REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

REVENUE LAWS AMENDMENT BILL, 1999

[W.P. —'99]

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INTRODUCTION

The Revenue Laws Amendment Bill, 1999, introduces amendments to the Marketable Securities Tax Act, 1948, the Transfer Duty Act, 1949, the Estate Duty Act, 1955, the Income Tax Act, 1962, the Customs and Excise Act, 1964, the Stamp Duties Act, 1968, the Value-Added Tax Act, 1991, the Income Tax Act, 1993, the Taxation Laws Amendment Act, 1994, the Uncertificated Securities Tax Act, 1998, and the Skills Development Levies Act, 1999.

BUY-BACK OF SHARES IN A COMPANY

The Companies Amendment Act, 1999 (Act No. 37 of 1999), was promulgated on 30 April 1999, and amends the Companies Act, 1973 (Act No. 61 of 1973), to, *inter alia*,—

- provide for the acquisition by a company of its own shares;
- provide for the acquisition by a subsidiary of shares in its holding company; and
- generally regulate payments by a company to its shareholders.

These amendments to the Companies Act, 1973, came into operation on 30 June 1999.

In terms of these new provisions a company will be able to buy back its own shares which was not allowed under the previous provisions of that Act. The company acquiring its own shares, will, however, not transfer such shares into its own name, but the shares so acquired must be cancelled as issued shares and restored to the status of authorised shares.

In order to address the tax consequences resulting from these amendments, it is proposed that a number of changes be introduced to the relevant revenue Acts.

Secondary Tax on Companies (STC)

The acquisition by a company of its own shares in terms of the new section 85 of the Companies Act, 1973, will result in the cancellation of the shares and a reduction of the company's reserves (distributable or non-distributable). This will, therefore, have an impact on the amount of reserves available for distribution by the company and, consequently, the collection of STC.

The view is, however, held that a buy-back of shares will give rise to a dividend where the profits available for distribution, as determined for purposes of the definition of "dividend" in the Income Tax Act, are reduced as a result of the buy-back of the shares. The company will, therefore, be liable for STC to the extent that the purchase price of the shares constitutes a dividend. Furthermore, a shareholder company from which the shares are so acquired, will be entitled to a credit for STC purposes in respect of the portion of the selling price of the shares which constitutes a dividend, if it complies with the other provisions relating to STC in the Income Tax Act.

However, in order to place this beyond any doubt, it is proposed that the definition of "dividend" in section 1 of the Income Tax Act be amended to specifically provide that where a company acquires its own shares in this manner, so much of the consideration paid to the shareholder, which represents profits available for distribution, shall be a dividend and STC will, therefore, be payable on such amount. STC will also be payable where the share premium account is reduced, but limited to profits deemed to be available for distribution in terms of the definition of "dividend". Where the seller of the shares is a company, such company will also effectively receive a dividend which may be claimed as a credit for STC purposes.

Income Tax

The view is held that where a person holds shares as trading stock and such shares are sold to the issuer company in terms of a buy-back transaction, the full consideration for the disposal of the shares should be included in the income of the trader for normal tax purposes. In order to give effect to this, it is proposed that section 10(1)*(k)* of the Income Tax Act be amended to provide that the portion of the consideration received by the trader which constitutes a dividend shall not be exempt from normal tax. The same principle will also apply in respect of other forms of capital reduction. The provisions of section 9B will, however, remain applicable where all the requirements of that section have been complied with.

Stamp Duty, Marketable Securities Tax and Uncertificated Securities Tax

As far as stamp duty, marketable securities tax and uncertificated securities tax are concerned, the view is held that where a company buys back its own shares and there is no intention to avoid the payment of stamp duty in terms of a scheme as contemplated in section 23(10) of the Stamp Duties Act, 1968, the transaction should not be subject to such duties or tax. It is, however, proposed that the provisions of section 23(10) of the Stamp Duties Act, be extended to ensure that stamp duty will be imposed where a buy-back of shares forms part of a scheme as contemplated in that section.

As the amendments to the Companies Act, 1973, took effect on 30 June 1999, it is, therefore, proposed that the amendments referred to above, should also come into operation on that date.

TAXATION OF LONG-TERM INSURERS

Prior to 1993, a long-term insurer's taxable income was determined in accordance with a formula. In essence, it represented the gross amount of investment income less 55 per cent of expenses. Certain fees for managerial or secretarial services were also included. Investment income included interest, rental income from the letting of property and one-third of dividends received. In 1993, a new section 29 was inserted in the Income Tax Act, 1962, which introduced a new method of taxation of life insurers and their policyholders. This approach is, in ordinary terms, referred to as the four-fund approach and was introduced following the recommendations of the Jacobs Committee. The approach is based on the trustee principle and the recognition that insurers hold and administer certain of their assets on behalf of various categories of policyholders while the balance of their assets represents shareholders' equity. The effect thereof is that the taxable income generated by assets administered in the policyholder funds is taxed in the hands of the insurer and not in the hands of the millions of policyholders.

The application of the four-fund approach requires that insurers allocate their assets and liabilities to separate funds representative of the various policyholder or corporate interests and that each fund be taxed as a separate entity in accordance with the applicable taxation principles. The four funds consist of a corporate fund and three policyholder funds. Each of the above policyholder funds is permitted to hold only assets having a market value equal to the insurer's liabilities to policyholders. The balance of the insurer's assets (excluding certain residual surpluses) are to be transferred to the corporate fund.

For purposes of the calculation of the taxable income of the different funds, the normal provisions (subject to certain exceptions) of the Income Tax Act, 1962, apply. However, the following are some of the exceptions provided for in terms of section 29, more specifically—

- selling expenses are averaged over a period of five years;
- premiums and claims, as well as reinsurance premiums and claims, are excluded from the tax computation;

- certain transfers from one fund to another are taken into account in the determination of the taxable income of the relevant funds, while certain special transfers are disregarded for tax purposes.

It, however, became apparent after the phasing-in period of the four-fund approach that the amount of tax payable by the long-term insurance industry was decreasing, despite the fact that substantial profits were reflected in the annual financial statements of the insurers. The method of the taxation of long-term insurers has, therefore, been investigated. Certain deficiencies in the current method of calculation of tax were identified, which appear to be the reason for the relatively small amount of tax collected from the industry.

Some of the deficiencies causing the low tax yield from the industry can be ascribed to the following:

- In terms of section 29, the insurer's expenditure is required to be allocated to the fund in which the business, to which the expenditure exclusively relates, is conducted. Where the expenditure does not so exclusively relate to business in any one fund, the expenditure is allocated to the different funds in the proportion that business is conducted in the respective funds. The bulk of these expenses are allowed as a deduction against the investment income of policyholder funds. As the base of the taxable income which mainly consists of investment income in each respective policyholder fund is relatively small compared to the amount of the deductible expenses, especially the selling expenses, the taxable income in the policyholder funds is drastically reduced.
- Furthermore, an insurer charges administrative and management fees in respect of the income or assets of the policyholders. These charges are at present not taxed appropriately as transfers from one fund to another. Although taxable in the transferee fund, these charges are fully deductible in the transferor fund.
- The current system of transfers provides for opportunities to defer taxation.

To address the deficiencies in the current provisions, without doing away with the trustee principle underlying the four-fund approach, it is proposed that a new section 29A be inserted in the Act. The effectiveness of the proposed measures will, however, once implemented be monitored closely and, if necessary, adjusted appropriately. Such adjustments may also include a re-evaluation of the appropriateness of the four-fund approach and the trustee principle. The following are the main characteristics of the proposed measures:

Policyholder funds:

All investment income derived in a policyholder fund will remain taxable in that fund. The expenses to be allowed against such income will be limited to the expenses which directly relate to such investment income, and all other expenses allocated to the respective funds not directly attributable to the investment income, i.e. selling and administration expenses (excluding expenses linked to non-taxable income). Such other expenses will be apportioned in accordance with a formula. The underlying principle of apportionment is to exclude that portion of the expenses attributable to non-taxable income, such as dividend income and capital gains. An appropriate method of apportioning these expenses would have been an asset-based approach. It does, however, appear that such a basis is susceptible to manipulation. For that reason an income-based formula is proposed on a basis that would more or less produce the same result as an asset-based approach. Such formula will be closely monitored to ensure that it produces the appropriate apportionment ratio.

Transfers:

The principle underlying the proposed method of determining the taxable income of the different funds, is that the shareholder profit element in respect of business conducted in the respective policyholder funds should be taxed in the corporate fund. At the end of each tax year, a re-determination of the value of the liabilities of the policyholder funds must, therefore, be made. Assets with a market value equal to the liabilities must be placed or retained in the fund and any surplus must be transferred to the corporate fund, effectively being the profit derived by the insurer in that fund. This corresponds with the current provisions of section 29, but although the total transfer to the corporate fund will remain taxable, the deduction in respect of the transfer in the respective policyholder funds from which the transfer is to be made, will be restricted. The deductible portion of the transfer will be calculated by applying the ratio (used to determine the allowable selling and administration expenses in respect of policies in the relevant policyholder fund), to 50 per cent of the transfer. It is, furthermore, proposed that the deductible portion of the transfer may not result in an assessed loss in the relevant policyholder fund. No deduction will of course be allowed in the untaxed policyholder fund. This deduction will also be monitored on a regular basis to determine whether it appropriately compensates for any possibility of double taxation. Transfers to the policyholder funds will, however, not be taxable in such funds. Transfers from the corporate fund will also not be deductible in the corporate fund, but any subsequent return of such transfer to the corporate fund will not be taxable in the corporate fund.

Corporate fund

This fund represents the interests of the shareholders of an insurer and the taxable income of this fund will consist of—

- transfers from the policyholder funds; and
- other income such as for example investment income.

The expenses allocated to this fund in terms of the proposed section will be allowed as a deduction against the income of this fund and such deduction must be determined in terms of normal tax principles.

Valuation basis

It is proposed that the existing valuation basis be changed from the prescribed valuation basis to the financial soundness valuation method. This method is generally used for financial reporting purposes and is also the method which is recommended by the Financial Services Board. The Chief Actuary of the Board may, in consultation with the Commissioner, prescribe certain amendments to this method for determining the value of liabilities for tax purposes.

Transitional arrangements

The new provisions will apply in respect of the first year of assessment commencing on or after 1 January 2000. As far as transitional arrangements are concerned, it is proposed that the transfers in terms of the existing provisions of section 29, which relate to the last year of assessment before the new provisions apply, be deemed to be made for the purposes of the calculation of the tax liability on the last day of such last year of assessment.

Furthermore, an insurer must, within 6 months of the commencement of the first year of assessment of the new tax regime, calculate the difference between the market value of all assets in each policyholder fund and the liabilities of such fund in terms of the new valuation method. This calculation must be done as at the first day of such year of assessment and after taking into account the last transfer adjustment in terms of section 29.

Where the market value of the assets in a policyholder fund—

- exceeds the liabilities in the fund, the excess must be transferred to the corporate fund;
- is less than the liabilities in the fund, the shortfall must be made up by transferring assets from the corporate fund to the relevant policyholder fund.

The abovementioned excess transferred from the policyholder fund to the corporate fund must be included in the income of the corporate fund. Such transfer shall, however, firstly, be reduced by the balance of any assessed loss carried forward. Any portion of the transfer remaining after the set-off of such assessed loss may be utilised to redeem—

- the balance of any special transfers contemplated in section 29(10)*(b)* and (11); and
- any unutilised selling expenses carried forward from the previous tax regime. The deduction of such selling expenses will, however, be restricted to an amount equal to the percentage (used to determine the allowable portion of the selling and administration expenses in terms of the proposed section 29A in respect of the first year which such section applies) of such unutilised selling expenses.

Any balance of the special transfers and unutilised selling expenses not deducted against the transfer, will be forfeited by the insurer.

The abovementioned shortfall transferred from the corporate fund to the relevant policyholder fund, shall be dealt with as a transfer as contemplated in subsection (7)*(b)*.

Consequential amendments

Various consequential amendments are also effected following the introduction of the new Long-term Insurance Act, 1998.

CLAUSE 1

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

These amendments are of a textual nature.

CLAUSE 2

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

Subclause (a): See notes on BUY-BACK OF SHARES IN A COMPANY.

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

CLAUSE 3

Marketable Securities Tax: Amendment of section 6 of the Marketable Securities Tax Act, 1948

Section 5A was inserted in the Marketable Securities Tax Act, 1948, in 1998 to make provision for the payment of interest on overdue payments of tax. Section 6(2) of the Act currently provides that where any amount of tax and penalty is payable by a taxpayer and any payment made by such taxpayer is less than the total amount due by him in respect of such tax and penalty, the payment shall for the purposes of this Act be deemed to be made firstly, in respect of the penalty and so much of the amount paid as exceeds the penalty is deemed to be made in respect of the outstanding amount of tax.

Section 6 is, therefore, amended to provide that such payment will first be set off against the penalty, thereafter against any interest due and only so much of any payment as exceeds the amount of penalty and interest, will be set off against the amount of outstanding tax.

CLAUSE 4

Marketable Securities Tax: Amendment of section 10 of the Marketable Securities Tax Act, 1948

The Adjustments of Fines Act, 1991 (Act No. 101 of 1991) makes provision that if any law provides that on conviction of an offence a person may be sentenced to undergo a prescribed maximum period of imprisonment or, in the alternative, to pay a fine and the maximum amount of the fine is not prescribed, the maximum fine which may be imposed must be determined at a ratio as set out in that Act, by taking into account the maximum period of imprisonment prescribed by such law.

Currently, the maximum amount of the fine is determined at a ratio equivalent to R60 000 where the maximum period of imprisonment prescribed is 3 years and R300 000 where the period of imprisonment prescribed is 15 years.

It is proposed that section 10 be amended to delete the amount of the maximum fine contained in that section, which will have the effect that the provisions of the Adjustments of Fines Act, 1991, will apply. It is also proposed that the maximum period of imprisonment be increased to 2 years. The effect thereof will be that the maximum monetary penalty will be equal to R40 000.

CLAUSE 5

Marketable Securities Tax: Substitution of the long title of the Marketable Securities Tax Act, 1948

This amendment is of a textual nature.

CLAUSE 6

Transfer Duty: Amendment of section 8 of the Transfer Duty Act, 1949

This amendment is of a textual nature.

CLAUSE 7

Estate Duty: Amendment of section 1 of the Estate Duty Act, 1955

The amendment is of a textual nature.

CLAUSE 8

Estate Duty: Amendment of section 5 of the Estate Duty Act, 1955

The amendment is of a textual nature.

CLAUSE 9

Estate Duty: Amendment of section 24 of the Estate Duty Act, 1955

The amendment deletes the reference to an obsolete provision.

CLAUSE 10

Income Tax: Amendment of section 1 of the Income Tax Act, 1962

Subclause (1)(a): These amendments are of a textual nature.

Subclauses (1)(b) and (h): See notes on BUY-BACK OF SHARES IN A COMPANY

Subclauses (c) to (g): The amendments delete the reference to certain obsolete provisions.

