REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

SECOND REVENUE LAWS AMENDMENT BILL, 2001

[W.P. 3 —'01]

EXPLANATORY MEMORANDUM ON THE SECOND REVENUE LAWS AMENDMENT BILL, 2001

INTRODUCTION

The Revenue Laws Amendment Bill, 2001, 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, the Revenue Laws Amendment Act, 1999, the Taxation Laws Amendment Act, 2001 and the Revenue Laws Amendment Act, 2001.

OBJECTIONS AND APPEALS

In terms of the current provisions of the Income Tax Act, 1962, a taxpayer may object to and appeal against an assessment or certain decisions of the Commissioner to the specially constituted court or the specially constituted board for hearing income tax appeals.

Where the amount of tax in dispute does not exceed an amount determined by the Minister (which is currently fixed at R100 000), the appeal shall in the first instance be heard by the specially constituted board. All other cases are heard by the income tax special court, which is constituted in terms of the Income Tax Act, 1962. These provisions are contained in Part III of Chapter III of the Income Tax Act, 1962.

Various Acts administered by the Commissioner contain provisions to make the objection and appeal provisions in the Income Tax Act, 1962, applicable *mutatis mutandis*. An appeal against a decision of the Commissioner in terms of those Acts are, therefore, also dealt with in the special court. These include, *inter alia*, the Estate Duty Act, 1955, the Uncertificated Securities Tax Act, 1998, etc.

During the last year substantial research was done in order to explore ways and means to streamline and fast track the processes around dispute resolution. The following is an overview of some of the issues considered and contain the proposals to improve and expedite the process.

Procedures

At present the procedures followed in the special court are by and large based on those followed in the Magistrates' Courts. These existing procedures do, however, have numerous shortcomings, specifically with reference to discovery of documents before a case is heard, defining the issues in dispute properly, etc.

In terms of the proposed amendments, the legislation will allow court rules to be made on the procedures for purposes of noting an objection and lodging an appeal. These rules will deal with the time periods within which and the manner in which an objection and appeal must be noted, as well as the processes to be followed up to the hearing of the appeal in the tax court. This will include identifying the issues in dispute, discovery of documents, settlement discussions, pre-trial conferences, etc.

The legislation will establish the tax courts, provide for the Registrar of the court and grant specific powers to the court to make orders, e.g. the granting of costs, etc.

Costs

Currently, the court may not make an order as to costs unless the claim of the Commissioner is held to be unreasonable or the grounds of appeal therefrom to be frivolous or where the decision of the special board is substantially confirmed.

It is proposed that provision be made for costs where—

- the claim of the Commissioner is held to be unreasonable;
- the grounds of appeal of the appellant are held to be frivolous;
- the decision of the tax board referred to in section 83A is substantially confirmed;
- the hearing of the appeal is postponed at the request of one of the parties; or
- the appeal is withdrawn or conceded by one of the parties after a date of hearing has been allocated by the Registrar.

Settlement of disputes

The regulations to be promulgated will provide for procedures which may facilitate settlement of disputes, as the taxpayer and the Commissioner must meet in order to determine what the issues are that are in dispute. Before the matter goes on trial, a pre-trial meeting must also be held in order to further narrow down the issues. A new section 107B is inserted in the Income Tax Act, 1962, to empower the Minister of Finance to prescribe the circumstances under which the Commissioner may, for purposes of the settlement of any dispute between the Commissioner and a taxpayer, waive a claim against that taxpayer in whole or in part. The Minister must prescribe the reporting requirements in respect of any claim so waived. These provisions must be incorporated in the Act within 12 months.

Extended bench

It is proposed that provision be made that where the amount in dispute exceeds R50 million or where the taxpayer and the Commissioner agree thereto, the case may be heard by three judges. The reason therefor is that there are often cases which involve large amounts and where the taxpayer obtains more than one legal opinion which confirms the taxpayer's views. When the case is then heard in the special court only one judge may decide against the taxpayer. This will necessarily have the effect that the taxpayer will appeal against the judgement to be heard by three judges.

Alignment of all Acts administered by Commissioner

In order to streamline the dispute procedures in all the Acts administered by the Commissioner, these Acts are all amended to provide that the objection and appeal procedures contained in the Income Tax Act, 1962, shall also apply in respect of any dispute in terms of those Acts.

SIYAKHA

SIYAKHA (which means "we are building") is a project which SARS has launched to make more efficient use of its resources through the re-engineering of its processes and the introduction of new technologies.

In terms of the SIYAKHA Initiative, changes will be implemented to the current structure of SARS. At present, SARS has 42 full service revenue branch offices, 7 seaports, 2 international border posts, 10 airports, 17 BNLS border posts and 14 district offices.
In terms of the new SIYAKHA proposal, SARS will consist of—
- 6 large scale processing centres, namely, two at Gauteng, and one each at Cape Town, Durban, Bloemfontein and Port Elizabeth;
- 10 major compliance centres plus satellite offices (most co-located with processing centres);
- 42 SARS taxpayer service centres;
- new SARS taxpayer service centres in previously disadvantaged areas;
- new SARS call centres to handle most frequent queries.

The transformation process, as it is referred to, has already commenced in the KwaZulu-Natal area. As a result of these changes, some of the references in the various Acts administered by the Commissioner have become superfluous. Hence, changes have been effected to various provisions to bring them in line with the new dispensation in SARS.

SECRECY PROVISIONS

Various revenue laws contain secrecy provisions to prohibit an employee of SARS to disclose any information which has come to his or her knowledge in the performance of his or her duties in terms of those laws.

The purpose of these secrecy provisions is to—
- to encourage taxpayers to make full disclosure of their financial affairs thereby maximising tax compliance while the taxpayer, on the other hand, has the peace of mind that his or her information will remain confidential;
- to protect a person's fundamental right to privacy and that information supplied by the person will, for example, not be disclosed to his or her competitors.

It does, however, occur that in the performance of an employee of SARS's duties, certain information is accumulated or may have come to his or her attention which is of such a nature that it is in the national interest that it be shared with another organ of state. This is also in line with international best practice.

In view of the above, it is proposed to amend the relevant secrecy provisions in the various revenue laws as follows:

Income Tax Act and Value-Added Tax Act

Section 4 of the Income Tax Act, 1962, and section 6 of the Value-Added Tax Act, 1991, contain the secrecy provisions and prohibit the Commissioner and any person employed in carrying out the provisions of these Acts from disclosing any information which comes to his or her knowledge in the performance of his or her duties, except in the performance of any duties under these Acts or by order of a competent court.

It does, however, occur that during an investigation of a taxpayer's affairs, certain information relating to serious offences that have been committed may come to the attention of the Commissioner. In terms of the secrecy provisions, this information may not be disclosed to the relevant authorities. It is, therefore, proposed that an exception be included in section 4 and section 6, respectively, to provide that the secrecy provisions do not prevent the Commissioner from disclosing to the National Commissioner of the South African Police Service or the National Director of Public Prosecutions, information relating to a serious offence or an imminent and serious public safety risk, where the public interest in the disclosure of the information outweighs any potential harm to the taxpayer should the information be disclosed. Information provided by a taxpayer in terms of the Act is not admissible in criminal proceedings to the extent that it constitutes an admission of the commission of an offence.

