The value of the deemed supply in such a case is the *full cost* to the vendor of acquiring the enterprise, part, goods or services, reduced by an amount which bears to the amount of such full cost the same ratio as the intended use or application thereof in

the course of making taxable supplies bears to the total intended use or application.

If such enterprise, part, goods or services were acquired from a *connected person* for no consideration or for a consideration which is less than the open market value thereof, the cost thereof is either nil or the amount paid by the recipient. The adjustment to be made in terms of section 18A would, therefore, be less than it would be in normal circumstances.

In terms of section 16(3)(h) of the principal Act, a vendor is entitled to claim an input tax deduction in respect of the portion of the goods or services which was previously used for non-taxable purposes, when he on-supplies such goods or services. This prevents double taxation to the extent that he also has to account for output VAT in respect of a portion of the goods or services in respect of which he has not yet been entitled to claim input tax (section 8(16)). In order to ensure that the vendor can claim an input tax deduction in respect of such VAT, which has previously been accounted for by him, the proviso to subparagraph (i)(aa) of the paragraph defining the meaning of the symbol "B" in section 16(3)(h) provides that the cost of such goods or services is deemed to include the open market value of the original supply to him, as determined in accordance with section 10(4), to the extent that it exceeds any consideration in money paid for the supply. (Similar provisos are contained in subparagraph (i)(aa) of the paragraphs defining the meaning of the symbol "B" in sections 18(4) and 18(5) of the principal Act.)

In order to ensure that a vendor, who acquired an enterprise as a going concern from a connected person, does not get an undue tax benefit by claiming an input tax deduction under the provisions of section 16(3)(h) of the principal Act, based on the *higher of cost or open market value* of the supply, while he has previously accounted for VAT under section 18A only on the *cost* to him of the supply, which cost may be nil or the amount paid by him, section 18A is amended by this subclause.

Paragraph (b) of the proviso added to section 18A now deems the cost of the deemed supply to be the open market value if the supply was between connected persons and is for either no consideration or for a consideration less than the open market value of the supply.

CLAUSE 25

Irrecoverable debts: Amendment of section 22 of the Value-Added Tax Act, 1991

A vendor who accounts for VAT on the invoice basis and writes off a bad debt (or part thereof), is, in terms of the provisions of section 22 entitled to an input tax deduction equal to the tax fraction (at the prescribed rate as applicable at the time the original supply was made) of the irrecoverable amount that he has written off as a bad debt. No credit note will be issued.

As the law stands, the recipient of the supply (whose debt has been written off and who also accounts for VAT on the invoice basis) is not required to make any adjustments, even though he had made an input tax deduction in respect of the relevant supply to him.

Apart from the fact that the fisc is prejudiced by this in normal circumstances, it also leaves opportunity for deliberate manipulation by merely creating bad debts with a view to obtaining a tax benefit.

The amendment introduced by the addition of subsections (3), (4) and (5) to section 22 is aimed at rectifying the position. The recipient of a supply of goods or services who has claimed an input tax deduction in relation thereto and who has not yet paid the full consideration charged in respect thereof after a period of thirty six months has lapsed is now liable to account for output tax equal to the tax fraction (14/114) of the amount still outstanding. The period of thirty six months begins at the end of the tax period during which the input tax deduction was claimed and the supply is deemed to take place during the tax period that follows upon the period of thirty six months. The

vendor must therefore declare the VAT as an adjustment in his VAT return.

It should be noted that the amendment makes provision for the period of thirty six months to be postponed if the supply took place under a written agreement which provides for the consideration to be paid at a later stage. In that case the period will be reckoned from the end of the month during which the consideration is payable in terms of the contract.

Where the recipient does in fact pay the debt at a later stage, he may, in terms of section 16(3)(a)(v) of the Act, make a deduction equal to the tax fraction of the amount so paid.

CLAUSE 26

Appeals to special court: Amendment of section 33 of the Value-Added Tax Act, 1991

This amendment is necessary to bring the Afrikaans text in line with the English text.

CLAUSE 27

Refunds: Amendment of section 44 of the Value-Added Tax Act, 1991

This amendment is necessary to bring a refund under the Export Incentive Scheme (eg to foreign tourists) within the ambit of the refund provisions of section 44 of the principal Act. The effective date is deemed to be 30 September 1991.

CLAUSE 28

Recovery of tax from recipient: Amendment of section 61 of the Value-Added Tax Act, 1991

Section 61 allows the Commissioner to raise an assessment upon the recipient of a supply if the supplying vendor has incorrectly zero-rated or exempted that supply as a result of a fraudulent action or misrepresentation on the part of the recipient. Subsection (1A) is amended to bring this section in line with section 31(3) by allowing the Commissioner to estimate the amount upon which the tax is payable.