Subclause (1)(i): Paragraph *(e*A*)* was inserted in the definition of "gross income" in section 1 of the Income Tax Act, 1962, to provide, *inter alia*, for the inclusion in the gross income of any member of a fund of two-thirds of an amount in a public sector pension fund which is converted to another fund which allows such member or the dependants or nominees of a deceased member to receive lump sum payments exceeding one-third of the total capitalised value of all the benefits of such member.

In terms of section 7 of the Divorce Act, 1979 (Act No. 70 of 1979), the pension interest of any one of the parties to a divorce action is deemed to be part of such party's assets. Section 7(8) of that Act provides that the court granting a decree of divorce may make an order that any part of the pension interest of the member is due or assigned to the other party and shall be paid by the fund to the other party when the pension benefits accrue to the member. In this regard an endorsement must be made in the records of the fund to give effect to this.

The Court has now ruled that, having regard to the provisions of the Divorce Act, the portion of the pension interest awarded to the former spouse of a member accrues to the former spouse and the member is consequently not taxable thereon.

It is, therefore, proposed that paragraph *(e*A*)* be amended to provide that where any fund is converted as contemplated in subparagraph (ii) of that paragraph and such an endorsement has been made in the records of the fund, the portion of the benefit which shall be payable to the former spouse of the member shall be deemed to be converted for the benefit or ultimate benefit of the member.

It is also proposed that item *(bb)* be amended to provide that the amount converted shall be deemed to have been received by or accrued to such member or the dependants or nominees of the deceased member.

Subclause (1)(j) and (k): These amendments are of a textual nature.

CLAUSE 11

Income Tax: Amendment of section 4 of the Income Tax Act, 1962

These amendments are of a textual nature.

CLAUSE 12

Income Tax: Amendment of section 6quat of the Income Tax Act, 1962

Currently the wording of section 6*quat* provides that a resident will be entitled to a rebate equal to the sum of any taxes on income paid or payable to the government of another country, in respect of *inter alia* income received by or accrued to such resident from any country other than the Republic, which has been included in the resident's taxable income in the Republic. It is proposed that this section be amended to clarify that such credit will also be available where the income in respect of services rendered outside the Republic during any temporary absence from the Republic, is actually paid to such resident from the Republic.

CLAUSE 13

Income Tax: Amendment of section 7 of the Income Tax Act, 1962

This amendment is of a textual nature.

CLAUSE 14

Income Tax: Amendment of section 8 of the Income Tax Act, 1962

The amendments proposed in paragraph *(a)* are consequential upon the promulgation of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

Currently section 8(1)*(f)* provides that where it is expected of any Minister, Deputy Minister, member of Parliament or member of the provincial legislature, to defray certain expenditure out of his or her salary, an amount equal to a portion of such salary, which shall be determined from time to time by the Minister of Finance by notice in the *Gazette*, shall be deemed to be an allowance granted to such person for the purposes of section 8(1)*(d)*.

The Remuneration of Public Office Bearers Act, 1998 (Act No. 20 of 1998), which came into operation on 23 September 1998, however, provides that section 8(1)*(d)* of the Income Tax Act, 1962, shall apply to such portion of the remuneration of the President as the National Assembly may from time to time determine by resolution. Similarly, that Act provides that the President must from time to time determine the portion of the remuneration of all other holders of a public office contemplated in section 8(1)*(e)*(i), to which section 8(1)*(d)* apply. It is, therefore, proposed that section 8(1)*(f)* be amended to bring the provisions in line with the Remuneration of Public Office Bearers Act, 1998.

CLAUSE 15

Income Tax: Amendment of section 9 of the Income Tax Act, 1962

These amendments are of a textual nature.

CLAUSE 16

Income Tax: Amendment of section 9B of the Income Tax Act, 1962

Section 9B was introduced into the Act in 1990 and provides that a person may elect not to be taxed on the proceeds of listed shares disposed of, if the shares were held for a period of at least five years (previously ten years). In such an event the proceeds are deemed to be of a capital nature.

This clause proposes an amendment to the reference in section 9B to a stock exchange as defined in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), and is consequential upon the amendment to the definition in that Act.

It is also proposed that subsection (1) be amended to clarify that any share held by a person for a period of five years before being disposed of, must have been held as a listed share for the full five year period before section 9B will apply. It has always been the practice of the Commissioner to apply section 9B in this manner and the amendment merely clarifies any uncertainty in this regard.

Lastly, the combined application of sections 24A and 9B enables a taxpayer to avoid taxation on the sale of shares held as trading stock altogether. It also creates a disparity in respect of transactions in fixed property between different taxpayers. Where a trader holds fixed property as trading stock and sells the property for cash, the gain is taxable. On the other hand, where a trader exchanges fixed property held as trading stock for shares as contemplated in section 24A, the gain on the exchange at the time of exchange may never be taxed if the shares so received are listed shares and held for a period exceeding five years. This often occurs where, for example, mining rights held as trading stock are exchanged for listed shares and the proceeds of the shares are deemed to be of a capital nature when they are realised. Section 24A, therefore, also effectively brings fixed property within the 5 year safe haven rule.

In view of the above, it is proposed that shares that were the subject of an exchange in terms of section 24A, should not qualify for the 5 year safe haven rule as provided for in section 9B.

CLAUSE 17

Income Tax: Amendment of section 9D of the Income Tax Act, 1962

Subclause (1)(a): The amendment proposed is of a textual nature to clarify that the amount of investment income attributable to the donation, settlement or other disposition referred to in section 9D(4) shall be included in the income of the resident by whom such donation, settlement or other disposition was made. This has always been the interpretation of the Commissioner and this amendment merely serves to clarify any uncertainty in this regard.

Subclause (1)(b): Section 9D(8) provides that the provisions of section 11 shall apply in respect of investment income earned by a controlled foreign entity where the investment income arises in the course of the carrying on of a trade outside the Republic. The proviso to the subsection provides that—

- any deduction shall be allowed on an apportionment basis;
- such deductions shall be limited to the investment income; and
- any excess shall be carried forward to the following year.

The present wording may, for example, create the impression that the amount of the excess carried forward from the previous year is deemed to be a deduction or allowance for purposes of section 11, which will have the effect that such excess will have to be apportioned again as provided for in subsection (8). An amendment to paragraph *(a)* of the proviso is, therefore, proposed to clarify that the excess which is carried forward is allowable as a deduction in terms of subsection (8) without any further apportionment during subsequent years of assessment.

Subclause (1)(c): Section 9D(9)*(a)* of the Income Tax Act, 1962, currently provides that the provisions of section 9D shall not apply where the foreign tax actually paid or payable in any country other than the Republic, relating to the proportional amount included in the income of the resident in terms of this section, is more than 85 per cent of the normal tax payable in the Republic. It is proposed that this paragraph be amended to provide that the 85 per cent will be determined by having regard only to the amount of taxes actually paid or payable which are not subject to any

right to recovery by any person, except where it is a right of recovery in terms of an entitlement to carry back losses.

CLAUSE 18

Income Tax: Amendment of section 10 of the Income Tax Act, 1962

Subclause (1)(a), (b) and (e): These amendments are consequential upon the amendment to the definition of a 'licensed stock exchange' in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

Subcluase (1)(c): Section 10(1)*(c*M*)* of the Income Tax Act, 1962, exempts from tax the receipts and accruals of any company incorporated under section 21 of the Companies Act, 1973, the sole or principal object of which is to promote or facilitate the distribution of agricultural and related commodities. Section 10(1)(cM) was inserted in the Act in 1994, to exempt non-profit companies carrying on the business of facilitating and promoting fresh produce markets, which formerly formed part of the activities conducted by local municipalities. The local municipalities were at that stage contemplating separating these activities from their other functions as local authorities by transferring these activities to non-profit making companies. It, however, appears that this provision has wider application than what was intended and it is, therefore, proposed that the paragraph *(c*M*)* be amended to apply in fact only in instances where the activities were previously carried on by a municipal council and the company is controlled by such municipal council.

The reference to local authority is also substituted to refer to a municipal council and this proposed amendment is consequential upon the promulgation of the Constitution.

Subclause (1)(d): Section 10(1)*(e)* currently provides for the exemption from tax of the receipts and accruals of any company, society or other association of persons which derives its profits and gains (other than profits and gains from investments), solely from transactions with or on behalf of its individual members. This has the effect that such entities are liable to pay income tax on their investment income. Investment income includes interest income and income from the letting of property.

A number of problems have been experienced with the application of the current provisions of section 10(1)*(e)*, which include *inter alia*—

- Associations not for gain established in terms of section 21 of the Companies Act, 1973, for the management of the common interests of the members of such an association, do not fall within the current wording of the exemption.
- Difficulties are being experienced with the assessing of bodies corporate and share block companies for income tax purposes. These difficulties include the carry forward of certain losses. Although the section provides that the levies are not taxable, the section provides for a unique situation in the sense that the entity should not, as a result of the exemption, be placed in a worse situation in comparison to if it were in a taxpaying situation. The effect thereof is that the entity is allowed to also do a tax calculation on the basis as if it were fully taxable (including its levy income) and its tax liability will, therefore, be the lesser of the two. This in essence allows the entity to claim any expenditure over and above its levy income against its investment income in a specific year. This is not acceptable as the members are, in certain cases, such as in the case of sectional title schemes, permitted to effectively, by utilising a sectional title scheme, claim private housing expenditure against investment income. This exceptional dual annual tax calculation also adds to the complexity of administering the exemption.

It is, therefore, proposed that paragraph *(e)* be substituted to specifically limit the exemption to amounts received by way of levies by bodies corporate, share block companies and other associations of persons formed solely for purposes of managing the collective interests common to

all its members including the collection of levies and administration of the expenditure in respect of the common property.

The reason why the levies are exempted from income tax is that the levy is collected in order to pay certain expenditure on behalf of the members of the body corporate, share block or other association of persons. This expenditure arises from the management of the collective interests of the members. Were it not for the body corporate, share block or other association, each member would have been responsible in his or her own right to pay such expenditure.

Subclause (1)(f) and (g): See notes on BUY-BACK OF SHARES IN A COMPANY.

Subclause (1)(h): Section 9(1)*(f)* of the Income Tax Act, 1962, provides that any amount received by or accrued to any person who is ordinarily resident in the Republic, by virtue of services rendered or work or labour done by that person as an officer or member of the crew of any South African ship, is deemed to have accrued to that person from a source in the Republic. Section 10(1)*(o)*, on the other hand, provides for an exemption from tax of any remuneration derived by any person as an officer or crew member of such a ship engaged in the international transportation for reward of passengers or goods, if such person was outside the Republic for a period or periods exceeding 183 days during the year of assessment.

Section 10(1)*(o)* was inserted in the Act in 1993, to bring the provisions of the Act in line with that of many other major maritime nations, which exempt their seamen from income tax if they are absent from their home countries for a period exceeding 183 days in the tax year. The deeming provisions contained in section 9(1)*(f)* only apply to persons who are ordinarily resident in South Africa. Foreigners working on a South African ship are, therefore, exempt from South African tax while residents employed on any South African ship were, prior to the introduction of the exemption, subject to South African tax regardless of the period of time spent outside the Republic. Furthermore, South African residents employed on foreign ships are also not subject to South African income tax. The amendment introducing the exemption, therefore, removed the competitive disadvantage that was at that stage experienced by the South African ship operators in attracting South African crew members. The exemption was granted to South African officers and crew of South African ships engaged in international transportation for reward of passengers or goods, if they are outside the Republic for a period exceeding 183 days during any year of assessment.

It, however, appears that similar problems are being experienced as far as the recruitment of crew members by marine mining companies is concerned. The vessels operated by these companies are involved in mining at sea and these vessels are often outside the territorial waters for periods exceeding 183 days in a year. The crew members who are responsible for the passage of the ship, are in a disadvantageous position compared to crew members who do exactly the same work on a ship engaged in the transportation of passengers or goods.

It is, therefore, proposed that section 10(1)*(o)* be amended to also provide for the exemption of the income of officers and crew members on marine mining vessels, where such officers and crew members are outside the Republic for more than 183 days in a year. This will, however, only apply in respect of officers and crew members employed on a ship solely for purposes of the passage of such ship and will, therefore, not include any crew members involved in the prospecting or mining activities of the ship.

Subclause (1)(i): This proposed amendment withdraws the exemption of the South African Housing Trust Limited and will come into operation on a date to be fixed by the President by proclamation in the *Gazette*.

CLAUSE 19

Income Tax: Amendment of section 10A of the Income Tax Act, 1962

Subclauses (a), (b) and (d): Section 10A of the Income Tax Act, 1962, provides for the exemption of the capital element of purchased annuities. This exemption, however, only applies where the annuity amount is payable to the purchaser who is a natural person (including such person's deceased or insolvent estate) or such person's spouse.

Where upon application to the High Court, a person has been declared of unsound mind and incapable of managing his/her own affairs and a *curator bonis* is appointed to such person or his/her property, the exemption will still apply as the annuity amount is still payable to a natural person. Where, however, the Court makes an order that a trust be created for such person and that the *curator bonis* is appointed as the trustee, the amount will no longer be payable to a natural person, even though it is paid for his or her benefit and the provisions of section 10A will, therefore, not apply.

It is, therefore, proposed that section 10A be amended to provide that the exemption of the capital element shall also apply in these circumstances.

Subclauses (c) and (e): This amendment is consequential upon the promulgation of the Long-Term Insurance Act, 1998 (Act No. 52 of 1998).

CLAUSE 20

Income Tax: Amendment of section 11 of the Income Tax Act, 1962

Subclause (a) and (b): These amendments are of a textual nature.

Subclause (c) to (e): The number of taxpayers selling assets of which a substantial proportion relates to trademarks, has increased dramatically over the past few years. An important reason for this is that the disposal of intellectual property is generally regarded as being of a capital nature, while the acquisition of such property, on the other hand, qualifies for favourable annual allowances for tax purposes. The current legislation—

- creates a mismatch between the deduction and taxation of consideration in respect of intellectual property; and
- requires the devotion of inordinate amounts of time and resources to the review of such transactions and the determination of the probable duration of use.

What, therefore, often happens where a business is sold as a going concern, is that a favourable tax allocation is made between the value of the goodwill and the value of the trade mark included in such transaction, depending on the tax position of the parties to the agreement of sale. In terms of the existing provisions the Commissioner has a discretion as far as the period over which intellectual property may be written off for tax purposes is concerned, but does not have an explicit discretion relating to the value of the intellectual property. The increasing frequency of these transactions in recent years and the steady rise in the rand value thereof is posing a threat to the tax base. In only five recent transactions of this nature, the costs allocated to trade marks exceeded R2 billion and it has, therefore, become necessary to address the situation.

As far as trade marks are concerned, it is proposed that no allowance be granted in respect of any expenditure incurred by such taxpayer on or after the date of Tabling of this Bill, which relates to the acquisition of any trade mark or other property of a similar nature.