The disclosure of such information may only be made in terms of an order issued by a judge in chambers.

In terms of the new provisions proposed, the National Director of Public Prosecutions and the Commissioner of the South African Police Service may not divulge any such information obtained to anyone except in the exercise of his powers of the carrying out of his duties for purposes of any investigation of, or prosecution for, an offence.

It is also proposed that the Commissioner shall disclose information regarding any class of taxpayers to the Director-General of the National Treasury to the extent necessary for purposes of tax policy design or revenue estimation.

A further provision is also inserted to provide that the secrecy provisions shall not apply in respect of any information relating to any person, where that person has consented that such information may be published or made known to any other person.

Customs and Excise Act

Section 4 of the Customs and Excise Act, 1962, contains the secrecy provisions. Subsection (3) is amended to enable the Commissioner to also disclose information to the Director-General of the Department of Trade and Industry, the Treasury as defined in the Exchange Control Regulations, 1961, and the Governor of the South African Reserve Bank in relation to imports and exports and importers and exporters.

The Commissioner may further disclose information to the National Commissioner of the South African Police Service or the National Director of Public Prosecutions where the information may reveal evidence—

- that a serious offence has been or may be committed, or that may be relevant to the investigation or prosecution of such offence in respect of which a court may impose a sentence exceeding five years imprisonment; or
- of an imminent and serious public safety or environmental risk.

The information may be disclosed to the National Commissioner of the South African Police Service or the National Director of Public Prosecutions if the public interest in the disclosure of the information outweighs any potential harm to the taxpayer concerned should such information be disclosed. Information provided by a taxpayer in terms of the Act is not admissible in criminal proceedings to the extent that it constitutes an admission of the commission of an offence. The disclosure of such information may only be made in terms of an order issued by a judge in chambers.

The Commissioner may also provide certain information to the Treasury or the Governor of the South African Reserve Bank must, notwithstanding the provisions of section 33 of the South African Reserve Bank Act, 1989, for purposes of exercising any power or performance of any duty or function in connection with foreign transactions under the provisions of the Exchange Control Regulation, 1961.

CORPORATE RULES

Internationally capital gains tax regimes provide for varying degrees of relief in respect of transactions between group companies or between founding shareholders and their company. These measures are generally based on the view that where the group or the shareholders have retained a substantial interest in the assets transferred, it is appropriate to permit the tax-free transfer of assets to the entity where they can be most efficiently used for business purposes.

International experience has, unfortunately, also shown that these measures are often abused to avoid tax. A balance must, therefore, be struck between the breadth of the concessions these measures introduce and the potential for tax avoidance.

When the Eighth Schedule was introduced earlier this year, Government announced that group relief measures were to be delayed until October in view of the complex issues these measures would have to address and the fact that they would address CGT and other taxes.

The proposed measures to be introduced in Part III of Chapter II of the Income Tax Act, 1962, cover corporate formations, corporate share-for-share takeovers, corporate liquidations, unbundlings, and asset transfers within a single corporate group.

Company Formations

A company formation transaction means any transaction in terms of which a person transfers assets to a resident company in exchange for shares in that company, after which that person holds an interest of more than 25 per cent of the total equity share

capital of that company. This does, however, not apply in respect of any asset transferred to a company by a trust (other than a special trust).

Where a person transfers a gain asset (i.e. where the market value exceeds the base cost) to a company in terms of a company formation transaction—

- that person will be treated as having disposed of the asset for an amount equal to the base cost. That person will therefore not realise any capital gain on that asset;
- the base cost of the asset will be carried over to the shares acquired by that person in the company; and
- any amount which has been recovered or recouped by that person will be treated as not having been recovered or recouped.

The company, on the other hand, will be treated as having acquired the capital asset when that the person disposing of the asset acquired the asset and the base cost of that person is also carried over to the company.

Where, however, within a period of 18 months before that disposal, that person disposed of a loss asset (i.e. where the base cost of the asset exceeds the market value thereof) to the company, the person will be treated as having disposed of that second asset for an amount equal to the market value, although only so much of the gain realised as doesn't exceed that prior loss will be taken into account in the determination of the taxable capital gain of that person. That person will then be treated as having acquired those shares in the company at a cost equal to the sum of the base cost of the asset and the amount of the capital gain so taken into account. By adding this amount of capital gain to the base cost, it will prevent any capital gain from being taxed twice.

In this instance, the company will be treated as having acquired the asset at a cost equal to the cost of the shares to that person as mentioned above.

Where the asset disposed of by a person to the company constitutes trading stock in the hands of that person which is attributable to the business undertaking of that person which is transferred as a going concern, that person will be treated as having disposed of that asset for an amount equal to the cost contemplated in section 22(1) or (3), as the case may be. That cost will also be treated as the base cost of the shares acquired by that person. The company will also be treated as having acquired that asset at that cost.

Where that person, in addition to any shares, becomes entitled to any consideration in respect of the disposal of the asset, that transfer of the asset will, to the extent that consideration is receivable, be treated as a part disposal of that asset.

In the case of a disposal by a person of a depreciable asset or any other asset in respect of which an allowance is allowable, the company's allowances claimable in respect of that asset will be limited to the amount of any allowance which that person would have been entitled to deduct in respect of that asset, had that asset not been disposed of by that person. The company may, furthermore, be treated as having recovered or recouped any allowances which were claimed as a deduction by that person before disposal of that asset to the company.

Provision is made for a transfer of an appropriate portion of the bad and doubtful debts allowances as well as for section 24 and 24C allowances.

The shares in the company will be treated as trading stock in the hands of the person where more than 50 per cent of the assets transferred by that person to the company consists of depreciable assets or trading stock and that person disposes of the shares within 18 months (other than by way of an involuntary disposal or as a result of the death of that person).

Where that person within 18 months after the corporate formation transactions ceases to hold a 25 per cent interest in the company—

- other than by way of a disposal of the shares, i.e. where any other person acquires a shareholding in the company which affects the shareholding of that person, that person will be treated as having disposed of the shares for proceeds equal to the market value on the date of acquiring the shares and to have reacquired those shares for a cost equal to that market value; or
- by way of disposal of some or all of the shares (other than in terms of an intra-group transaction, an unbundling transaction or a liquidation distribution), that person will be treated as having disposed of—
  - the shares actually disposed of for the higher of either the proceeds or the market value on the date of the disposal; and
  - any shares not actually disposed of, for proceeds equal to the market value on the date of acquisition of those shares and to have reacquired those shares for cost equal to that market value.

This will have the effect of including any capital gain realised on the shares actually disposed of in the taxable capital gain, whereas, in the case of shares not disposed of, only the gain, which would have been realised on the disposal of the asset to the company, will be taxable.

This will, however, not apply where the person ceases to hold a qualifying interest as the result of the death of that person and where that qualifying interest accrues to the surviving spouse of that person.