CLAUSE 29

Reporting of unprofessional conduct: Amendment of section 63 of the Value-Added Tax Act, 1991

This amendment is necessary to put it beyond doubt that the Commissioner may also lodge a complaint with the controlling body (as defined in subsection (1) of this section) which has been established in respect of a person who carries on a profession, calling or occupation in those cases where the person has enabled or assisted a client to obtain a VAT refund to which the client was not entitled.

CLAUSE 30

Contract price or consideration may be varied according to rate of value-added tax: Amendment of section 67 of the Value-Added Tax Act, 1991

Section 67 of the principal Act, in subsection (1), provides that any increase in the tax rate may be recovered by the supplying vendor from the recipient and in terms of subsection (2) where the tax rate is decreased the vendor shall reduce the amount payable to him by the recipient. These provisions apply "*notwithstanding anything to*

the contrary in any agreement or law".

The abovementioned quotation in this section places a restriction on the freedom of the parties to contract. For example, two parties may specifically want to make an agreement that any increase in the tax rate is to be borne by the supplier of the goods or services, but such agreement would have no effect as section 67 allows the supplier to decide, on his own, whether he will abide by it.

The amendment introduced by this clause removes the restriction and the section now instead provides that "*unless agreed to the contrary in any agreement in writing*" the supplying vendor may recover from the recipient any additional tax as a result of an increase in the tax rate or shall reduce the amount payable to him by the recipient in the event of a decrease in the tax rate.

CLAUSE 31

Application of increased or reduced tax rate: Amendment of section 67A of the Value-Added Tax Act, 1991

Subclauses (a) and (b): Section 67A of the principal Act regulates the transitional rules in the event of an increase or a reduction in the tax rate. The amendments to this section are aimed at ensuring that these provisions will apply *mutatis mutandis* where value-added tax is *imposed or withdrawn* in respect of the supply of goods or services. The amendments were necessary to provide for transitional measures with regard to financial services which will become subject to VAT with effect from 1 October 1996, but will, of course, also apply in the event of changes to the taxable status of any other supplies. The effect of the amendments is that financial services performed before 1 October 1996 which were previously not subject to VAT will not become subject to VAT merely because an invoice is issued or payment is made after that date.

CLAUSE 32

Exemption from tax on the importation of goods: Amendment of Schedule 1 to the Value-Added Tax Act, 1991

Subclauses (a) to (g): These amendments are consequential upon amendments to the Customs and Excise Act.

CLAUSE 33

Amendment of Value-Added Tax Act, 1991

This amendment is of a textual nature.

CLAUSE 34

Special provisions in relation to unbundling transactions: Amendment of section 60 of Income Tax Act, 1993

The unbundling provisions require at present *inter alia* that shares qualify as "distributable shares" only where there was an existing situation on 19 June 1995 and the unbundling company has met the qualifying percentages as prescribed in terms of the definition of "distributable shares". In terms of the proposed amendments the date on which the existing situation has to be in existence, may be fixed from time to time by the Minister of Finance by notice in the *Gazette*.

CLAUSE 35

Exemption from stamp duty or transfer duty relating to transfer of marketable securities or property or of rights or obligations under bonds under a scheme for the rationalisation of a group of companies and the assessment of companies in such a group for income tax purposes in certain circumstances: Amendment of section 39 of Taxation Laws Amendment Act, 1994

Section 39 of the Taxation Laws Amendment Act, 1994, was introduced to soften the tax impact on rationalisation schemes of groups of companies which are effected for commercial reasons. Limited exemption from transfer duty and stamp duty is granted and in addition the income tax effects of such rationalisations are regulated.

The amendments proposed in terms of this clause provide that the date (at present 19 June 1995) on which an existing situation has to be in existence (namely the date on which a controlling company has to hold the required percentage equity shares in its controlled companies), may be fixed from time to time by the Minister of Finance by notice in the *Gazette*.

CLAUSE 36

Sales tax, penalty or interest not recoverable in respect of certain goods imported into the former Republic of Transkei

The Government of the former Republic of Transkei, with a view to inducing industrialists to relocate to Transkei, gave written undertakings to a number of industrialists in that country that the Transkei Sales Tax Act would be amended to provide for an exemption from sales tax in respect of manufacturing machinery or plant imported into that former state. By virtue of an omission, the Act was, however, not amended in accordance with the undertaking and the enterprises concerned are, in the absence of such legislation, liable for sales tax in this respect. The proposed substantive provision is designed to provide the necessary exemption to honour the aforesaid undertaking.

CLAUSE 37

Short title

The short title of the amending Act is the Taxation Laws Amendment Act, 1996.