It is, furthermore, proposed that the discretion as far as the period over which the expenditure shall be allowed be removed and that the write-off period for intellectual property be brought more in line with the legislation regulating such property. In terms of the Patents Act, 1978, the duration of the registration of a patent is 20 years. In terms of the Designs Act, 1993, the duration of the registration of an aesthetic design is 15 years and a functional design 10 years. In terms of the Copyright Act, 1978, the term of copyright is 50 years. It is, therefore, proposed to fix the duration

periods of patents, inventions, copyright, knowledge and similar property at 20 years and any design, or any other property of a similar nature at 10 years. These proposals are in line with the methods employed in some foreign tax jurisdictions to deal with similar situations. The proposed measures also remove the Commissioner's discretion to allow shorter write-off periods. This will enhance certainty and simplify the application and administration of the provisions.

Subclauses (f) and (g): Section 11*(n)* provides for the deduction of the total current contributions to any retirement annuity fund during the year by a person as a member of such fund. The amount of the deduction may however, not exceed the greatest of—

(A) 15 per cent of the amount equal to the amount remaining after deducting from the income derived by the taxpayer the deductions admissible against such income under the Act; or

(B) the amount by which the amount of R3 500 exceeds the amount of any deduction under section 11*(k)*(i), i.e. contributions to a pension fund; or

(C) R1 750.

It has been submitted that the existing wording of section 11*(n)(aa)*(A) does not permit the set-off of any losses in determining the amount to which the 15 per cent must be applied.

It is, therefore, proposed that section 11*(n)* be amended to specifically provide that the set-off of losses must also be taken into account when determining the amount under (A) above. It has always been the practice of the Commissioner to apply the provisions in such a manner and the amendment merely clarifies any uncertainty in this regard.

CLAUSE 21

Income Tax: Repeal of section 11oct of the Income Tax Act, 1962

Section 11*oct* of the Income Tax Act, 1962, provides for the deduction of expenditure incurred in respect of the cost of preparing a submission to the Department of Trade and Industry in regard to any financial aid or incentives required in respect of the establishment, expansion or carrying on in an economic development area of any industrial or commercial undertaking of the taxpayer. Section 21*ter* specifically deals with the special deduction in respect of industrial undertakings in economic development areas. The final date to apply for an allowance in respect of new industrial undertakings was 31 March 1982. The Minister of Finance may, however, still authorise the granting of a development allowance or supplementary allowance in terms of section 21*ter*. It is nevertheless proposed that sections 11*oct* and 21*ter* be repealed.

CLAUSE 22

Income Tax: Amendment of section 13 of the Income Tax Act, 1962

Section 13 provides for the deduction of an allowance equal to five per cent of the cost to the taxpayer of the erection, improvement or acquisition of a building used by such taxpayer in the process of manufacture in the course of his or her trade. Where, however, the erection of such building or improvements thereto commenced after 30 June 1996 but before 1 October 1999, and the building or improvements are brought into use on or before 31 March 2000, the allowance will be increased to ten per cent of the cost to the taxpayer of such building or improvements.

The accelerated write-off period should, however, only apply where the erection of the building, or improvements thereto, was undertaken by the taxpayer itself and not where the building was acquired by a taxpayer after 31 March 2000. Where such building is acquired by a taxpayer after that date the allowance equal to five per cent will apply. It is, therefore, proposed that section 13 be amended to specifically give effect thereto.

CLAUSE 23

Income Tax: Amendment of section 18 of the Income Tax Act, 1962

This amendment is of a textual nature.

CLAUSE 24

Income Tax: Repeal of section 21ter of the Income Tax Act, 1962

See notes on the repeal of section 11*oct* of the Income Tax Act, 1962.

CLAUSE 25

Income Tax: Amendment of section 22 of the Income Tax Act, 1962

Subclause (1)(a): See notes on BUY-BACK OF SHARES IN A COMPANY.

Subclause (1)(b): The provisions of section 22 are extended to allow for a marked to market basis for valuation of option contracts held as trading stock.

CLAUSE 26

Income Tax: Amendment of section 24I of the Income Tax Act, 1962

This clause provides for the extension of the provisions of section 24I(6) to a premium or discount in respect of a forward exchange contract. The effect thereof is to prevent the double deduction or double taxation of such a premium or discount by requiring that the inclusion in or deduction from income must be made in terms of section 24I instead of in terms of any other provision of the principal Act.

CLAUSE 27

Income Tax: Amendment of section 24J of the Income Tax Act, 1962

Currently the definition of “interest” in section 24J includes the gross amount of any amount payable by a borrower to a lender in respect of any interest-bearing arrangement, which would have constituted a “lending arrangement” as defined in section 23(1) of the Stamp Duties Act, 1968, if the term of the arrangement was less than 6 months, to which the lender would have been entitled had such lending arrangement not been entered into.

This in effect means that there is included in the definition of “interest” an amount equivalent to any interest that the lender would have received had such lending arrangement not been entered into (i.e. manufactured interest).

The definition of “lending arrangement” contained in the Stamp Duties Act, 1968, is, however, limited as it only applies to instances where the borrower—

- borrows a marketable security to effect delivery thereof under a transaction entered into by him/her to sell such security; and
- undertakes to transfer a marketable security of the same kind to the lender within 12 months.

It is proposed that a separate definition of “lending arrangement” with a wider scope be inserted in section 24J and this amendment gives effect to this proposal.

In addition to that the provisions of section 24J(9) are being extended to allow dealers to account for option contracts on a market valuation basis.

CLAUSE 28

Income Tax: Insertion of section 24L in Act 58 of 1962

This clause inserts a new section 24L in the principal Act in relation to the incurral of amounts paid or payable by the holder of an option contract for the acquisition of the option contract and the accrual of amounts received or receivable by the writer of an option contract.

In terms of normal tax principles a purchaser of an option contract who meets the requirements of the general deduction formula in section 11*(a)* of the Act may claim the amount of the premium or consideration incurred in respect of the acquisition thereof in full during the year of assessment the option contract is acquired.

This may result in unacceptable tax deferral opportunities for taxpayers who purchase option contracts shortly before the end of their year of assessment in order to claim the full premium or acquisition price as a deduction for tax purposes. The same applies to option contracts written for periods covering a number of years. In order to address this anomaly it is proposed to introduce an accrual basis in respect of the premium or purchase price of an option contract for the purchaser thereof; and in respect of the premium receivable by the writer thereof.

In addition, where a portion of the premium or purchase price is attributable to the intrinsic value of the option on the date the option is written or purchased, that portion is deemed to have been incurred for tax purposes on the date the option is exercised, terminated or disposed of.

The proposed legislation will not interfere with the general tax principles such as the source principles or the capital or revenue nature of amounts, but will only deal with the timing of the incurral or accrual of the specified amounts in respect of options contracts.

“Intrinsic value” and “option contract” are defined for purposes of the proposed section.

CLAUSE 29

Income Tax: Amendment of section 29 of Act 58 of 1962

See notes on TAXATION OF LONG-TERM INSURERS.

CLAUSE 30

Income Tax: Insertion of section 29A in Act 58 of 1962

See notes on TAXATION OF LONG-TERM INSURERS.

CLAUSE 31

Income Tax: Amendment of section 31 of the Income Tax Act, 1962

Section 31 was inserted in the Income Tax Act, 1962, to address tax avoidance schemes involving the manipulation of prices for goods and services under cross-border transactions between connected persons.

The definition of “international agreement” in subsection (1) does not currently include transactions, operations or schemes entered into between parties who are both resident (in the case of individuals) or managed or controlled (in the case of persons other than individuals) in the Republic, in respect of the supply of goods or services to or by a permanent establishment of one of the parties outside the Republic. This definition is amended to provide that the Commissioner can also apply the provisions of section 31 to transactions, operations or schemes entered into between these parties.

CLAUSE 32

Income Tax: Amendment of section 38 of the Income Tax Act, 1962

Subclause (a) and (b): These amendments are of a textual nature.

Subclause (c): Section 38 deals with the classification of companies and it is proposed that this section be amended to ensure that all insurers are recognised as public companies for purposes of the Income Tax Act, 1962.

CLAUSE 33

Income Tax: Amendment of section 62 of Act 58 of 1962

Where in terms of the provisions of section 62(2) of the Income Tax Act, 1962, it is established to the satisfaction of the Commissioner that property which is subject to a fiduciary, usufructuary or other like interest could not reasonable be expected to produce a return equal to 12 per cent of the market value of such property, the Commissioner may reduce such rate of return. These provisions are similar to the provisions contained in section 5(2) of the Estate Duty Act, 1955, which were amended in 1991. It is proposed that the provisions of section 62 be amended to bring it in line with the provisions of the Estate Duty Act, 1955, thereby authorising the Commissioner to reduce the rate of return on his own initiative.

CLAUSE 34

Income Tax: Amendment of section 63 of the Income Tax Act, 1962

These amendments are of a textual nature.

CLAUSE 35

Income Tax: Amendment of section 64B of the Income Tax Act, 1962

Subctlause (a): This amendment is of a textual nature.

Subclauses (b) and (c): These amendments are consequential upon the amendments to the change to the method of taxation of long-term insurers.

CLAUSE 36

Income Tax: Amendment of section 64C of the Income Tax Act, 1962

Section 64C deems certain amounts to be dividends declared for the purposes of the levying of secondary tax on companies. Subsection (3)*(e)* specifically includes any amount which has been adjusted or disallowed in accordance with section 31 of the Act.

Section 64C(4)*(c)*, however, provides that the deeming provisions shall not apply to so much of any amount deemed to have be distributed as exceeds the company's profits and reserves which are available for distribution. As the provisions of section 31 constitute anti-avoidance measures, it is proposed that the exclusion contained in subsection (4)*(c)* should not apply to any amount adjusted or disallowed in terms of section 31.

CLAUSE 37

Income Tax: Amendment of section 70 of the Income Tax Act, 1962

See notes on BUY-BACK OF SHARES IN A COMPANY.

CLAUSE 38

Income Tax: Amendment of section 74D of the Income Tax Act, 1962

The amendment of this section is of a textual nature.

CLAUSE 39

Income Tax: Amendment of section 75 of the Income Tax Act, 1962

Section 75(1)*(f)* of the Income Tax Act, 1962, provides that it shall be an offence if any person contemplated in that paragraph fails to retain all records for a period of four years. These records, however, only relate to documents in paper form and it is proposed that this provision be extended to also include any data created or stored in electronic form.

CLAUSE 40

Income Tax: Amendment of section 75A of the Income Tax Act, 1962

Section 75A was inserted in the Income Tax Act, 1962, during 1998 to provide that the Commissioner may publish in the *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Income Tax Act, 1962. It is proposed that this provision be amended to provide that the Commissioner may publish such particulars for general information and that such publication should not be limited to the *Gazette*.

CLAUSE 41

Income Tax: Amendment of paragraph 11 of the First Schedule to the Income Tax Act, 1962

See notes on BUY-BACK OF SHARES IN A COMPANY.

CLAUSE 42

Income Tax: Amendment of paragraph 2B of the Second Schedule to the Income Tax Act, 1962

See notes on the amendment of paragraph *(e*A*)* of the definition of “gross income” in section 1. The Second Schedule to the Income Tax Act, 1962, provides for the computation of an amount to be included in the gross income of any person in respect of lump sum benefits received by or accrued to such person from or in consequence of his membership or past membership of any pension fund, provident fund or retirement annuity fund.

It is proposed that a provision be introduced in the Act to provide that any portion of the benefit of a member in a fund which is payable to the former spouse of such member, shall be deemed to be an amount that accrues to the member on the date on which the benefit, of which such amount forms part, accrues to the member. It is also proposed that provision be made for the right of recovery from the former spouse of any amount of tax paid due to the inclusion in the income of such member of any amount which is payable to such spouse to whom or in whose favour an endorsement has been made.

CLAUSE 43

Income Tax: Insertion of paragraph 12 in Fourth Schedule to the Income Tax Act, 1962

Section 78 of the Income Tax Act, 1962, provides that where any person makes default in furnishing any return or information or the Commissioner is not satisfied with the return or information furnished by any person, the Commissioner may estimate either in whole or in part the taxable income in relation to which the return or information is required.

The provisions of the Fourth Schedule to the Income Tax Act, 1962, do not contain any similar provisions in terms of which the Commissioner may estimate the amount of employees’ tax which is required to be deducted or withheld and paid over to the Commissioner. It is, therefore, proposed that a provision be inserted to enable the Commissioner to estimate the amount of employees’ tax due by an employer where an employer failed to deduct or withhold the correct amount of employees tax or where such employer failed to pay over the employees’ tax deducted or withheld.

CLAUSE 44

Income Tax: Amendment of paragraph 30 of Fourth Schedule to the Income Tax Act, 1962

The Adjustments of Fines Act, 1991 (Act No. 101 of 1991) makes provision that if any law provides that on conviction of an offence a person may be sentenced to undergo a prescribed maximum period of imprisonment or, in the alternative, to pay a fine and the maximum amount of the fine is not prescribed, the maximum fine which may be imposed must be determined at a ratio as set out in that Act, by taking into account the maximum period of imprisonment prescribed by such law.

Currently, the maximum amount of the fine is determined at a ratio equivalent to R60 000 where the maximum period of imprisonment prescribed is 3 years and R300 000 where the period of imprisonment prescribed is 15 years.

It is proposed that paragraph 30 be amended to delete the amount of the maximum fine contained in that paragraph, which will have the effect that the provisions of the Adjustments of Fines Act, 1991, will apply. It is also proposed that the maximum period of imprisonment be increased to 12 months. The monetary penalty will, therefore, be limited to a maximum of R20 000.

CLAUSE 45

Income Tax: Amendment of paragraph 7 of Seventh Schedule to the Income Tax Act, 1962

The Afrikaans text of item *(a)* of the proviso to Paragraph 7(1) of the Seventh Schedule differs from the English text, as certain words were erroneously omitted when Income Tax Act 21 of 1995, which amended this item, was published in the Government *Gazette* of 19 July 1995. These words did, however, appear in the Income Tax Bill, 1995 (Bill No. 41 of 1995). It is, therefore, proposed that the item in the Afrikaans text be amended to re-insert the words so omitted.

CLAUSE 46

Customs and Excise: Amendment of section 1 of the Customs and Excise Act, 1964

The amendment of the definition of "this Act" in subsection (1) is consequential upon the promulgation of the Constitution of the Republic of South Africa, 1996.

The amendment of subsection (2) is in consequence of the inclusion of "container" in section 87.

CLAUSE 47

Customs and Excise: Amendment of section 4 of the Customs and Excise Act, 1964

Subsection (12A) is added to section 4 to authorise officers to verify or investigate certificates, declarations or other evidence furnished regarding the origin of goods exported to comply with the provisions of any agreement contemplated in section 46, 49 or 51. This is necessary in order to give effect to obligations contained in such agreements.