Where that person disposes of a loss asset to the company, that person must disregard any capital loss and the company will be treated as having acquired the asset for a cost equal to the market value thereof. Any capital loss so disregarded in the hands of that person may, however, be deducted from any capital gain determined in respect of further capital assets disposed of by that person to that company

Where the company disposes of the asset within 18 months after the corporate formation transaction, the capital gain may not be set off against any assessed loss of the company and any capital loss must be disregarded.

Where a person disposes of an asset to a company, which is encumbered by any debt incurred more than 18 months before that disposal and that company assumes that debt or an equivalent amount of debt that is secured by that asset or where that person transfers any business undertaking to a company as a going concern which includes any amount of any debt, that person must be treated as having acquired the shares in the company at a cost equal to the base cost of that asset or business undertaking, reduced by the amount of that debt.

A provision is also inserted to provide that where all the assets and liabilities of a branch in the Republic of any non-resident company is transferred to a wholly owned subsidiary of that foreign company the foreign company and the subsidiary will be deemed to be one and the same company in respect of any transactions of the branch.

An exemption is proposed from marketable securities tax, stamp duties and uncertificated securities tax in respect of the disposal of any marketable securities by a person to a company in terms of a company formation transaction.

The relief provisions contained in the new proposed section 42, will, however, not apply in respect of the disposal of an asset—

- by a company which is exempt from tax;
- which constitutes a financial instrument, unless it is a debt due to that person in respect of any goods sold or services rendered in terms of the business which is transferred as a going concern or the market value of the financial instruments transferred do not exceed five per cent of the market value of all the assets transferred; or
- which was acquired in terms of any company formation transaction, within 18 months before that disposal.

Share-for-share Transactions

A ‘share-for-share transaction’ means a transaction in terms of which a person disposes of a share in a resident company (‘target company’), to another resident company (‘acquiring company’), in exchange for shares in that acquiring company and—

- the acquiring company after that transaction and any other share-for-share transaction (entered into in terms of any offer made on the same terms as that transaction and which is accepted within a period of 45 days before or after that transaction)—
  - where the target company is a listed company holds at least 35 per cent of the direct shareholding in the target company (or more than 25 per cent in the case where no other shareholder holds an equal or greater shareholding than that acquiring company); or
  - where the target company is not a listed company, holds a direct shareholding of at least 75 per cent in the target company; and
- that person holds shares in that acquiring company—
  - which is a listed company; or
  - in any other case, which constitutes a direct shareholding of more than 25 per cent.

Where the target shares are disposed of by a person (other than target shares held by that person as trading stock) in exchange for shares in the acquiring company, that person must be treated as having disposed of the target shares for proceeds equal to the base cost and to have acquired the shares in the acquiring company at a cost equal to that base cost. The period that the target shares were held by that person will also be carried over to the new shares held in the acquiring company. That person will, therefore, not realise any gain from the disposal of the target shares.

The acquiring company must—

- where the target company is a listed company and the shares were acquired from any shareholder who does not hold a direct 25 per cent shareholding in the acquiring company after the share-for-share transaction, be treated as having acquired those shares at a cost equal to the market value of those shares; or
- in any other case, be treated as having acquired those shares at a cost equal to the base cost of the person from whom the shares were acquired.

In the case of a disposal of shares in terms of a share-for-share transaction, which are held as trading stock by a person, the person must be treated as having disposed of those shares for proceeds equal to the cost of those shares contemplated in section 22(1) or (3), as the case may be, and to have acquired the shares in terms of the share-for-share transaction at a cost equal to that amount. The company will be treated as having acquired those share at a cost equal to the amount of that cost. Those new shares so acquired will also constitute trading stock in the hands of that person.

A disposal of shares by a person in terms of a share-for-share transaction will also, as is the case of corporate formation transactions, be treated as a part disposal where, in addition to any shares in the acquiring company, that person becomes entitled to any other consideration.

Similar provisions to those in respect of company formation transactions apply in respect of a share-for-share transaction, where—

- a person ceases to hold a qualifying interest in the acquiring company within 18 months after the share-for-share transaction;
- a loss share (i.e. base cost exceeds the market value) is disposed of within a period of 18 months before the share-for-share transaction;
- where the acquiring company disposes of a share acquired in terms of a share-for-share transaction within 18 months after that transaction, other than in terms of an intra-group transaction, unbundling transaction or a liquidation transaction.

The acquiring company is exempt from marketable securities tax, stamp duties and uncertificated securities tax in respect of any target shares acquired.

The treatment provided for under section 43 does, however, not apply in respect of the disposal of any share by a company—

- to a company which is exempt from tax;
- within 18 months after acquiring that share in terms of a company formation transaction; or
- where more than 50 per cent of either the market value or actual cost of all the assets of the target company and any other company which is a controlled company in relation to the target company, consists of financial instruments other than any share in a controlled company.

Transfers between group companies

Where a company disposes of an asset to another company in terms of an intra-group transaction, these companies may jointly elect—

- in the case of a capital asset, that the transferor company must be treated as having disposed of that asset for proceeds equal to the base cost and the transferee company must be treated as having acquired that capital asset at a cost equal to that base cost;
- in the case of an asset which constitutes trading stock, the transferor company will be treated as having disposed of the asset for proceeds equal to the amount of the cost of the asset as determined in section 22(1) or (3), as the case may be, and the transferee company will be treated as having acquired that asset at a cost equal to that cost.

An 'intra-group transaction' means a transaction in terms of which an asset is disposed of by one resident company to another resident company in the same group of companies.

Where the asset transferred constitutes a depreciable asset, the allowable allowance of the transferee company will be limited to the amount which the transferor company could have deducted if that asset had not been disposed of by that transferor company. The transferee company will also be treated as having been allowed all allowances of that transferee company for purposes of the recoupment provisions.

Provision is made for a transfer of an appropriate portion of the bad and doubtful debts allowances as well as for section 24 and 24C allowances.

Where the two companies at any time after an intra-group transaction cease to form part of the same group of companies the transferee company will be treated as having disposed of that asset for proceeds equal to the market value on the date that the companies cease to form part of the same group of companies and to have immediately re-aquired that asset for a cost equal to that market value. This will have the effect that the transferee company realises the gain that was rolled over from the transferor company.

The intra-group transaction benefits will not apply where—

- the asset disposed of is a financial instrument, unless it constitutes a debt due to the transferor company in respect of goods sold or services rendered by the transferor company or where the market value of those financial instruments do not exceed 5 per cent of the total market value of all the assets transferred;
- the transferee company is exempt from tax; or
- more than 50 per cent of the market value or the actual costs of all the assets of the company and any other company which is a controlled company in relation to that company consists of financial instruments other than shares in a controlled company.

Similar provisions apply in the case of an intra-group transaction in respect of the disposal within 18 months of that asset by the transferee company, as is the case in a corporate formation transaction.

An acquisition or disposal of any asset in terms of an intra-group transaction will also be exempt from marketable securities tax, stamp duties (on issue and on registration of transfer), donations tax and transfer duty. It will also not constitute a dividend for purposes of secondary tax on companies (STC).

Unbundling Transactions

Where an unbundling company disposes of distributable shares to its shareholders or its holding company in terms of an unbundling transaction, that unbundling company must be treated as having disposed of those shares for proceeds equal to the base cost of those shares. The unbundling company will, therefore, not realise any capital gain from that disposal. The shareholder or that holding company must be treated as having acquired the shares held in the unbundling company and the distributable shares at a cost equal to—

- where the shares held in the unbundling company were held as trading stock, the cost for the purposes of section 22(1) or (3), as the case may be, to that person of those shares in the unbundling company, or where such person is not a company, the lesser of such cost or the diminished value of the shares held in the unbundling company; or
- in any other case, the base cost of those shares held in the unbundling company.

A portion of the cost or base cost will be apportioned to the distributable shares, in the same proportion as the market value of the distributable shares bears to the market value of the shares held in the unbundling company.

The shares in the unbundling company and the distributable shares will be treated as being the same shares for purposes of section 9B.

A 'distributable share' means a share in a resident company held directly by a resident unbundling company, if the unbundling company—

- in the case where the unbundled company is a listed company, holds at least 35 per cent of the shareholding (or where no other shareholder holds an equal or greater interest than the unbundling company, more than 25 per cent; or
- where that unbundled company is an unlisted company—
  - holds more than 50 per cent of shareholding of that unlisted company; and
  - in the case where the unbundling company is a listed company, those shares are to be listed on a stock exchange within six months after the distribution *in specie.*

Any share in a company acquired by the unbundling company during the period of 18 months before the date of the unbundling transaction, shall not be taken into account in determining the interest of the unbundling company in that other company and does not constitute a distributable share, unless that share was acquired in terms of a previous transaction contemplated in this Part, an unbundling transaction in terms of section 60 of the Income Tax Act, 1993, or a rationalisation scheme contemplated in section 39 of the Taxation Laws Amendment Act, 1994.

The disposal or acquisition of distributable shares in pursuance of a distribution *in specie* in the course of an unbundling transaction is exempt from marketable securities tax, stamp duty and uncertificated securities tax. The distribution *in specie* of distributable shares shall not be a dividend for the purposes of STC.

The distribution *in specie* by an unbundling company in terms of an unbundling transaction is treated as having been distributed first from the share premium account of the unbundling company thereafter from undistributed profits.

The treatment awarded in terms of the proposed section 45 does not apply—

- where more than 50 per cent of either the market value or actual costs of all the assets of the unbundled company and any controlled company in relation to that unbundled company consists of financial instruments, other than shares in any controlled company; or
- in respect of any distribution of shares in terms of an unbundling transaction to a non-resident shareholder who acquires more than 5 per cent of the distributable shares in terms of that unbundling transaction.

Transactions relating to liquidation, winding-up and deregistration

Where a liquidating company disposes of a capital asset in terms of a liquidation distribution to its holding company the liquidating company must be treated as having disposed of that asset for proceeds equal to the base cost. The liquidating company does not, therefore, realise any capital gain as a result of the disposal of that asset. The base cost of the asset will be carried over to the holding company.

Where the asset constitutes trading stock the liquidating company must be treated as having disposed of that asset for an amount equal to the cost of that asset as contemplated in section 22(1) or (3), as the case may be, and that cost will be carried over to the holding company.

Where the asset is a depreciable asset any claimable allowance of the holding company will be limited to the amount of any allowance that the liquidating company could deduct in respect of that asset, if that asset had not been disposed of by that liquidating company. The holding company will be treated as having been allowed any allowance which was allowed as a deduction in the determination of the taxable income of that liquidating company for the purposes of the recoupment of any allowance.

Provision is made for a transfer of an appropriate portion of the bad and doubtful debts allowances as well as for section 24 and 24C allowances.

The acquisition or disposal in terms of this section, of any—

- immovable property shall be exempt from transfer duty; and
- marketable security shall be exempt from the payment of marketable securities tax, stamp duties and uncertificated securities tax.

Provisions similar to that in respect of corporate formation transactions apply in the case of a liquidation transaction where the holding company disposes of an asset within 18 months after so acquiring that asset.

The benefits provided under section 46 do not apply where—

- the holding company is exempt from tax;
- more than 50 per cent of either the market value or actual cost of all the assets of the liquidating company and any controlled company in relation to the liquidating company, consists of financial instruments other than shares in a controlled company;

- the liquidating company has not, within a period of six months after the date of the liquidation distribution, taken such steps as prescribed by the Minister of Finance by regulation to liquidate, wind up or deregister that company. Any tax which becomes payable as a result of the application of this paragraph shall be recoverable from the holding company.

CLAUSE 1

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

A new provision is proposed to provide for an exemption of any disposal of marketable securities in terms of certain transactions contemplated in the CORPORATE RULES referred to above. This exemption will apply where the public officer of the company has made a sworn affidavit that the transaction complies with the relevant provisions. See NOTES on CORPORATE RULES above.

CLAUSE 2

Marketable Securities Tax: Amendment of section 4 of the Marketable Securities Tax Act, 1948

See NOTES on SIYAKHA above.

CLAUSE 3

Marketable Securities Tax: Amendment of section 9 of the Marketable Securities Tax Act, 1948

See NOTES on SIYAKHA above.

CLAUSE 4

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

See NOTES on SIYAKHA above.

CLAUSE 5

Marketable Securities Tax: Insertion of section 11A of the Marketable Securities Tax Act, 1948

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 6

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

See NOTES on SIYAKHA above.

CLAUSE 7

Transfer Duty: Amendment of section 4 of the Transfer Duty Act, 1949

See NOTES on SIYAKHA above.

CLAUSE 8

Transfer Duty: Amendment of section 9 of the Transfer Duty Act, 1949

A new provision is proposed to provide for an exemption of any transfer of immovable property to any company in terms of certain transactions contemplated in the CORPORATE RULES referred to above. This exemption will apply where the public officer of the company has made a sworn affidavit that the transaction complies with the relevant provisions.

CLAUSE 9

Transfer Duty: Amendment of section 11A of the Transfer Duty Act, 1949

See NOTES on SIYAKHA above.

CLAUSE 10

Transfer Duty: Substitution of section 18 of the Transfer Duty Act, 1949

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 11

Transfer Duty: Repeal of section 19 of the Transfer Duty Act, 1949

This amendment is consequential upon the introduction of the new objection and appeal procedures. See NOTES on OBJECTIONS AND APPEALS.

CLAUSE 12

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

Section 5 of the Estate Duty Act, 1955, was amended by the Revenue Laws Amendment Act, 2001 (Act No. 19 of 2001), to provide that the value of the property determined in terms of this section shall apply in respect of property to be included in an estate, as well as for purposes of the deductions contemplated in section 4.

The amendments proposed in this clause are consequential upon the amendment of this section by the Revenue Laws Amendment Act, 2001. These amendments shall be deemed to have come into operation on 27 July 2001.

CLAUSE 13

Estate Duty: Amendment of section 8A of the Estate Duty Act, 1955

See NOTES on SIYAKHA above.

CLAUSE 14

Estate Duty: Amendment of section 9A of the Estate Duty Act, 1955

This amendment is consequential upon the introduction of the new objection and appeal procedures introduced in the Act.