CLAUSE 48

Customs and Excise: Amendment of section 18 of the Customs and Excise Act, 1964

The addition of subsection (1A) intends to clarify that goods in transit through the Republic are included in the reference to imported goods landed in the Republic.

Specific provision only exists in subsection (1)*(c)* and subsection (11) in respect of goods in transit through the Republic from any territory in Africa. As other goods in transit through the Republic are also dealt with under section 18, it is considered necessary that specific reference should be made to such goods traffic. The proposal to amend the section was prompted by comments thereon in a recent judgment.

CLAUSE 49

Customs and Excise: Amendment of section 36 of the Customs and Excise Act, 1964

On 1 May 1998, the excise duty structure for malt beer was simplified. The previous eight bands were consolidated into a single band within which the duty payable is now based on a single rate according to the alcoholic strength by volume.

It is proposed that section 36 be amended to introduce certain control measures for the beer industry.

Subsection (1) is substituted to define “beer” for the purposes of this section. For the purposes of controlling the manufacture of beer, including the manner of determining alcoholic strength by volume, records to be kept and testing of samples, various matters will now be prescribed by rule as provided in the proposed subsection (10). The method for testing the alcoholic strength by volume of each brew is to be approved by the Commissioner (subsection (7)*(a)*(i)).

In the proposed subsection (2)*(a)* provision is made for the registration of brand names, the alcoholic strength by volume and the quantity which will be indicated on each container size.

Other new provisions of the subsection include–

- paragraph *(b)* – the requirements for registration are also applicable if the registered alcoholic strength by volume or quantity changes;
- paragraph *(c)* – if beer is subject to further fermentation after being packaged the strength to be registered and shown on the container must be the strength the beer is reasonably expected to have when consumed;
- paragraph *(d)* – this is a prohibition against the packaging of beer for home consumption if the alcoholic strength by volume exceeds the registered strength after deduction of any tolerance prescribed by rule;
- paragraph *(e)* – this provision requires the testing and recording of the alcoholic strength by volume of beer removed in bulk from a customs and excise warehouse.

The amendments to subsections (3) and (4) insert references to quantity with regard to the prohibition on the sale of beer (subsection (3)) and the deemed declaration for assessment of duty (subsection (4)).

The amendment to subsection (6)*(a)* includes a reference to a container “not intended for export as contemplated in subsection (9)” as the latter subsection requires that containers for export must contain a distinguishing mark approved by the Commissioner. Provision is now also made for the deduction of a tolerance prescribed by rule in determining whether the alcoholic strength of beer by volume in a container is higher than the registered strength.

Subsection (7) requires manufacturers to test and record the alcoholic strength by volume of each brew and keep a record of the actual total quantity of beer packaged for sale or disposal for home consumption.

Liability for additional duty may arise where the average of the test results show that the registered alcoholic strength by volume, after deduction of an average allowance prescribed by rule, is exceeded over two successive periods of three months. If the actual total quantity of beer in each container size sold or disposed of for home consumption during any period of three months exceeds the calculated total quantity, after deduction of any average allowance prescribed by rule, duty is payable on the excess quantity.

A manufacturer is not entitled to a refund if the alcoholic strength by volume or the quantity is less than the registered strength or quantity (paragraph *(d)*).

Subsection (8) relates to the taking of samples, while subsection (9) requires that beer must only be exported in containers with a distinguishing mark approved by the Commissioner and subsection (10) enables the Commissioner to make rules in respect of various control measures.

CLAUSE 50

Customs and Excise: Insertion of section 37A in the Customs and Excise Act, 1964

This section was inserted into the Customs and Excise Act in terms of the Taxation Laws Amendment Act, 1998, and contained a provision that it would come into operation on a date fixed by the President by proclamation in the *Gazette*. However, certain additional measures were

found necessary with the result that the section had to be revised and therefore did not come into operation.

The revised section and its rules were published in *Gazette* No. 20279 dated 7 July 1999 for comment to reach SARS by 27 July 1999. The new provisions contain certain textual and other amendments and additional subsections. However, as the principles of the previous section are mainly unaffected the explanatory comments are repeated for ease of reference with adaptations and amendments where necessary. In this respect the prohibition against mixing of marked goods with lubricity agents is no longer absolute in that mixing is allowed in certain instances (subsection (4)*(a)*(iii)). The section seeks to create measures to combat the illegal use of illuminating paraffin (kerosene) in mixtures which are then used as fuel in compression ignition engines.

The principal features are that:–

- kerosene will be marked and use as fuel in engines prohibited;
- distribution will be subject to certain control procedures (issuing of invoices and keeping of records); and
- officers will monitor distribution and test contents of containers and tanks of vehicles.

In the event of dealing with goods in conflict with specified prohibitions or non-compliance with the duties imposed of keeping records, liability for duty is incurred, offences will be committed and goods, containers, engines or vehicles are liable to forfeiture.

The provisions of the new section include:

- *Subclause (1)* requires that goods free of duty as defined in that subsection must be accounted for in a customs and excise warehouse.

- In terms of *subclause (2)* unmarked goods must be marked in a customs and excise warehouse and any goods to which the provisions of subsection (1) apply are subject to the provisions of the Act relating to dutiable goods stored and removed from a customs and excise warehouse (paragraphs *(a)* and *(b)*). Paragraphs *(c)*, *(d)* and *(e)* deal with other miscellaneous matters relating to marked goods.

- *Subclause (3)* requires that invoices must be issued on sale and disposal of marked goods in excess of quantities specified by rule. Such invoices must be kept, and books, accounts and documents completed and kept for such period as may be prescribed by rule.

- *Subclause (4)(a)* specifies certain prohibitions in respect of marked goods and *subclause (4)(b)* provides for liability, as the Commissioner may determine for payment of an amount not exceeding the amount of the duty applicable to any distillate fuel, petrol, lubricity agent or unmarked goods (whichever yields the greater amount of duty) on marked goods, which–
  - are in possession or under control of the person whose acts are so prohibited; or
  - were previously sold or disposed of or purchased or were in the possession or under the control of such person, unless the contrary is proved within 30 days.

  Further, if different rates of duty on such distillate fuel, petrol, agents or unmarked goods were in force during any such time, the highest rate is applicable. If any tank or container contains any marked goods mixed with distillate fuel, petrol or lubricity agent, duty is required to be calculated on the total quantity of such mixed goods as provided in *subclause (4)(b)*. Provision is, furthermore, made for payment of duty if invoices are not issued or kept, or books, accounts and documents are not produced.

- *Subclause (5)* empowers an officer to take samples, to test them, to send them to a designated person and to stop any vehicle. In terms of paragraph *(c)* the Commissioner may prescribe various matters relating to the testing of samples.

- *Subclause (6)* relates to matters where goods are dealt with contrary to the provisions of the Act according to the particulars stated in the report by the designated person.

- *Subclause (7)* provides for circumstances where marked goods become mixed with or contaminated by unmarked goods or any other goods by an act or omission which by the exercise of reasonable care could not have been avoided. Paragraph *(b)* allows blending or mixing of such goods with other goods by the persons referred to in subparagraphs (i) and (ii). Provision is also made for liability for costs and expenses incurred and charges due to the Commissioner in respect of the handling of or dealing with such goods as well as for liability if the provisions are contravened.

- *Subclause (8)* relates to the disposal of seized goods which may be disposed of in terms of section 90.

- *Subclause (9)* provides for the circumstances in which a person may acquire or sell or dispose of or use goods free of duty (aviation/jet fuel) and goods mixed with lubricity agents. Such persons must register if so required by rule. The Commissioner may register the persons concerned or cancel or refuse registration (paragraph *(c)*). Various matters may be regulated by rule (paragraph *(d)*). Paragraph *(e)* relates to the duty payable if goods referred to in paragraph *(a)*(i) (aviation kerosene) are used (with the prior permission of the Commissioner) for any other purpose. It also provides for the liability incurred if such goods are dealt with contrary to the provisions of the section and the rules.

- *Subclause (10)* provides for an indemnity.

- *Subclause (11)* provides for the application of section 44A (joint and several liability) in respect of the liability incurred by any person in terms of the proposed section.

- *Subclause (12)* contains definitions of “engine”, “invoice”, “vehicle” and “ship” for the purposes of the section.

Section 62 of the Taxation Laws Amendment Act, No. 30 of 1998, which provided for the section is repealed and the section will now come into operation when the Taxation Laws Amendment Act, 1999, is promulgated.

CLAUSE 51

Customs and Excise: Amendment of section 44 of the Customs and Excise Act, 1964

Limitation of liability for any underpayment of duty exists in sections 47(10), (11), 65(7), (7A), 69(6) and (7) and also in the proposed new subsection (12), but no general limitation of liability exists where such underpayment is due to the acceptance of a bill of entry bearing any incorrect information other than those in respect of tariff headings or items and value for duty purposes.

Subclause (11)(a) introduces such a general limitation to create certainty. In terms of the proviso liability does, however, not cease if a false declaration has been made for the purposes of this Act (defined in section 1) or if an underpayment is discovered during any inspection, from a date two years prior to the date on which such inspection commenced.

Subclause (11)(b) provides for the calculation of the period for which books, accounts or other documents in whatever form must be kept available for production or inspection.

Subclause (11)(c) states that unless the Commissioner otherwise determines, there is no limitation of the period of liability or the period for which books, accounts or any other documents available are required to be produced to or may be inspected by an officer, where any false declaration has been made for the purposes of this Act.

Subclause (12) provides for liability for duties, in addition to any other liability incurred in terms of this Act, where a person makes a false statement concerning the origin of goods or makes use of any declaration or document containing such statement as a result of which such person obtains entry of imported goods at a preferential rate of duty in accordance with the provisions of any agreement contemplated in section 49 or 51. Such a person is liable for duty at the general rate specified in Part 1 of Schedule No. 1 for a period of three years prior to the date such false statement was made or made use of, but the Commissioner may on good cause shown reduce such period. The period of liability in respect of origin contraventions is also applied by customs administrations of the European Community.

CLAUSE 52

Customs and Excise: Amendment of section 46 of the Customs and Excise Act, 1964

The amendment to subsection (1)*(a)* in effect provides that the origin provisions of section 46 are not applicable where any agreement contemplated in section 49 or 51 otherwise provides.

The addition of paragraph *(d)* to subsection (4) enables the Commissioner to make rules for the purposes of tariff preferences allowed by any country in respect of goods exported from the Republic other than the tariff preferences provided in terms of agreements contemplated in section 49 or 51.

Subclause (5): This subclause requires that a declaration of origin in the form prescribed by the Commissioner by rule must be produced by the person entering any imported goods for which a general rate of duty is prescribed in any column of Part 1 of Schedule No. 1 and which are liable to any provisional payment as contemplated in section 57A or to any anti-dumping duty imposed under section 56 or countervailing duty imposed under section 56A or safeguard duty imposed under section 57. The declaration must be issued by a person approved by the Commissioner. The provision is intended to improve general control over goods liable to such duties.

CLAUSE 53

Customs and Excise: Amendment of section 47 of the Customs and Excise Act, 1964

In order to provide for the possibility that a person may not be able to calculate the correct amount of duty payable due to the fact that the computer system required to provide the information to calculate such amount of duty, is not year 2000 compliant, provision is made in the proposed subsection (2) that the Commissioner may determine the amount of duty in such circumstances.

In terms of paragraph *(b)* of the subsection the provision is not to be construed as absolving any person from otherwise complying with the provisions of the Act.

Presently Part 1 of Schedule No. 1 only provides for one duty column. In order to provide for preferential rates of duty in accordance with the provisions of the Agreement on Trade, Development and Co-operation between the European Community and the Republic of South Africa and the Treaty establishing the Southern African Development Community, it is proposed that provision be made in the said Part 1 for additional columns for such preferential rates.

The proposed section 47(3)*(a)* provides for the admission of goods at a rate of duty other than the general rate of duty when conforming to origin requirements contained in any part of the schedule to the General Notes of Schedule No. 1 and any other provisions stated in subparagraphs (i) and (ii). Further provisions in this respect are contained in proposed amendments to sections 48 and 49.

The proposed section 47(3)*(b)* defines the expression “any provision of origin”.

The present subsection (3) is substituted as no specific provision exists for a most-favoured nation rate of duty in Part 1 of Schedule No. 1. Subsection (3) is proposed in order to clarify that any reference in any agreement contemplated in section 49 or 51, to a most favoured nation rate of duty or MFN tariff or rate of duty or like expressions must be deemed, except as otherwise specified, to be a reference to the rates of duty in the column for the general rate of duty in Part 1 of Schedule No. 1.

The amendment to subsection (9) is of a textual nature.

CLAUSE 54

Customs and Excise: Section 48 of the Customs and Excise Act, 1964

The proposed amendment to section 48(1) provides for the amendment or substitution of Part 1 of Schedule No. 1 in order to give effect to any agreement or any amendment of any agreement contemplated in section 49.

The proposed subsection (1A)*(a)* provides for the inclusion in a schedule to the General Notes of Schedule No. 1 of the origin provisions of any agreement contemplated in section 49 which will govern the preferential tariff treatment of goods in the respective columns of Part 1 of Schedule No. 1. Provision is also made for the inclusion of any instrument referred to in section 49(1)*(b)*, for notes to any such agreement or any protocol or other part or provision of such agreement and for any amendment to such schedule or notes.

The proposed subsection (1A)*(b)* provides for a prohibition in respect of the preferential treatment of goods imported or exported, unless they comply with the provisions of origin. Contravention of this subsection is made a specific offence under section 80(1)*(o)*.

CLAUSE 55

Customs and Excise: Amendment of section 49 of the Customs and Excise Act, 1964

The provisions of this section are principally intended to provide for the implementation of the provisions of the Agreement on Trade, Development and Co-operation between the European Community and the Republic of South Africa and the Treaty establishing the Southern African Development Community.

Subclause (1)(a): Provision is made that whenever Parliament has approved any agreement as contemplated in section 231 of the Constitution with any country or countries or group of countries–

- which includes the granting of preferential tariff treatment of goods and provisions of origin governing such treatment;
- concerning customs co-operation, including the exchange of information and the rendering of mutual and technical assistance in respect of customs co-operation between the Republic and such other country or countries or group of countries;
- regulating transit trade and transit facilities;
- which provides for any other matter which either expressly or by implication requires to be administered by customs legislation,

such agreement or any protocol or other part or provision thereof becomes law and will form part of the Customs and Excise Act when published by notice in the *Gazette* in accordance with subsections (1) and (1A) of section 48 and subsection (5) of this section.

Paragraph *(b)*(i) of subsection (1) provides that any amendment to such agreement, any regulations for facilitating implementation, any agreed list of processing relating to originating status and any other "instrument" (defined in paragraph *(b)*(ii)) will likewise become part of the Customs and Excise Act when so published by notice in the *Gazette* as an amendment to such agreement, or protocol or part or provision of such agreement. In subparagraph (iii) "agreement" is stated to include any treaty or convention unless the context otherwise requires.