CLAUSE 15

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

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 16

Estate Duty: Insertion of section 25A in the Estate Duty Act, 1955

Section 102 of the Income Tax Act, 1962, provides that the Commissioner may refund any amount of tax which was paid by the taxpayer, but which was not properly chargeable. No amount so overpaid on an assessment which was accepted by the taxpayer and which was made in accordance with the practice generally prevailing at the date of that assessment, shall be refunded.

Furthermore, the Commissioner shall not authorise any refund, unless the claim therefor is made within three years after the date of the assessment under which such tax was payable.

No similar provisions are contained in the Estate Duty Act, 1955, and it is proposed that a new section 25A be inserted in the Act to address these issues.

A provision is also inserted to provide that where any refund is due to an executor in respect of any estate of a person and such person has failed to pay any amount of tax, additional tax, duty, levy, charge, interest or penalty levied or imposed under any other law administered by the Commissioner, the Commissioner may set-off the amount which has become refundable to the executor against the amount which that person has failed to pay.

CLAUSE 17

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

Subclause (a): It is proposed that a new section 9G be introduced in the Income Tax Act, 1962, to provide for the taxation of foreign currency equity instruments. Certain other provisions in the Act, including section 9D and paragraph 43 of the Eighth Schedule to the Act also refer to foreign equity instruments and it is, therefore, proposed that a definition thereof be included in section 1.

A foreign currency equity instrument is defined as—
- a share listed on a recognised exchange;
- a unit in a scheme or arrangement contemplated in paragraph *(e)*(ii) of the definition of "company" in section 1;
- a contractual right or obligation which derives its value from any specified index; or
- a coin made mainly from gold or platinum,

which is denominated in any foreign currency, and any option, future or contract relating to such share, unit, interest, investment or commodity or coin.

Subclause (b): Paragraph *(e*A*)* of the definition of "gross income" provides that where a pension fund is converted to a fund which entitles the member to a benefit on retirement in the form of a lump sum exceeding one-third of the value of the benefits, an amount equal to two-thirds of such amount shall be deemed to have been received or accrued to the member. Paragraph *(e*A*)* was amended in 1999, to provide that where an endorsement has been made in the records of a pension fund which provides that any part of the amount in that fund shall be paid to the former spouse of the member, and the fund converts as contemplated in paragraph *(e*A*)*, that portion of the amount in the fund which must be paid to the former spouse must be deemed to be converted for the benefit of the member.

Although section 7(8) of the Divorce Act, 1979 (Act No. 70 of 1979), provides that an endorsement may be made in the records of the fund where the court makes an order that part of the pension interest of the member shall be paid to the former spouse of the member, such an endorsement is not always made. It is, therefore, proposed that this requirement be deleted and that paragraph *(e*A*)* should apply in any instance where the court granting a decree of divorce makes an order that part of the pension interest shall be paid to the former spouse.

Subclause (c): In a recent judgement of the Supreme Court of Appeal, the court found that an amount received or accrued from the disposal of an asset manufactured by a taxpayer, which was not manufactured for purposes of resale, but for purposes of using that asset within the business operation of the taxpayer, is of a capital nature and, therefore, not subject to tax. In this case the taxpayer was a manufacturer of vehicles and the issue revolved around the taxability of the amounts received from the disposal of, for example, the vehicles manufactured for use by employees.

The view is held that these amounts should form part of the income derived from the business carried on by the taxpayer. It is, therefore, proposed that a new paragraph be inserted in the definition of "gross income" to provide that there must be included in the gross income any amount received by or accrued to a taxpayer during the year of assessment from the disposal of any asset manufactured, produced, constructed or assembled by the taxpayer, which is similar to any other asset manufactured, produced, constructed or assembled by that taxpayer for purposes of manufacture, sale or exchange.

Subclause (d): Currently foreign dividends are included in the gross income of a person under paragraph *(k)* of the definition of "gross income". The amount included under that paragraph only relates to any foreign dividend after taking into account any exemptions provided in section 9E. It is proposed that the gross amount of foreign dividends be included in gross income, but that the exemptions as provided for in section 9E be exempted under section 10. This amendment gives effect to this proposal.

Subclause (e): The definition of "trading stock" currently includes *inter alia* anything produced, manufactured, purchased or in any other manner acquired for purposes of maufacture, sale or exchange. It is proposed that this definition be extended to also include anything constructed or assembled by the taxpayer for purposes of manufacture, sale or exchange.

CLAUSE 18

Income Tax: Amendment of section 3 of the Income Tax Act, 1962

Paragraph 29 of the Eighth Schedule is amended by the addition of a new subparagraph to provide that the Commissioner must in certain circumstances determine the market value of financial instruments listed on an exchange in the Republic, having regard to the value of the financial instrument, circumstances surrounding the suspension of that financial instrument or reasons for the increase in the value of that financial instrument. It is proposed that the exercise of the discretion by the Commissioner must be subject to objection and appeal and this amendment gives effect to that proposal.

CLAUSE 19

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

See NOTES on SECRECY PROVISIONS above.

CLAUSE 20

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

Subclause (a) and (b): Section 6*quat* of the Income Tax Act, 1962, grants a rebate against tax payable by a person of any amount of foreign tax paid to the government of any other country in respect of income which is included in the taxable income of the taxpayer.

In terms of section 7 of the Act, and certain provisions contained in the Eighth Schedule to the Act, certain amounts received by or accrued to a person, or certain capital gains of a person are attributed to another person and taxed in that other person's hands.

In terms of the current wording of section 6*quat* the person in whose hands the income now becomes taxable, will not be able to claim the foreign tax credits as the foreign tax was not payable by that person.

Similarly, where a beneficiary of a trust becomes entitled to an amount of capital in a trust which constituted income of the trust which was not taxable in the Republic (or which would have constituted income had such trust been a resident), that amount to which the beneficiary so becomes entitled to is included in the income of the beneficiary.

As any foreign tax in respect of the income would have been payable by the trust and not the beneficiary, that beneficiary will also not be able to claim the foreign tax credits.

It is, therefore proposed that section 6*quat* be amended to specifically provide that the person will be entitled to claim the foreign tax payable as a credit against normal tax in these instances.

Subclauses (c) and (d): Section 9E(5) provides that where a foreign dividend is declared to a unit portfolio and that dividend or a portion of that dividend is on-declared by the unit portfolio to its unit holders, the foreign dividend shall be deemed to have been declared by the company directly to such unit holders. As the withholding tax on that dividend would, strictly speaking, have been paid by the unit portfolio, it is proposed that section 6*quat* be amended to provide that the unit holders may claim the foreign tax credit relating to the portion of the foreign dividend which is included in that unit holder's income.

CLAUSE 22

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

Subclause (a): A new paragraph *(j*A*)* is inserted in the definition of "gross income" to include therein any amount received by or accrued to any person during the year of assessment from the disposal of any asset manufactured, produced, constructed or assembled by a taxpayer, which is similar to any other asset manufactured, produced, constructed or assembled by that taxpayer for purposes of manufacture, sale or exchange by that taxpayer.

Where such an asset was used as a capital asset by that taxpayer prior to disposal and the taxpayer claimed an allowance thereon, any amount of that allowance which is recovered or recouped will be included in the income of that taxpayer in terms of section 8. It is, therefore, proposed that an exclusion be inserted in this provision to provide that the amount recovered or recouped must not be included in the income of the taxpayer in terms of section 8, where that amount has already been included on the taxpayer's gross income in terms of the new provision *(j*A*)* of that definition.

Subclause (b): Section 8(4)*(k)* of the Income Tax Act, 1962, provides that for the purposes of the recoupment provisions in section 8(4)(a), where any person has donated an asset or distributed any asset by way of a dividend in respect of which a deduction or an allowance has been granted to such person in terms of any of the provisions referred to in that paragraph, such person shall be deemed to have recovered or recouped an amount equal to the market value of such asset as at the date of such donation or distribution.

It is proposed that this paragraph be extended to also apply where a person disposes of any asset to a connected person. The reason for this proposal is that a taxpayer may sell an asset, in respect of which an allowance was granted, to a connected person at the tax value and that connected party immediately sells that asset at market value. This will have the effect that there is no recoupment in the hands of the taxpayer.

CLAUSE 22

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

Subclause (a): A controlled foreign entity is defined as a foreign entity in which any resident or residents of the Republic, whether individually or jointly, and whether directly or indirectly, hold more than 50 per cent of the participation rights, or are entitled to exercise more than 50 per cent of the votes or control of the entity. It is proposed that in the case of a foreign listed entity, it is not always practically possible for the entity to determine the residency of its shareholders.

It is, therefore, proposed that a proviso be added to the definition to provide that in determining whether residents jointly hold more than 50 per cent of the participation rights of any foreign entity which is listed on a recognised exchange, or which is a scheme or arrangement contemplated in paragraph *(e)*(ii) of the definition of "company" in section 1, any person who holds less than 5 per cent of the participation rights shall be deemed not to be a resident, except where connected persons hold more than 50 per cent of the participation rights of that foreign entity.

Subclause (b) and (c): Section 9G provides for the determination of tax in respect of foreign equity instruments held as trading stock. Similarly, paragraph 43(4) of the Eighth Schedule provides for the determination of a capital gain from the disposal of a foreign equity instrument which is held as a capital asset. In order to determine the foreign currency profit or gain in respect of such an asset, one needs to determine the expenditure by translating the amount of the expenditure incurred in the foreign currency to the local currency of that person at the ruling exchange rate on the date that the expenditure was incurred. The amount derived from the disposal of that foreign equity

instrument is translated to the local currency at the ruling exchange rate on the date of the disposal. In this manner the foreign currency gain or loss is determined.

Where these provisions need to be applied in respect of a controlled foreign entity in determining the net income of the controlled foreign entity for purposes of section 9D, it is proposed that the foreign currency gain or loss be determined in the currency of the Republic and that the gain or loss must be translated to the local currency of the controlled foreign entity on the last day of the foreign tax year of the controlled foreign entity

Furthermore, capital gains tax was introduced by the Taxation Laws Amendment Act, 2001 (Act No. 5 of 2001), and took effect on 1 October 2001. Only a portion of the net capital gain of a person is included in the taxable income of that person. In the case of—

- natural persons and special trusts, the inclusion rate is 25%;
- an insurer in respect of its individual policyholder fund, the inclusion rate is 25%, whereas for its untaxed policyholder fund, it is 0%; and
- any other person, the inclusion rate is 50%.

Section 9D of the Income Tax Act, 1962, provides for the inclusion in the income of a resident of a proportional amount of the net income of a controlled foreign entity in relation to that resident. The net income of the controlled foreign entity is determined as if such entity had been a resident. This would effectively mean that the inclusion rate of any capital gain would be 50% and the proportional amount of the net income which is taxable in the hands of the resident would include 50% of the capital gains of the controlled foreign entity.

It is proposed that where the resident is a natural person, a special trust or an insurer in respect of its individual policyholder fund, only 25% of the net capital gain of the controlled foreign entity be taken into account in determining its net income for purposes of inclusion of the proportional amount in the income of that resident.

Subclause (d): The first exclusion from the application of the provisions of section 9D relates to receipts and accruals of a company, which have been or will be subject to tax on income in a designated country at a statutory rate of at least 27 per cent. Bearing in mind that the controlled foreign entity will now also have to include capital gains in the determination of the net income of the controlled foreign entity for purposes of imputing a proportional amount to the residents, it is proposed that a reference also be inserted to the capital gains.

It is proposed that these capital receipts and accruals must not be taken into account in the determination of the net income of the entity, where they have been or will be subject to tax at a statutory rate of at least 13,5 per cent. This percentage is determined based on 50 per cent of the current required rate of 27 per cent, as only 50 per cent of the capital gains will be required to be included in the net income in terms of the provisions of the Eighth Schedule.

Therefore, where those capital gains have been or will be subject to tax at a rate of 13,5 per cent, it will also be excluded from the ambit of section 9D.

Subclause (e), (f), (g) and (h): The provisions of section 9D do not apply in respect of the receipts and accruals of a controlled foreign entity which are attributable to a business establishment of that controlled foreign entity in a country outside the Republic.

This exclusion does, however, not apply in respect of any receipts and accruals in the form of dividends, interest, royalties, rental, annuities, insurance premiums or income of a similar nature, or any proceeds derived from the disposal of any asset, unless those receipts or accruals do not in total exceed 5 per cent of the total receipts and accruals of the controlled foreign entity, or arise from the principal trading activities of any banking or financial services, insurance or rental business. It is proposed that foreign currency gains from the disposal of a foreign currency equity instrument and the foreign currency gains determined in terms of section 24I also be included in the provision which refers to these other forms of passive income.

In determining whether the receipts and accruals exceed 5 per cent of total receipts and accruals, it is proposed that capital gains also be included in this amount. This will, however, require that the provisions of section 9D(9)*(b)*(iii) also be amended to also only refer to capital gains from the disposal of any asset from which these forms of passive income is derived, instead of referring to the proceeds derived from the disposal.

These passive forms of income (including capital gains) will also be excluded from the ambit of section 9D if it arises from the principal trading activities of any banking or financial services, insurance or rental business. This exclusion will, however, not apply in respect of any receipts and accruals from any connected person in relation to the controlled foreign entity, who is a resident. It is proposed that this provision be amended to provide that the exclusion should also not apply in respect of receipts and accruals from any resident who holds at least 5 per cent of the participation rights of that controlled foreign entity. It is, furthermore, proposed that before the receipts and accruals are excluded from section 9D, it must also be derived mainly from persons who are not connected persons in relation to that controlled foreign entity.

Subclause (i): Currently, section 9D does not apply in respect of interest, royalties or rental which is paid by a controlled foreign entity to another controlled foreign entity in relation to the same resident. It is proposed that this exclusion from the ambit of section 9D be extended to other income of a similar nature and to any exchange difference determined in terms of section 24I. The test whether the other foreign entity is a controlled foreign entity in relation to the resent is also removed. Before this exemption thus applies, the other foreign entity must form part of the same group of companies as the controlled foreign entity.