Subclause (2): The duty is imposed on the Commissioner to keep two copies of such agreement, effect amendments thereto and record the date it entered into force and the date of any publication referred to in *subclause (1)*.

A copy of the agreement so kept by the Commissioner is sufficient proof of the contents thereof and the date of publication or the date on which such agreement or amendment entered into force (paragraph *(b)*).

If the context so requires, the interpretation and application of any provision of any protocol or other part of such agreement referred to in section 49, are subject to other applicable provisions of such agreement (paragraph *(c)*).

Subclause (3): This subclause provides in paragraph *(a)* thereof that the application of the provisions of the Customs and Excise Act is, for the purposes of giving effect to any agreement contemplated in section 49 or any protocol or other part or provision thereof, subject to compliance with the provisions of the agreement or protocol or other part or provision thereof, as the case may be.

In paragraph *(b)* it is stated that any reference to any protocol or other part or provision of such agreement is deemed to include a reference to any instrument referred to in section 49(1)*(b)* applicable thereto and any provision of such agreement governing such protocol or other part or provision or instrument, as the case may be.

Subclause (4)(a) and (b): This subclause provides for the circumstances where reference is made in such agreement to any convention, treaty or agreement which is to be observed in ascertaining the originating status of goods obtained, produced or manufactured or imported or exported in specified instances. For instance, in article 3, of the protocol concerning the definition of the concept of "originating products" and methods of administrative co-operation of the agreement between the Republic and the European Community, provisions of the rules of origin of the Lomé Convention require consideration. The Commissioner must also keep two copies of such convention, treaty or agreement to which the provisions of paragraph (2)*(b)* are *mutatis mutandis* applicable.

Subclause (5): In terms of this clause the Minister may publish by notice in the *Gazette* in Schedule No. 10 to this Act under the title: Agreements or protocols or other parts or provisions thereof contemplated in section 49(5)–

- in separate parts of such Schedule, any such agreement or any protocol or other part or provision of such agreement (which does not relate to the origin of goods);
- any instrument thereto;
- notes to the Schedule;
- any amendments to the Schedule.

Subclause (6): This subclause enables the Commissioner to administer the provisions of any agreement, protocol or other part or other instrument contemplated in section 49 by deciding or determining any matter in connection therewith or performing any duty or function or imposing any condition and by making rules.

In paragraph *(c)* the Commissioner may enter into an agreement with any person with the concurrence of any exporter, producer or manufacturer to perform any function or provide any service for the purposes of establishing and reporting on the origin of goods or issuance of any proof of origin to give effect to such agreement.

Subclause (7): This provision specifies that any determination of any heading or item or the customs value of goods imported must, notwithstanding the provisions of section 47(9), 65(4) or 66(9), if concerning goods of which the origin is being determined, be made in terms of section 49.

Paragraphs *(b)* and *(c)* provide for an appeal against the Commissioner's decision or determination. The provisions accord in most respects with those for other appeals, for example, in section 47(9). In paragraph *(b)*(i), however, a proviso provides that if disputes with foreign customs authorities are involved the processes for dispute settlement in the agreement must be followed.

Subclause (8): In this subclause provision is made for a binding origin determination in respect of imported goods.

The provisions are based on provisions for binding origin information in regulations of the European Community.

The subclause furthermore provides for the circumstances in which the determination is issued or annulled, the period of validity and when validity ceases, when the determination may be revoked, the date on which the determination ceases to be valid and the circumstances in which the determination may still be used after it is no longer valid.

Subclause (9): This subclause relates to procedures which must be complied with if imported goods are claimed to qualify for any preferential rate of duty and the importer is unable to produce the certificate of origin or invoice declaration or other document confirming originating status at the time of entry of the goods.

CLAUSE 56

Customs and Excise: Insertion of section 54A in the Customs and Excise Act, 1964

Subclause (1): At present, unlike section 36 in respect of locally manufactured beer, no specific provision is made in respect of imported beer. It is considered necessary to do so and the proposed section provides for information on containers similar to section 36.

Paragraph (1)*(b)* provides for information to be shown on invoices.

Subclause (2) provides for the consequences if the alcoholic strength by volume or quantity is found to be higher than such strength or quantity indicated on the container or invoice.

Subclause (3) provides for similar measures in respect of beer brought into the Republic from the common customs area.

This clause will come into operation on a date fixed by the President by proclamation in the *Gazette*.

CLAUSE 57

Customs and Excise: Amendment of section 60 of the Customs and Excise Act, 1964

Subclause (2): Currently the provisions of section 60(2) provide for an appeal to the Minister in respect of a decision by the Commissioner to refuse certain applications in respect of licences in certain instances. As any decision by the Commissioner will relate to legal matters as specified in paragraphs *(a)* and *(b)*, it appears that the proper approach may be not to involve the Minister to adjudicate thereon, but that in the case of any dispute the decision should be tested by judicial review.

Paragraph *(a)* provides for additional grounds for refusal of any application for a new licence or renewal of a licence. This includes for example situations where the applicant has made false or misleading statements.

In paragraph *(b)* it is proposed that the conduct of an employee of such applicant or holder should also be a ground for refusal. A new ground for refusal, cancellation or suspension namely, failure to comply with any condition or obligation imposed by the Commissioner in respect of such licence, is also introduced.

However, in terms of a proviso to paragraph *(b)*, the provisions regarding refusal may in certain circumstances not apply in respect of an employee (except with regard to any condition or obligation imposed by the Commissioner).

Apart from subparagraph (iii) which relates to an offence involving dishonesty in general, the other provisions concern contraventions of or offences under the Act and failure to comply with any condition or obligation imposed by the Commissioner.

Having regard to the privileges and rights of licensees under the Act and the effect the unlawful conduct of employees can have on the efficient and effective administration of the Act, it is considered reasonable to expect that the licensees should employ persons of integrity.

Any condition or obligation imposed by the Commissioner are essential mechanisms for the lawful conduct of the business of any licensee.

CLAUSE 58

Customs and Excise: Amendment of section 64B of the Customs and Excise Act, 1964

Subclause (1): Section 64B regulates licences for clearing agents who make entry and deliver bills of entry on behalf of their principals. This amendment extends the scope of the subsection. The new provisions will now provide that no person may for the purposes of this Act for reward make an entry or deliver a bill of entry on behalf of any of the principals contemplated in section 99(2) unless licensed as a clearing agent. Presently the provision only refers to entry for the purposes of section 38 and on behalf of any importer or exporter.

Subclause (2): It is proposed that provision be made to prescribe an application form and requirements for the issue of a licence. The Commissioner may impose conditions or obligations (paragraph *(b)*) which if contravened will be a ground to refuse, cancel or suspend a licence (proposed section 60(2)*(b)*).

Subclauses (5) and (6): The purpose of these measures is to clarify that a clearing agent is liable as contemplated in section 99(2). The agent must disclose the name and category of principal on a bill of entry and if the agent does not so disclose or makes or delivers a bill of entry where the name of another such agent or his/her own name is stated as the importer, exporter or remover in bond or other principal, he/she will be liable for the fulfilment of the obligations imposed on such principal.

Subclause (7): The effect of this proposal is that the security provided by any agent may only be used for his own business purposes.

CLAUSE 59

Customs and Excise: Amendment of section 65 of the Customs and Excise Act, 1964

The Commissioner may determine the transaction value of imported goods under section 65(4)*(a)* which provides for various matters in connection therewith including a right of appeal to the court. Section 66(9) also provides for a determination by the Commissioner in certain circumstances, but does not provide for the consequences of such a determination.

Because of difficulties experienced in the interpretation of the two provisions, subsection (4)*(a)* is amended to clarify that the Commissioner may determine a transaction value which is required to be ascertained or may be determined as provided in section 66. In view of this amendment it is consequently not necessary to retain the qualifications that the Commissioner may make a determination if the transaction value cannot be ascertained or has been incorrectly ascertained as stated in the present wording of the subsection.

CLAUSE 60

Customs and Excise: Amendment of section 66 of the Customs and Excise Act, 1964

The insertion of the words “under section 65(4)*(a)*” in subsection (9) is for the purpose of clarifying that the determination referred to in the subsection is to be made under section 65(4)*(a)* to accord with the proposed amendment to that section..

CLAUSE 61

Customs and Excise: Amendment of section 69 of the Customs and Excise Act, 1964

Presently section 69 does not provide for any period of liability in respect of an underpayment of excise duty arising from the acceptance of a bill of entry bearing an incorrect value for duty purposes of excisable goods.

Subclauses (6) and (7): Provisions similar to those in section 65(7) and (7A) relating to imported goods are accordingly introduced by the proposed amendment in respect of the value for duty purposes of excisable goods.

CLAUSE 62

Customs and Excise: Amendment of section 73 of the Customs and Excise Act, 1964

This is an enabling provision authorising the Commissioner to make rules for the purposes of any agreement contemplated in section 49 or 51 relating to amounts to be used in currencies in respect of goods imported and exported between the Republic and any country or countries or group of countries concerned.

CLAUSE 63

Customs and Excise: Amendment of section 80 of the Customs and Excise Act, 1964

The proposed amendment to subsection (1)*(o)* is consequential upon the amendments to sections 4(12A)*(b)*, 37A(1)*(c)* and 114(2B) and new provisions contained in section 48(1A) and 99A. Contraventions of the provisions of the relevant sections are made specific offences under section 80(1)*(o)*.

The addition of paragraph *(q)* is proposed to provide for an offence in the event of any person contravening or not complying with a provision of an agreement contemplated in section 49 or 51.

CLAUSE 64

Customs and Excise: Amendment of section 85 of the Customs and Excise Act, 1964

The amendment is consequential upon the amendment of section 36.

CLAUSE 65

Customs and Excise: Amendment of section 86A of the Customs and Excise Act, 1964

Section 86A was inserted in the Customs and Excise Act, 1964, during 1998 to provide that the Commissioner may publish in the *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of the Act. It is proposed that this provision be amended to provide that the Commissioner may publish such particulars for general information and that such publication not be limited to the *Gazette*.

CLAUSE 66

Customs and Excise: Amendment of section 87 of the Customs and Excise Act, 1964

The proposed amendment to the proviso to section 87(1) makes it clear that a person is liable for unpaid duty even if the goods are liable to forfeiture. This accords with an established principle that a duty imposed must be collected unless provision is made for remission or rebate. In terms of section 93 the Commissioner may release goods detained, seized or forfeited to the owner on compliance with the provisions of the section and conditions which may be imposed.

Subclause (b) substitutes section 87(2)*(a)* to provide that any ship, vehicle, container or other transport equipment used in the removal or carriage of any goods liable to forfeiture or constructed, adapted, altered or fitted in any manner for the purpose of concealing goods, is liable to forfeiture. These amendments are made because of difficulties experienced in the application of such forfeitures in accordance with the existing provisions. It appears that in terms of the current provisions forfeiture can be avoided if either the owner or the person lawfully in possession or in charge thereof can indicate that the ship or vehicle was used without his consent. However, the Commissioner is now empowered in terms of section 93 to direct that the ship, vehicle, container or other transport equipment may be released to the owner “on good cause shown”.

As containers are increasingly used for concealment of goods liable to forfeiture, section 87(2) now also includes a reference to *inter alia* a container. “Container” is a container as defined in section 1(2).

In terms of the proposed provisions goods conveyed, mixed, packed or found with any goods liable to forfeiture on any ship, vehicle, container or other transport equipment are also liable to forfeiture.

In respect of the use of goods liable to forfeiture which are used as fuel, the provisions now include any ship, vehicle, machine, machinery, plant, equipment or apparatus of Chapters 84 to 87 and 89 of Part 1 of Schedule No. 1.

CLAUSE 67

Customs and Excise: Amendment of section 93 of the Customs and Excise Act, 1964

Section 93 allows the Commissioner a discretion to release goods detained, seized or forfeited to the owner on certain conditions.

The inclusion of "good cause shown" in this section is intended to afford an opportunity to make representations for the release of a ship, vehicle etc detained, seized or forfeited. The ambit of the section is also extended to include a container or other transport equipment.

On a literal interpretation of the existing wording, release can only be effected if an amount equal to the value for duty purposes of such ship, vehicle etc is paid. In order to bring the provisions in line with existing practice, provision is now made for payment of an amount not exceeding such value, i.e. a possibly lesser amount.

CLAUSE 68

Customs and Excise: Amendment of section 99 of the Customs and Excise Act, 1964

In terms of section 99 an agent is liable for the fulfilment of all the obligations of his principal. He may, however, escape such liability if he falls within the exclusions provided for in the proviso to section 99(2). In terms of the proposed amendment an agent is now excluded from the provisions in terms of which liability ceases if the principal is not disclosed or the name of another agent or his/her own name is stated as principal as envisaged in section 64B(6) or is a person outside the Republic.

A principal outside the Republic is also deemed to include the consignee in a country outside the Republic shown on a bill of entry for removal in bond of imported goods as provided in the proposed paragraph *(c)*.

CLAUSE 69

Customs and Excise: Amendment of section 99A of the Customs and Excise Act, 1964

Consultants or other agents other than clearing agents often represent principals referred to in section 99(2) in customs and excise matters. At present no provision in the Act exists to regulate their activities. The proposed section 99A will introduce measures to control their operations. The provisions will only come into operation on a date specified by the Commissioner and will exclude licensed clearing agents and any other person specified by rule.

Contravention of the provisions of the section will be a specific offence under section 80(1)*(o)*.

CLAUSE 70

Customs and Excise: Amendment of section 101 of the Customs and Excise Act, 1964

The amendment of this section is a necessary inclusion which provides for the keeping and production of data created by a "computer" as defined in section 1 of the Computer Evidence Act,

1983 (Act No. 57 of 1983), including data in the electronic form in which it was originally created or in which it is stored for purposes of backing up such data.

CLAUSE 71

Customs and Excise: Amendment of section 114 of the Customs and Excise Act, 1964

Section 114 provides for a lien on goods as security for a debt due to the State, for example where such debt arises from unpaid duties or forfeiture. Furthermore, section 114(1)*(b)* provides for a preference of claims of the State

Subclause (1): The lien as security of a debt due to the State extends to the property of third parties as confirmed in judgments by the former Appellate Division of the Supreme Court of South Africa. Such provisions are also found in the legislation administered by other customs administrations. However, the addition of the proposed proviso to paragraph (1)*(b)* will enable the Commissioner where the person by whom the debt is due is not the owner of the goods concerned, to deliver the goods to the owner on good cause shown. The concurrence of the person by whom the debt is due is necessary. The Commissioner may deliver the goods on payment of the debt due to the State which is secured by the value of such goods at the time of delivery and any charges that may have been incurred in connection with any detention.

Subclause (2): Where the Commissioner has allowed anything under lien to be used and the debtor sold such thing, it was decided in a recent court case that an officer is not empowered to dispossess the purchaser of such thing without “recourse to due process”. The amendment intends to address this problem and if a person is allowed to use such thing the person is not allowed to enter into an agreement whereby ownership is transferred or relinquished to any other person or the thing is pledged or hypothecated in favour of any other person.