Subclause (j): It is, furthermore, proposed that a further exclusion from section 9D be introduced in respect of any capital gain of the controlled foreign entity, where the asset in respect of which that capital gain is determined was attributable to the business establishment of the controlled foreign entity or any other foreign entity which forms part of the same group of companies. This exclusion will, however, not apply in respect of financial instruments or intangible assets.

Subclause (k): It is proposed that there should also be excluded from section 9D, any amount received or accrued to such controlled foreign entity—

- from the disposal of any interest in the equity share capital of any other foreign entity which is a company; or

- by way of a dividend declared to that controlled foreign entity by any other foreign entity which is a company,

if that controlled foreign entity on the date of that disposal or declaration of dividend holds more than 25 per cent of the equity share capital in that other foreign entity. In the case of the disposal, it is required that the controlled foreign entity must have held more than 25 per cent shareholding for a period of at least 18 months prior to the disposal, unless that interest was acquired by the controlled foreign entity from any other foreign entity which forms part of the same group of companies as that controlled foreign entity and both companies in aggregate held that interest of more than 25 per cent for more than 18 months.

This exclusion from section 9D will, however, not apply where more than 50 per cent of either the market value or the actual cost of all the assets of that other foreign entity and any controlled company, as defined in section 41, of that other foreign entity, on the date of that disposal or distribution, consists of financial instruments other than any shares in a controlled company.

CLAUSE 23

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

Subclause (a): Paragraph *(b)* of the definition of "foreign dividend" includes in that definition as a dividend any amount derived by a person from the disposal of a share or interest in the fixed capital of a company, to the extent that such company or any subsidiary of such company has any undistributed profits which have not been subject to tax in the Republic, which were available for distribution to that person. Bearing in mind that capital gains tax has been introduced with effect from 1 October 2001, it is proposed that this paragraph be deleted, as the gain from the disposal of any share will now be taxable as a capital gain.

Subclause (b): Section 9E(5) provides that where a foreign dividend is declared by a company to a unit portfolio and that dividend is distributed by the unit portfolio by way of a dividend, or portion of a dividend, to persons who have become entitled to the dividend by virtue of being registered as a unit holder, that dividend must be deemed to have been declared by the company directly to the unit holders. As it is not always the full dividend that is passed on to the unit holders, as the unit portfolio deducts administration fees, it is proposed that the provision be amended to deem the amount of the dividend to have been directly declared to the unit holders, to the extent that the dividend is declared to such unit holder.

Subclause (c): Section 9E determines the amount of any foreign dividend that is taxable in the hands of a resident. Subsection (5A) provides for a deduction from the income derived by way of taxable foreign dividends of an amount of any interest actually incurred by the resident in the production of income in the form of foreign dividends. This deduction is, however, limited to the amount of foreign dividends included in the gross income of such resident.

There are, however, certain foreign dividends which are included in the gross income of a resident, but which are exempt from tax in terms of section 9E, or may be exempt in terms of the interest and dividend exemption in terms of section 10(1)*(I)*(xv). The

deduction contemplated in subsection (5A) must, therefore, be limited to the amount of foreign dividends which are not exempt from tax. In order to achieve that, it is proposed that the amount be limited to the income (which is determined after exempt amounts have been excluded) of the resident.

Subclause (d): A foreign dividend is exempt from tax where that dividend is declared by a company to a resident who holds a qualifying interest in such company, to the extent that the profits from which the dividend is declared were generated in a designated country and are or will be subject to tax at a statutory rate of at least 27 per cent. It is proposed that the requirement that the profits had to be generated in a designated country be removed and that the requirement that the profits be subject to tax at a statutory rate of 27 per cent be amended to provide that the profits must be subject to a rate at that level in a designated country. This will bring it in line with the exemption provided in section 9D(9)*(a)* and will simplify the application of the foreign dividend provisions for both taxpayers and SARS.

Bearing in mind that capital gains tax was introduced on 1 October 2001, a foreign dividend will also be exempt where the capital gain from which the dividend is declared was subject to tax at a statutory rate of 13,5 per cent, being a rate equal to 50 per cent (i.e. the company inclusion rate for capital gains) of the 27 per cent statutory rate.

Subclause (e): Section 9E(7)*(e)* of the Income Tax Act, 1962, provides that foreign dividends declared by a company listed on the Johannesburg Stock Exchange are exempt from tax, provided certain requirements are met. Section 9E(7)*(f)*, in addition, exempts from tax any foreign dividend declared by a company out of profits derived by such company by way of any foreign dividend which is exempt from tax in terms of the provisions of section 9E(7).

Where a dividend is thus declared by a listed company to a foreign company that is a controlled foreign entity, the dividend declared by the listed company after 23 February 2000 will be exempt both in the hands of the controlled foreign entity and in the hands of the ultimate South African shareholder to whom that dividend is on-declared by that controlled foreign entity.

Where, however, the dividend was declared by the listed company before 23 February 2000, to a CFE but not on declared to the South African shareholder before that date, the on declaration of the dividend will not be exempt in terms of section 9E(7)*(f)*, as the initial dividend did not constitute a foreign dividend which was exempt. It was not the intention that these dividends must now be taxable. It is, therefore, proposed that section 9E(7)*(f)* be amended to provide that a foreign dividend will be exempt where it is declared out of a income derived from exempt foreign dividends, or dividends which would have constituted an exempt foreign dividend had it been declared before 23 February 2000.

CLAUSE 24

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

Section 9F of the Income Tax Act, 1962, effectively deals with the foreign source income of an offshore branch of a South African company. It provides that any amount received

or accrued to such a company from a source outside the Republic is exempt from tax where that amount has been or will be subject to tax in any designated country at a statutory rate of at least 27 per cent. Bearing in mind that capital gains tax was introduced with effect from 1 October 2001 and foreign source capital gains will now also become taxable, it is proposed that the exemption be extended to capital gains which have been or will be subject to tax at a statutory rate of at least 13,5 per cent.

CLAUSE 25

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

It is proposed that a new section 9G be introduced in the Income Tax Act, 1962, to provide for the taxation of income in respect of foreign equity instruments. A foreign equity instrument is defined in section 1, as—

- a share listed on a recognised exchange outside the Republic;
- a unit in a scheme or arrangement contemplated in paragraph *(e)*(ii) of the definition of "company" in section 1;
- any other contractual right or obligation that derives its value from a specified index; or
- any coin made mainly from gold or platinum,

which is denominated in any foreign currency, and any option, future or contract relating to such share, unit, interest, investment or contractual right or obligation or coin.

'Foreign currency' means any currency which is not legal tender in the Republic.

This section provides that the amount to be included in the gross income of a person in respect of the disposal of a foreign equity instrument which is held as trading stock, must be determined by translating the amount received or accrued in any foreign currency in respect of that disposal into Rands at the ruling exchange rate on the date of that disposal.

Any amount allowed as a deduction for tax purposes in respect of a foreign equity instrument must be translated into Rand at the ruling exchange rate on the later of the date of incurral of that expenditure or 1 October 2001.