Any agreement entered into contrary to those conditions is null and void. If the person enters into such agreement or otherwise deals with such thing contrary to any conditions imposed by the Commissioner, an officer may detain such thing and remove it to a place of security. The Commissioner may thereafter dispose thereof at any time as contemplated in subsection (1)*(b)* (see *subclause (1)* in respect of the proviso). The person by whom the debt is due is liable for all costs and expenses incurred by and charges due to the Commissioner (proposed subparagraph (iii)).

The amendment to subsection (2A) is consequential upon the above amendments.

CLAUSE 72

Customs and Excise: Amendment of section 118 of the Customs and Excise Act, 1964

In this section provision is made that the Minister of Finance may delegate any of the powers which may be exercised by him or her or duties which must be performed in terms of certain sections of the Act, in terms of the proposed amendment.

CLAUSE 73

Customs and Excise: Continuation of certain amendments to Schedules 1 to 6 to the Customs and Excise Act, 1964

The clause seeks the continuation of the amendments to the Schedules to the Act effected by the Minister during the 1998 calendar year.

CLAUSE 74

Stamp Duties: Amendment of section 1 of the Stamp Duties Act, 1968

This amendment is of a textual nature.

CLAUSE 75

Stamp Duties: Amendment of section 19 of the Stamp Duties Act, 1968

See notes on the amendment of Item 6 of Schedule 1 to the Stamp Duties Act, 1968.

CLAUSE 76

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

Subclauses (a) and (b): See notes on BUY-BACK OF SHARES IN A COMPANY.

CLAUSE 77

Stamp Duties: Amendment of section 30 of the Stamp Duties Act, 1968

Section 30 of the Stamp Duties Act, 1968, provides for the recovery of stamp duty and penalties by way of action in the magistrate's court where the amount does not exceed R1 000. This, in effect, means that any outstanding duties or penalties that exceed R1 000 must be recovered by way of action in the High Court. It is proposed that this section must be brought in line with the recovery proceedings in the Income Tax Act, 1962, and this amendment gives effect to this proposal.

CLAUSE 78

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

This amendment is consequential upon the repeal of the Mutual Building Societies Act, 1965, the Building Societies Act, 1986 and the Banks Act, 1965, as well as the promulgation of the Postal Services Act, 1998 (Act No. 124 of 1998).

CLAUSE 79

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

Subclause (1)(a): This clause proposes the deletion of the South African Housing Trust Limited from the exclusions from the concept of marketable security in Item 15. This amendment is consequential upon the discontinuance of the company's activities with effect from a date to be determined by the President by proclamation in the *Gazette*.

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

CLAUSE 80

Amendment of section 98 of the Companies Act, 1973

The proviso to section 98(2) of the Companies Act, 1973, provides that where new shares, equal to the nominal amount of preference shares to be redeemed, are issued within one month of the redemption of such preference shares, the new shares shall for purposes of any law relating to stamp duty be deemed not to have been issued.

In the past this provision was misused on a huge scale to avoid stamp duty by entities wishing to merge or take over a company. The scheme worked on the basis that the ordinary shares of the target company (the company to be taken over) would be converted to redeemable preference shares, which are then redeemed and new shares are issued within one month of the redemption.

This proviso was deleted during 1986 on the recommendation of the Margo Commission.

This proviso was incorrectly reinserted in the Companies Act, 1973, by the Companies Amendment Act, 1998 (Act No. 35 of 1998), without the required consultation process. This matter was therefore taken up with the Registrar of Companies and the proposed deletion of the proviso meets with his approval. The proposed amendment, therefore, gives effect to the deletion of the proviso.

CLAUSE 81

Value-Added Tax: Amendments to section 1 of the Value-Added Tax Act, 1991

Subclause (a): In terms of paragraph (b) of the definition of "commercial rental establishment," the total annual receipts and accruals from the letting of accommodation in any house, flat, apartment or room which is regularly let or held for letting as residential accommodation for continuous periods not exceeding 45 days must have exceeded R24 000, or there must be reasonable grounds for believing that it will exceed that amount, for that house, flat, apartment or room, to constitute a commercial rental establishment.

The amount of R24 000 has remained unchanged since 1991 with the result that, in real terms, smaller enterprises than before now qualify as commercial rental establishments. It has been found that a large number of people registered voluntarily as vendors with respect to casual letting of holiday homes and thereby qualifying for input tax deductions in respect of the acquisition thereof, as well as in respect of major repairs effected thereto. These input tax deductions often lead to a nett flow of funds from the State to these vendors as their output tax liabilities in the short term seldom exceed their input tax deductions. The amount of R24 000 per annum is consequently increased to R48 000 per annum.

Apart from the requirement that the total annual receipts and accruals must now be in excess of R48 000, or that there must be reasonable grounds for believing that such amount will be exceeded, it is now also required of any prospective vendor to meet the amended requirements of section 23 of the Act. He will no longer be entitled to register as a vendor on the mere expectation of exceeding a turnover of R48 000 per annum unless he has already reached a turnover of R20 000 in a period of 12 months.

Subclause (b): The amount of R24 000 prescribed in paragraph (bA) of the definition of "commercial rental establishment" is increased to R48 000 for the same reason as that in paragraph (b) which is dealt with in subclause (a) above.

Subclause (c): A new paragraph (d) is introduced to the definition of "commercial rental establishment" to include any prisons or other places of detention which are managed by persons other than public authorities, but in terms of agreements with public authorities.

Subclause (d): Paragraph (vi) of the proviso to the definition of "enterprise" presently excludes the activity of underwriting insurance business by Underwriting Members of Lloyd's of London from the definition. This paragraph of the proviso is amended with the effect of these activities, to the extent that contracts of insurance are concluded in the Republic, now constituting an enterprise and thereby removing any disparities which may exist between the VAT treatment of insurance policies issued by local insurers and those issued in South Africa by Underwriting Members of Lloyd's of London. This amendment will come into effect on 1 January 2001.

Subclause (e): The amendment to the definition of "supply" is merely of a textual nature to put it beyond doubt that the term does not necessarily require some positive act on the part of the person who makes the supply. The expropriation of property, for instance, also constitutes a supply as defined in section 1.

Subclause (f): The amendment to the definition of "welfare organisation" is of a textual nature and replaces the reference to the Fund-Raising Act, 1978 with a reference to the Nonprofit Organisations Act, 1997 (Act No 71 of 1997).

CLAUSE 82

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

Subclause (a): Section 2(1)*(k)* currently refers to futures contracts and option contracts as defined in the Financial Markets Control Act, 1989 (Act No 55 of 1989). These contracts are described as standarised contracts which, *inter alia*, means that dealings in respect thereof only take place on a financial market.

A large number of contracts which are similar to standarised contracts, but which are traded otherwise than on a financial market are therefore excluded from the ambit of section 2(1)*(k)*. The buying and selling of these contracts are not deemed to be financial services and are accordingly not exempt from VAT.

Section 2(1)*(k)* is amended to eliminate the inequality which presently exists. The buying and selling of contracts which are similar to futures and option contracts but which are traded otherwise than on a financial market are now also deemed to be a financial service. A proviso is added to the section, which has the effect of any supply of the underlying goods or services being deemed to be a separate supply of goods or services at the open market value thereof, and that the open market value be deemed not to be consideration for the supply of a financial service as contemplated in section 2(1)*(k)*. The nature of the supply of the underlying goods or services will determine the VAT consequences thereof.

Subclause (b): The amendment of the definition of "long-term insurance policy" in section 2(2) is of a textual nature and replaces the reference to the Insurance Act, 1943 with a reference to the Long-Term Insurance Act, 1998 (Act No 52 of 1998).

CLAUSE 83

Value-Added Tax: Amendments to section 8 of the Value-Added Tax Act, 1991

Subclause (a): A person who ceases to be a vendor is deemed by section 8(2) to have supplied any goods (other than goods in respect of the acquisition of which by such vendor a deduction of input tax under section 16(3) was denied in terms of section 17(2)) and any right capable of assignment, cession or surrender then forming part of the assets of his enterprise. The supply is deemed to be made immediately before he ceased to be a vendor. In terms of the second proviso to this sub-section the provisions of section 8(2) did, however, not apply to any goods or rights in

respect of the acquisition of which a deduction of input tax was not or will not be allowed, where the vendor:

(i) was registered as a vendor due to a *bona fide* error on the part of any person; and

(ii) has on or before 30 June 1992 requested the Receiver of Revenue to cancel his registration.

Due to the lapse of time the latter proviso became superfluous and is now substituted for another proviso.

As a result of the amendments to section 24(5) and section 23(3), a large number of vendors whose total value of taxable supplies have not exceeded R20 000 in the preceding period of 12 months will cease to be vendors. Vendors whose total receipts and accruals from commercial rental establishments or residential rental establishments have not exceeded R20 000 in a period of 12 months, or will not exceed R48 000 in the next 12 months, will likewise cease to be vendors in respect of those activities. These vendors who will no longer be entitled to remain registered as such will, in terms of the new proviso, not be deemed to have made supplies of goods, or rights capable of assignment, cession or surrender then forming part of the assets of their enterprises, to the extent that an input tax deduction was not made in respect of the acquisition of those goods or rights.

A third proviso is also inserted, in terms of which vendors who are below the new compulsory registration threshold, are no longer liable to be registered and who apply to the Commissioner, in writing, on or before 30 June 2000, to be deregistered, shall also not be liable to account for output tax in respect of fixed property to the extent that a deduction of input tax in terms of section 16(3) has not been made or will not be made in respect of the acquisition or use of that fixed property.

Subclause (b): A new subsection (2A) is introduced, in terms of which vendors who cease to be vendors for the sole reason that the total value of their taxable supplies has not exceeded R20 000 in the preceding period of 12 months, or will not exceed R48 000 in the case of a commercial rental establishment, will be allowed to pay the tax on the supplies deemed to have been made in terms of section 8(2), in a number of equal monthly instalments. The last instalment shall be payable by no later than 28 February 2001. The concession provided for in this new subsection shall be allowed at the discretion of Receivers of Revenue but shall in any event only be available to those vendors whose liability for output tax in respect of the deemed supplies is in excess of R3 000.

Subclause (c): The amendment to paragraph (a) of subsection (4) is of a textual nature and replaces the reference to the Price Control Act, 1964 (Act No 25 of 1964) with a reference to the Sale and Service Matters Act, 1964 (Act No 25 of 1964).

CLAUSE 84

Value-Added Tax: Amendment to section 10 of the Value-Added Tax Act, 1991.

The amendment to section 10(2) of the Act is of a textual nature. It replaces the reference to the Department of Posts and Telecommunications with a reference to the postal company as defined in section 1 of the Post Office Act, 1958.

CLAUSE 85

Value-Added Tax: Amendment to section 11 of the Value-Added Tax Act, 1991

Subclause (a): The definition of "exported" in section 1 includes 4 different sets of circumstances in which exports may take place, including the circumstances where the goods are removed from the Republic by the recipient of those goods.

The reference to the term "exported" in section 11(1)*(a)* requires amendment as a result of the introduction of a new export incentive scheme on 16 November 1998. Section 11(1)(a) is accordingly amended to separately deal with the circumstances where goods are supplied to a recipient and then removed from the Republic by the recipient.

Subclause (b): The supply of an enterprise, or a part of an enterprise which is capable of separate operation is, in terms of section 11(1)(e), subject to VAT at the rate of zero per cent where such enterprise or part thereof, as the case may be, is disposed of by one registered vendor to another as a going concern.

In spite of the proviso to this section that a supply will not be regarded as a supply of a going concern, unless the supplier and recipient of the supply agreed in writing that such enterprise or part thereof will be a going concern and an income earning activity on the date of transfer thereof, it still happens that the parties to agreements of this nature disagree about the VAT consequences of the supply.

The supplier often argues that the supply is subject to VAT at the rate of zero per cent and that he does not have an output tax liability, while the recipient argues that the supply was made at the standard rate which entitles him to an input tax deduction.

The amendment to section 11(1)(e) now requires the parties to the agreement to agree in writing that the consideration for the supply includes VAT at the rate of zero per cent. There can, therefore, be no doubt between the parties as to the VAT consequences of the supply and in the event of the Commissioner not being satisfied that the supply is indeed the supply of a going concern, it would be clear that VAT should be added to the price agreed upon by the parties. This amendment will apply to supplies taking place on or after 1 January 2000.

Subclause (c): The amendment to section 11(1)*(h*B) is consequential upon the amendment of Schedule 1 to the Act and shall come into operation on a date to be fixed by the President in the *Gazette*.

Subclause (d): The amendment to section 11(2)*(g)*(ii) is consequential upon the amendment of Schedule 1 to the Act and shall come into operation on a date to be fixed by the President in the *Gazette*..

Subclause (e): Services which are supplied to persons who are not residents of the Republic are, in terms of section 11(2)*(l)*, subject to the zero rate of VAT. The zero-rating does, however, not apply where the services are supplied directly in connection with land or any improvements thereto which are situated inside the Republic or directly in connection with movable property situated inside the Republic at the time the services are rendered.

The view has always been held that equity securities, participatory securities and debt securities are not movable property within the context of section 11(2)*(l)*. Uncertainties in this regard have, however, arisen from time to time in view of the fact that shares in a company are, according to section 91A of the Companies Act, regarded as movable property. Subparagraph (ii) of section 11(2)*(l)* is accordingly amended to make it clear that services supplied directly in connection with debt securities, equity securities or participatory securities are not disqualified from being zero-rated if all the other requirements of section 11(2)*(l)* are met.

Subclause (f): A further amendment is effected to section 11(2)*(l)* by substituting the word "supplied" at the end of subparagraph (iii) for the word "rendered".

This amendment is aimed at putting it beyond doubt that the presence in the Republic of the recipient of a service, or of any other person to whom the service is rendered, at the time the service is physically rendered (as opposed to the time when the service is in terms of section 9 deemed to be supplied) will prohibit the zero-rating provided for in this subsection from being applied.

Subclause (g): The international community has, in recent years, made grants of millions of Rands to the Republic to aid development programmes. The international agreements in terms of which these grants were made, invariably specified that grant funds may not be used to pay value-added tax or any other taxes in the Republic. This resulted in the government department or local authority who received the grant having to bear the VAT out of its own funds in respect of any goods or services paid for out of these grant funds.

These departments or local authorities more often than not have not budgeted for the unexpected VAT cost, which has caused great difficulties. A new paragraph (q) is accordingly introduced to section 11(2) to provide for the zero rate of VAT to apply in respect of supplies deemed by section 8(5) to have been made to a public authority or local authority where that authority paid for the supply out of these grant funds. This new zero-rating does not extend to those circumstances where goods or services are acquired by and paid for by persons other than public authorities or local authorities, albeit paid for out of funds originally obtained by way of a grant in terms of an international agreement. The reason for this is that persons other than public authorities or local authorities will normally be in a position to register as vendors and will, as a result, be in a position to deduct input tax in respect of such supplies, which will put them in a neutral situation as regards VAT.

CLAUSE 86

Value-Added Tax: Amendment to section 13 of the Value-Added Tax Act, 1991

Subclause (a): The amendment of paragraph (iii) of the proviso to section 13(1) is consequential upon the amendment, with effect from 4 January 1999, of the rules in the Customs and Excise Act, 1964.

Subclause (b): The amendment of section 13(2)(b) is similar to the amendment of section 13(1)(iii).

Subclause *(c)*: The amendment of section 13(3) is consequential upon the amendment of Schedule 1 and must be read with the clause dealing with that amendment. It shall come into operation on a date to be fixed by the President in the *Gazette*.

Subclause (d): Section 13(4) regulated imports from BLNS countries prior to 4 January 1999. The importer was obliged to declare and pay the applicable VAT within 30 days after the date of importation of the goods, as the RSA Customs officers were not present at the BLNS Border posts. As from 4 January 1999 RSA Customs is present at the 17 BLNS land border posts and VAT is being collected at these posts.

Section 13(4) has therefore become superfluous. However, to make provision for circumstances where an importer has, for one or other reason, imported goods without having declared such goods and/or paying VAT thereon the said section is amended accordingly.

Subclause *(e)*: The amendment to section 13(5) of the Act is of a textual nature and merely substitutes the reference to the Postmaster-General for a reference to the postal company.

CLAUSE 87

Value-Added Tax: Amendments to section 16 of the Value-Added Tax Act, 1991

Subclause (a): The form that is used to declare goods for importation is called a “bill of entry” and can be one of two forms, namely a DA500 or a CCA1. The bill of entry is merely proof that the importation of goods was declared for Customs purposes and not proof that the tax was paid. Section 16(2)(d) is amended to include the requirement of the receipt for the payment of tax as issued by RSA Customs and Excise.

Subclause (b): The Lotteries Act, 1997, provides for a national lottery to be operated by a licence holder. The licence holder will operate the lottery as a principal and not as an agent of a State Department or as an organ of the State, and will therefore be a vendor by reason of the fact that it will carry on an enterprise as contemplated in the Value-Added Tax Act, 1991. Certain amounts will be payable by the licence holder to the National Lottery Distribution Trust Fund.

VAT will be levied by the licence holder on the sale of lottery tickets which will, in terms of section 8(13) of the Act, be deemed to be the supply of a service. The licence holder will, in terms of section 16(3)(d), be allowed an input tax deduction in respect of prizes paid. An input tax deduction is also allowed on other expenses subject to VAT.

In order to ensure that only the net take of the licence holder is subject to VAT and also to prevent the flow of funds from the licence holder to the National Lottery Distribution Trust Fund from being negatively impacted on by VAT, a new paragraph (dA) is inserted in section 16(3). It provides that the licence holder will be allowed an input tax deduction in respect of the amounts paid to the National Lottery Distribution Trust Fund. The input tax deduction will amount to the tax fraction of the amounts paid.

Subclause *(c)*: Section 16(4)(b)(i) determines that a vendor, who is registered on the payments basis of accounting for VAT, must account for output tax only to the extent that payment of any consideration has been received by him during the tax period for any supply of goods or services in respect of which the provisions of section 9(1), (3)(a), (b) or (d) or (4) or 21(2)(a) or (6) apply. The fact that section 10(4) may also be applicable to these supplies does not alter the fact that output tax only has to be accounted for to the extent that payment has been received.

Section 10(4) of the Act is an anti-avoidance measure aimed at those cases where a vendor makes a taxable supply for no consideration or a consideration less than the open market value of that supply, to a connected person who would not be entitled to a deduction of the full amount of input tax, had a consideration equal to the open market value been paid. This anti-avoidance measure is effectively nullified in the event of supplies which fall within the ambit of section 16(4)(b)(i), as the difference between the amount of the consideration for the supply and the open market value of the supply will never be paid. Output tax will therefore never be accounted for in respect thereof.

Section 16(4)(b)(i) is accordingly amended to exclude supplies to which section 10(4) applies from its ambit. Where a supply to which the provisions of section 10(4) apply is made, the supplier must henceforth account for output tax in the tax period in which the supply is deemed to have been made, irrespective of whether he has received payment or not.

CLAUSE 88

Value-Added Tax: Amendments to section 17 of the Value-Added Tax Act, 1991.

Where a vendor acquires goods or services and at least 90 per cent of the total intended use of those goods or services is for making taxable supplies, those goods or services may, in terms of paragraph (i) of the proviso to section 17(1), be regarded as having been acquired wholly for the purpose of making taxable supplies.

Although the 90 per cent use for making taxable supplies appears to be high, substantial amounts of VAT are lost as a result of this concession. The proviso is accordingly amended to increase the percentage to 95 per cent. Similar steps have already been taken by a number of other countries.

CLAUSE 89

Value-Added Tax: Amendments to section 18 of the Value-Added Tax Act, 1991.

The amendment to section 18(4) is similar to the amendment to section 17(1), which deals with the *de minimus* rule.

CLAUSE 90

Value-Added Tax: Amendment to section 18A of the Value-Added Tax Act, 1991.

The amendment to section 18A(1) is similar to the amendment to section 17(1), which deals with the *de minimus* rule.

CLAUSE 91

Value-Added Tax: Amendment to section 20 of the Value-Added Tax Act, 1991

Subclause (a): Non-residents purchasing goods in South Africa and subsequently exporting them, require valid tax invoices to obtain refunds of VAT on the goods they export. The amendment to section 20(1) is aimed at ensuring that the recipient of a supply, who in any case bears the tax, may insist that the supplier furnish him with a tax invoice.

Subclause (b): In terms of section 20(7) the Commissioner has a discretion to direct that certain particulars need not be reflected on a tax invoice or that a tax invoice is not required to be issued. The amendment to this section now also authorises the Commissioner to direct that the particulars which have to be reflected on a tax invoice, may be reflected in some other manner.

Subclause (c): The amendment to section 20(8) is of a textual nature and substitutes the reference to the Identification Act, 1986 (Act No 72 of 1986) for a reference to the Identification Act 1997 (Act No 68 of 1997).

CLAUSE 92

Value-Added Tax: Amendments to section 23 of the Value-Added Tax Act, 1991

Subclauses (a) and (b): When VAT was introduced in September 1991, the compulsory registration threshold was set at R150 000. Persons carrying on enterprises and whose total value of taxable supplies during a period of 12 months exceeded R150 000 were obliged to register as vendors, while persons whose total value of taxable supplies did not exceed the threshold were allowed to register voluntarily.

The R150 000 threshold has not been increased since 1991 with the result that, in real terms, smaller enterprises are now liable to register as vendors. While these smaller vendors do not make a significant contribution to the total collection of tax, they are still required to incur the costs relating to compliance with the provisions of the Act. The Commissioner's cost of administering the Act is increased due to the larger number of vendors on the register and his ability to keep evasion in check is diminished.

Section 23(1) of the Act is accordingly amended to increase the R150 000 compulsory registration threshold to R300 000. Vendors whose total value of taxable supplies is at present in excess of R150 000 but less than R300 000 in a period of 12 months, may apply for deregistration. The provisions of section 8(2) will be invoked in these circumstances, but amendments to that section also introduce certain concessions.

Subclause (c): It has been found that a large number of persons voluntarily apply for registration as vendors in anticipation of enterprises to be carried on from a future date. In many instances goods and services are acquired and input tax deducted in respect thereof without the enterprise ever actually coming into operation. When these vendors are subsequently deregistered and assessments are issued in accordance with the provisions of section 8(2) in order to recoup the input tax previously deducted, it often causes hardship which could have been prevented had that person not registered as a vendor.

Section 23(3) of the Act is accordingly amended to the effect that a person can no longer voluntarily register as a vendor if he only intends to carry on an enterprise from a future specified date. He must be able to show that he is in the process of acquiring an enterprise or part of an enterprise as a going concern of which the total value of taxable supplies in the preceding period of 12 months has exceeded R20 000, or the Commissioner must be satisfied that the person is already carrying on an enterprise and that the total value of taxable supplies made by him in the preceding period of 12 months has exceeded R20 000. An exception to this rule is however made. Where a person is continuously and regularly carrying on an activity such as plantation farming, where it can, as a consequence of the nature of the activity, only reasonably be expected that consideration will be received after completion of certain activities or after a period of time, and that the value of supplies will exceed R20 000 in a period of 12 months, that person may apply for registration as a vendor. It should also be borne in mind that an enterprise which is denied registration, can claim an input tax deduction in terms of section 18(4) on assets on hand when it satisfies the registration requirements.

This amendment does not affect associations not for gain or share block companies who will be permitted to apply for registration even though the total value of their taxable supplies has not exceeded or will not exceed R20 000 in a period of 12 months.

CLAUSE 93

Value-Added Tax: Amendment to section 24 of the Value-Added Tax Act, 1991

Subclause (a): Section 24(3) provides that every vendor who ceases to carry on all enterprises must notify the Commissioner of that fact. The Commissioner shall then deregister that vendor

from a date to be determined by the Commissioner. In terms of the proviso to this subsection, however, the Commissioner shall not cancel a vendor's registration if there are reasonable grounds for believing that the vendor will carry on any other enterprise within 12 months of such cessation.

This proviso is not reconcilable with the amendments to section 23(3) or 24(5) and as its purpose was purely to ease the administrative work of having to deregister and re-register a vendor within a relatively short period of time, this proviso is deleted.

Subclause (b): In terms of section 24(5) the Commissioner may cancel a vendor's registration if he is satisfied that the vendor is not carrying on an enterprise. This subsection will now also allow the Commissioner to cancel a vendor's registration if any of the further requirements for voluntary registration as a vendor, as contemplated in section 23(3), are not met. This clause should be read with the clauses dealing with the amendments to sections 8(2) and 23.

CLAUSE 94

Value-Added Tax: Amendment to section 25 of the Value-Added Tax Act, 1991

Section 25 stipulates that every vendor is under an obligation to notify the Commissioner of any change in the details or information as originally furnished by such vendor to the Commissioner. These details relate to, *inter alia*, a change in the name and address of the enterprise.

In terms of section 46 read with section 48 of the Act a representative vendor is responsible for performing the duties imposed by the Act, in the case of a vendor other than a natural person, or a natural person who is under legal disability, who is out of the Republic, deceased or insolvent. It is therefore essential that the Commissioner must always be notified of any changes in the appointment of a representative vendor.

Section 25 of the Act is accordingly amended to enforce an obligation that, should there be a change in the appointment of a representative vendor, such change must be reported to the Commissioner. This clause must be read with the clause dealing with the amendment to section 48.

CLAUSE 95

Value-Added Tax: Amendment to section 32 of the Value-Added Tax Act, 1991

Section 32(1) affords a person the right to object to certain decisions given by the Commissioner. These decisions are listed in paragraph (a) of subsection (1).

Any decisions given by the Commissioner in terms of section 43(5) or (6) should also be subject to objection and subparagraph (v) is accordingly inserted in paragraph (a) of section 32(1).

CLAUSE 96

Value-Added Tax: Amendment to section 33A of the Value-Added Tax Act, 1991

In terms of section 33A(1) of the Act any appeal referred to in section 33(1) shall in the first instance be heard by the Board established by section 83A(2) of the Income Tax Act where, inter alia, the appeal is lodged against an assessment of the Commissioner and the amount of the tax in dispute does not exceed R20 000. Where the amount of tax in dispute is in excess of R20 000, the appeal must be heard by the special court for hearing income tax appeals.

The amount of R20 000 was fixed in 1991 and in real terms only appeals with a substantially lower monetary value than in 1991 may now be heard by the Board, while the workload of the special court for hearing income tax appeals is increased.

Section 33A(1) is accordingly amended to increase the amount of R20 000 to R30 000.

CLAUSE 97

Value-Added Tax: Amendment to section 43 of the Value-Added Tax Act, 1991

In terms of section 43(1) of the Act the Commissioner may require a vendor to furnish security for tax which has, or may become payable by that vendor. This may however only be done in those instances where the vendor has a record of non-compliance with the provisions of the Act, or where the vendor is under the control of a person who, either directly or indirectly, has such a record.

Newly established close corporations, companies or trusts normally do not have direct or indirect records of non-compliance as is required by section 43(1) and can therefore not be required to furnish security for tax which has or may become payable.

A number of cases occurred where entities of this nature were used to fraudulently obtain refunds of VAT and in other instances these entities were stripped of their assets to the detriment of the fisc.

To assist the Commissioner in these circumstances in recovering the VAT due, a new subsection (5) is introduced to section 43, which authorises the Commissioner to require any shareholder, member or trustee involved in the management of a vendor which is not a natural person, to stand surety for the tax liability from time to time of that vendor.

A new subsection (6) is also introduced which determines that the shareholders, members or trustees of the vendor may jointly and severally with the vendor be held liable for the payment of the vendor's tax liability, and which also affords the Commissioner the discretion to determine the amount of the security as well as the duration thereof.

CLAUSE 98

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

Subclause (a): In terms of section 44(1) of the Act the Commissioner shall refund any amount refundable in terms of section 16(5), to the extent that that amount has not been set off against unpaid tax of that vendor. A refund shall, however, not be made if the claim for the refund is not received within five years from the end of the tax period to which it relates, or where the amount of the refund is R10 or less.

Due to the costs involved in making refunds, the amount of R10 is increased to R25 by means of an amendment to paragraph (ii) of the proviso to section 44(1). This will prevent the costs of making refunds from being higher than the amounts of the refunds. The amounts not refunded are carried forward to the next succeeding tax period.

Subclause (b): Paragraph (b) of section 44(3) is amended to increase the amount of R10 to R25 for the same reason as mentioned in subclause (a) above.

Subclause (c): Section 44(4) is amended to increase the amount of R10 to R25 for the same reason as mentioned in subclause (a) above.

CLAUSE 99

Value-Added Tax: Amendment to section 48 of the Value-Added Tax Act, 1991

In terms of section 48(1) the representative vendor will be the person responsible for performing the duties imposed by the Act on a company, public authority, local authority, body, trust fund or any other person and any person declared by the Commissioner to be the agent of a person referred to in section 47.

Every representative is, in terms of section 48(2), in regard to monies controlled or transactions concluded by him in his representative capacity, liable for the payment of any tax, interest or penalty chargeable under the Act as though the liability had been incurred by him personally.

A person who becomes a representative on behalf of another person (other than a person representing a company, public or local authority or a person appointed as an agent) is in terms of section 48(7) required to notify the Commissioner in a prescribed form of the fact that he has become a representative vendor within 21 days of becoming responsible for performing duties under the Act on behalf of the other person.

In many instances the Commissioner was never notified of any change in the representative vendor. The person who no longer acted as representative vendor could also not be held responsible for performing the duties imposed under the Act.

The amendment to section 48 now provides that a representative person will remain responsible for performing the duties imposed on him by the Act until such time as he notified the Commissioner in writing that he no longer acts as representative vendor, or until the Commissioner has been notified of the name and address of another person who shall act as representative vendor. The failure to notify the Commissioner as required by an amendment to section 25 of the Act, will also now constitute an offence in terms of section 58 of the Act.

CLAUSE 100

Value-Added Tax: Amendment to section 54 of the Value-Added Tax Act, 1991

Subclause (a): Section 54(3) provides that where a tax invoice, credit or debit note has been issued by or to an agent or a bill of entry is held by an agent, he must maintain sufficient records to enable the name and address and the registration number of the principal to be ascertained.

In terms of the current provisions of section 54(3) the person with whom a transaction is entered into on behalf of the principal cannot always be determined, since it is not a requirement of the said section that the agent keep record of such a person. In some instances the principal never receives any information from the agent regarding transactions entered into on his behalf. This makes it difficult to establish an audit trail.

The amendment to section 54(3) now provides that the agent must keep proper records of transactions entered into on behalf of a principal, since the particulars specified in paragraphs (e), (f) and (g) of section 20(4) must be kept by the agent. The agent must further in respect of all supplies made or received on behalf of his principal on or after 1 January 2000, provide these particulars in writing to the principal within 21 days of the end of the calendar month during which the supply was made or received, to ensure that a proper audit trail is established.

Subclause (b): Section 54(4) defines the expression “auctioneer” with reference to a sale on a national fresh produce market as defined in section 1 of the Commission for Fresh Produce Markets Act, 1970. The latter Act was repealed in 1992. The amended definition of auctioneer

now includes an agent, fresh produce agent and livestock agent as defined in the Agricultural Produce Agents Act, 1992.

Subclause (c): Section 54(5) determines that where the principal and the auctioneer or agent agree to have a supply by auction of any goods, other than a taxable supply, treated as if the supply is made by the auctioneer or agent and not by the principal, the supply will be subject to VAT as if it were made by the auctioneer or agent in the course or furtherance of his enterprise. The auctioneer or agent accounts for output tax in these circumstances.

The records presently maintained by auctioneers or agents are not sufficient to establish a proper audit trail, an essential element of any VAT system. The amendment to section 54(5) now requires auctioneers or agents to maintain proper records of the non-vendor with whom he agreed to make the supply. Those records are the records which the agent or auctioneer would have been required to maintain had the non-vendor made a supply of second-hand goods to the auctioneer or agent. The amendment is aimed at reducing tax evasion, particularly in the livestock and meat industries.

CLAUSE 101

Value-Added Tax: Amendment to section 57D of the Value-Added Tax Act, 1991

The section is amended to substitute the term “Supreme Court” for “High Court” and is merely of a textual nature.

CLAUSE 102

Value-Added Tax: Amendment to section 58 of the Value-Added Tax Act, 1991

Subclause (a): Paragraph (m) which is now inserted in section 58 brings any failure to comply with the requirements of section 54(3) or the proviso to section 54(5) within the ambit of section 58.

Subclause (b): Section 58 determines that a person who is guilty of an offence as set out in paragraphs (a) to (l) of the said section, will be liable on conviction to a fine not exceeding R4 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment.

The high incidence of offences under this section, highlights the need to increase the maximum penalties and periods of imprisonment which may be imposed. Section 58 is therefore amended to increase the maximum period of imprisonment from 12 months to 24 months and to ensure that penalties are determined in accordance with the Adjustment of Fines Act, 1991. The said Act provides that the maximum penalty which may be imposed will be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the penalty and the period of imprisonment which the Minister of Justice may from time to time determine.

CLAUSE 103

Value-Added Tax: Amendment to section 59 of the Value-Added Tax Act, 1991

Section 59 determines that any person who has intent to evade the payment of tax levied under the Act or to obtain any refund of tax to which such person is not entitled, or with intent assists any other person to evade the payment of tax payable by such other person or to obtain any refund of tax to which such other person is not entitled shall be guilty of an offence and liable on conviction to a fine not exceeding R10 000 or to imprisonment for a period not exceeding 24 months or to both such fine and such imprisonment.

The current provisions of section 59 do not correspond with fines and periods of imprisonment which may be imposed in the event of a person being convicted of fraud. In a number of cases the offences committed were of such a serious nature that higher penalties would have been imposed, had a maximum penalty not been prescribed in the Act. The amendment introduced to section 59 ensures that the penalty provisions are equivalent to the maximum sentences which may be imposed in fraud cases.

The said section has been amended to provide accordingly for a maximum penalty determined in accordance with the Adjustment of Fines Act, 1991 or/and imprisonment for a period not exceeding 60 months to be imposed. The Adjustment of Fines Act, 1991, provides that the maximum penalty which may be imposed will be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the penalty and the period of imprisonment which the Minister of Justice may determine from time to time.

CLAUSE 104

Value-Added Tax: Amendment of section 60 of the Value-Added Tax Act, 1991

Section 60(1) of the Act currently provides that a vendor shall be chargeable with additional tax where he, or a person under his control or acting on his behalf does or omits to do anything with intent to evade the payment of tax, or to cause a refund to him in terms of section 44(1), in excess of the amount properly refundable.

Refunds may also be made in terms of section 44(2) and it is equally possible to cause a refund under section 44(2) which exceeds the amount properly refundable. Section 60(1) is accordingly amended to refer not only to refunds under section 44(1), but to any refunds made by the Commissioner in terms of the Act.

CLAUSE 105

Value-Added Tax: Amendment to section 62 of the Value-Added Tax Act, 1991

Subclauses (a) and (b): Section 62 provides that the Commissioner may from time to time publish in the *Gazette* the names and particulars of persons who have been convicted of certain offences in terms of sections 58 and 59 of the Value-Added Tax Act, 1991.

The amendment to section 62 now permits the Commissioner to also publish such particulars for general information and that such publication not be limited to the *Gazette*.

CLAUSE 106

Value-Added Tax: Amendment to Schedule 1 of the Value-Added Tax Act, 1991

In terms of section 13(3) read with Schedule 1 to the Act the importation of certain goods is exempt from tax.

The intention has always been that the exemption should only be applicable to the extent indicated in Schedule 1. Schedule 1 as it stands does not achieve this, as the “item numbers” as well as the “description” relating to an item number as contemplated in the Customs and Excise Act were used to identify the goods, with the result that a broader scope of exemptions was created than what was intended.

Schedule 1 is therefore amended by the substitution for the Schedule as a whole for a new Schedule which -

- clearly indicates, in numbered paragraphs, in which circumstances the importation of certain goods are exempt from VAT;
- eliminates any misconceptions;
- minimises the loss of revenue and the adverse impact of roundtripping; and
- no longer distinguishes between the countries from where the goods are imported or the ports through which the goods enter the Republic (i.e. the procedures for the treatment of VAT have been standardised at all 41 designated commercial ports).

This amendment comes into operation on a date to be fixed by the President in the Gazette.

A comparative table listing the exemptions under the item numbers as utilised in the previous Schedule and their application, if any, in the amended Schedule indicating the new paragraph numbers, is set out below:

Previous Schedule 1:		Amended Schedule 1**:**	
Part A			
Paragraph 1			
Item No:		Paragraph No:	
405.04	(00.00/03.00)	?	Deleted
406.00		1.16	
407.01	(00.00/01.01	1.1	
407.01	(00.00/01.02)	1.1	
407.02	(22.00/01.00)	1.3(i)	
407.02	(22.00/02.00)	1.3(ii)	
407.02	(24.02/01.00)	1.3(iii)	
407.02	(24.03/01.00)	1.3(iv)	
407.02	(33.03/01.00)	1.3(v)	
407.02	(00.00/01.00)	?	Deleted
407.02	(00.00/02.00)	1.3(vi)	The value of R10 000 is reduced to R2 000.
407.06		1.7	
409.01		?	Deleted to minimise the loss of revenue.
409.02		?	Deleted to minimise the loss of revenue.
		1.14	NEW**:** Makes provision for the free movement of packing containers or pallets which are the property of a vendor.
		1.10	NEW**:** Makes provision for goods temporarily exported from the Republic which are, at the time of export, registered as such with the Controller of Customs and Excise (in such form as the Commissioner may prescribe), and thereafter returned to the exporter, no change of ownership having taken place, and which can be identified on reimportation.
409.04		1.11	The phrase: “Imported or locally manufactured articles” is replaced with “goods”. A proviso is also added that: “this exemption shall apply only to the extent of the value of the goods

			sent from the Republic on the day such goods left the Republic.”.
409.06		?	Deleted
409.07		1.15	A proviso is added that: “this exemption shall apply only to the extent of the value of the goods sent from the Republic on the day such goods left the Republic.”.
412.03		1.8	
412.04		1.9	
412.10		1.6	
412.11		1.17	
412.12		1.18	Amended with the effect that the agreement must be between the Government of the Republic and any one of the governments of the BLNS countries.
460.11	(63.09/01.04)	?	Deleted
470.00		1.12	Replaced with: “Goods temporarily admitted? ”.
470.01	(00.00/01.00)	1.12(i)	The word “importer” is replaced with: “any person of the Republic”.
470.02	(00.00/01.00)	1.12(ii)	
470.02	(00.00/02.00)	1.12(iii)	
470.03	(00.00/01.00)	1.12(iv)	
480.00		?	Deleted
490.00		1.12(v)	A proviso has been added to paragraph 1.12 (i.e. “goods temporarily admitted”) that: “the Controller of Customs and Excise ensures that the tax is secured by the lodging of a provisional payment or bond (except where the Commissioner otherwise directs, or in the circumstances contemplated in rule 120A.01(c) to the Customs and Excise Act.”).
		1.13	NEW**:** Goods in transit through the Republic, with the following proviso: “the Controller of Customs and Excise ensures that the tax is secured by the lodging of a provisional payment or bond (except where the Commissioner otherwise directs, or in the circumstances contemplated in rule 120A.01(c) to the Customs and Excise Act.”).
07.01		?	Deleted
07.02		?	Deleted
07.03		?	Deleted
07.04		?	Deleted
07.05		?	Deleted
07.06		?	Deleted
07.07		?	Deleted

07.08		?	Deleted
07.09		?	Deleted
07.13		?	Deleted
08.06	/0806.10	?	Deleted
08.07		?	Deleted
08.08		?	Deleted
08.09		?	Deleted
08.10		?	Deleted
10.05		?	Deleted
10.06		?	Deleted
16.04	/1604.13.15	?	Deleted
16.04	/1604.13.20	?	Deleted
27.09.00		1.4.1	
27.10	/2710.00.12	1.4.2	
27.10	/2710.00.16	1.4.3	
38.11	/3811.11	1.4.4	
49.07	/4907.00.30	1.4.5	
49.11	/4911.10.20	1.4.6	
		1.5	NEW**:** (1.5.1 – 1.5.19) This insertion relates to the goods listed in Part B of Schedule 2 to the Act (i.e. the supply of goods consisting of certain foodstuffs that may be made at the zero rate of tax).
Paragraph	2	2	
	3	3	
	4	4	
	5	5	The only change is the insertion of “by a non-resident”.
Part C		?	Deleted

CLAUSE 107

Amendment of section 60 of the Income Tax Act, 1993

Subclauses (a) and (c): These amendments are consequential upon the amendment of the definition of “stock exchange” in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

Subclause (b): See notes on BUY-BACK OF SHARES IN A COMPANY.

CLAUSE 108

Amendment of section 39 of the Taxation Laws Amendment Act, 1994

Subclause (a): This section was introduced to soften the impact on rationalisation schemes of groups of companies which are done for commercial reasons. Limited exemption from the payment of transfer duty and stamp duty is granted and in addition the income tax effects of such schemes are regulated. At present these benefits are only available to listed groups of companies and unlisted groups where the fixed capital of the holding company exceeds R250 million. It is now proposed that the R250 million limit be reduced to R75 million.

Subclause (b): This amendment is consequential upon the amendment of the definition of “stock exchange” in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985).

CLAUSE 109

Uncertificated Securities Tax: Insertion of section 1A in the Uncertificated Securities Tax Act, 1998

Although it is implied from the contents of the Uncertificated Securities Tax Act, 1998, that the Act is administered by the Commissioner, it is proposed that a provision be inserted to specifically provide for this.

CLAUSE 110

Uncertificated Securities Tax: Amendment of section 7 of the Uncertificated Securities Tax Act, 1998

It is proposed that a provision be inserted in the Act to bring it in line with the other revenue Acts, to provide that where an amount of interest or penalty is payable by any person in addition to any amount of tax due by him/her in terms of the Act, any payment made by that person will first be set off against the penalty, thereafter against the amount of interest and only after the penalty and interest have been paid, will any payment be set off against the tax.

CLAUSE 111

Skills Levy: Amendment of section 3 of the Skills Development Levies Act, 1999

The Skills Development Levies Act currently provides that the aggregate of the levy collected from a municipality and the budgetary allocations for training purposes to the municipality may not exceed certain percentages. From discussions with representatives of municipalities it is quite clear that the existing provisions for determining a rate for each municipality will, from an administrative point of view, be almost impossible to apply.

In view thereof it is proposed, that the ordinary rate structure applicable to any other employer, should also be applicable to municipalities. It is, however, proposed that the exemptions provisions in section 4 be extended to provide for a relief mechanism, for municipalities which are in serious financial difficulties.

A certificate of exemption may in such circumstances be issued by the Minister of Labour. The conditions under which and period for which such exemption can be granted will be prescribed by way of regulations made by the Minister of Labour, in consultation with the Minister of Finance and the Minister of Provincial and Local Government.

CLAUSE 112

Skills Levy: Amendment of section 4 of the Skills Development Levies Act, 1999

See notes on the amendment of section 3 of the Skills Development Levies Act, 1999, in clause 111.

CLAUSE 113

Skills Levy: Amendment of section 12 of the Skills Development Levies Act, 1999

Section 12(1) of the Skills Development Levies Act, 1999, incorrectly refers to the last day for payment as contemplated in section 7(3), instead of section 7(4). It is, therefore, proposed that this section be amended to refer to the correct subsection.

CLAUSE 114

Repeal of Laws

The tax laws of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei were repealed 1994 and 1995. It, however, appears that Decree No. 3 (Immovable Property Taxation) of 1991 of the Republic of Transkei was not included in the list of laws repealed at the time and it is, therefore, proposed that it be repealed.

CLAUSE 115

Short title and commencement

This clause provides the short title and commencement date of the Bill.

The following parties were consulted on the proposed amendments:

Association for the Advancement of Black Accountants of South Africa
Afrikaanse Handelsinstituut
Association of Law Societies
Banking Council of South Africa
Commercial and Financial Accountants
Department of Finance: Tax Policy Directorate
Financial and Fiscal Commission
Financial Services Board
Life Offices Association
National African Federated Chamber of Commerce and Industry
National Economic Development and Labour Council
South African Association of Freight Forwarders
South African Chamber of Business
South African Institute of Chartered Accountants
Tax Advisory Committee
Tax Commission
VAT Technical Committee