CLAUSE 26

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

Subclause (a): Section 10(1)*(e)* was amended in 1999, to exempt from tax any levy received by or accrued to *inter alia* any association of persons from its members where the Commissioner is satisfied that the association was formed solely for the purposes of managing the collective interests common to all its members, including the collection of levies and the administration of expenditure applicable to the common property. The common property referred to was intended to relate to common immovable property. It

is, therefore, proposed that the provision be amended to specifically refer to immovable property to remove any uncertainty in this regard.

Subclause (b): Currently foreign dividends are included in the gross income of a person under paragraph *(k)* of the definition of "gross income". The amount included under that paragraph only relates to any foreign dividend after taking into account any exemptions provided in section 9E. It is proposed that the gross amount of foreign dividends be included in gross income, but that the exemptions as provided for in section 9E be exempted under section 10. This amendment gives effect to this proposal.

CLAUSE 27

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

Section 11*(o)* provides for a scrapping allowance in respect of an asset which has been scrapped by a taxpayer. It is proposed that no allowance be allowed under this paragraph in respect of any asset which is disposed of by that person to a connected person. The reason for this proposal is that a taxpayer may sell an asset in respect of which an allowance was granted, to a connected person at the tax value and that connected party immediately sells that asset at market value. This will have the effect that there is no recoupment in the hands of the taxpayer.

Any amount which is disallowed as a deduction under this subparagraph may, however, be deducted by that person from any amount received by or accrued to that person from that connected person, which must be included in the gross income of that person in that year of assessment or any subsequent year of assessment, if that other person is still a connected person in relation to that person.

CLAUSE 28

Income Tax: Amendment of section 12D of the Income Tax Act, 1962

Section 12D was inserted in the Income Tax Act, 1962, in 2000 to provide for an allowance in respect of pipelines, transmission lines and railway lines used in the sole business of the taxpayer of transportation of persons, goods or things or the transmission of electricity or telecommunication signals. The reason why this provision was made so restrictive by limiting it to the use in the sole business of the taxpayer, was to prevent banking institutions from acquiring these pipelines and using its allowable tax base to claim these allowances.

In terms of the new proposed Gas Bill which is currently before Parliament, various types of licenses will be issued to companies in the gas industry, including a transmission license, storage license, distribution license and trading license. The Bill also provides that a company distributing gas will be granted licenses for the construction of the distribution network, the operation of the network and a trading license for the trading in gas within its area of distribution.

Although the distribution pipelines will be used by these taxpayers for the transportation of gas, they will also have a trading license and engage in the buying and selling of gas.

The transportation of gas will, therefore, not be the sole business of the taxpayer. It was not the intention to exclude these types of businesses from claiming the allowance.

It is, therefore, proposed that section 12D be amended to provide that the transportation must be the sole or principal business or must be a main or necessary activity in conducting the sole or principal business of the taxpayer.

CLAUSE 29

Income Tax: Amendment of section 12G of the Income Tax Act, 1962

Section 12G was introduced by the Revenue Laws Amendment Act, 2001 (Act No. 19 of 2001), to provide for an additional industrial investment allowance in respect of industrial assets used in qualifying strategic industrial projects. A project needs to comply with certain requirements before it will qualify for the additional allowance. One such requirement is that the Minister must be satisfied that the industrial project will not constitute an industrial participation project and will not receive any concurrent investment incentive provided by any national sphere of government.

Subsection (7) authorises the Minister of Finance to issue regulations prescribing the factors to be taken into account in determining whether a project complies with the requirements of the section. In this regard, the Minister may prescribe what constitutes an industrial participation project for purposes of subsection (4)*(e)*. No provision is made for the Minister to determine the concurrent investment incentives contemplated in subsection (4)*(e)*. This effectively means that where a project receives any investment incentive from national government, that project will be disqualified. It is, therefore, proposed that the provisions be amended to authorise the Minister to also provide which concurrent investment incentives may not be received by the project.

It is, furthermore, proposed that in determining whether the new project will displace any activities in the relevant industrial sector, regard must also be had to the possible displacement of employment.

CLAUSE 30

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

This amendment is of a textual nature.

CLAUSE 31

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

This provision deals with the tax consequences of schemes of arrangement involving trading stock. It is proposed that this provision be suspended as a consequence of the special rules which are being introduced in Part III of Chapter II of the Act.

This section will, therefore, no longer apply in respect of the acquisition of trading stock on or after 1 October 2001.

CLAUSE 32

Income Tax: Amendment of section 23A of the Income Tax Act, 1962

Section 23A limits certain allowances granted to lessors in respect of certain assets. In short, it provides that allowances granted under various provisions to lessors of assets are ring-fenced and may only be set-off against the rental income derived from such assets.

At present the affected assets contemplated in the section do not include assets referred to in section 11*(e)* of the Act. The purpose of the proposed amendment is to extend the ambit of the provision to also include section 11*(e)* assets.

An amendment is also proposed to the definition of "operating lease" in this section to clarify that the property may only be hired y members of the general public directly from a lessor.

CLAUSE 33

Income Tax: Amendment of section 23C of the Income Tax Act, 1962

Section 23C ensures that value-added tax (VAT) cannot be claimed as a deduction in terms of the Income Tax Act when it has been allowed as an input tax deduction in terms of section 16(3) of the Value-Added Tax Act, 1991. As it stands the section only refers to the *cost* of an asset or expenditure incurred by a taxpayer. It says nothing about the situation where, for example, a deduction in respect of an asset is not based on cost but rather on market value. There are many examples of such cases in the Income Tax Act, 1962, including—

- assets acquired by donation or inheritance (e.g. section 11*(e)*)
- assets sold between connected persons (e.g. section 12C(4))
- assets in respect of which market value is one of the methods used in determining the base cost of an asset in terms of the Eighth Schedule.

It is contended that it is arguable that VAT should be included when determining market value since it is usually included in the advertised price (see section 65 of the Value-Added Tax Act, 1991. To remove any uncertainty in this regard, it is proposed to extend the application of section 23C to exclude VAT from the market value of an asset where it has been claimed as an input tax deduction.

CLAUSE 34

Income Tax: Amendment of section 23H of the Income Tax Act, 1962

Section 23H was introduced in 2000, to provide that where any person has incurred any expenditure, which is or was allowable as a deduction, the amount allowed to be deducted in any year of assessment shall be limited to the expenditure relating to goods supplied, services rendered or benefits the person will become entitled to during the relevant year of assessment.

Certain commentators have suggested that this provision is not effective in spreading the amount incurred in respect of a benefit over the period over which that benefit will be enjoyed. It is, therefore, proposed that this section be amended to make it clear that this is the intention.

CLAUSE 35

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

This provision prescribes the tax consequences of transactions whereby trading stock consisting of fixed property or shares are exchanged for shares. It is proposed that the operation of this section be suspended as a consequence of the new corporate rules proposed in Part III of Chapter II. The section will, therefore, no longer apply in respect of transactions entered into on or after 1 October 2001.

CLAUSE 36

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

The move to the residence basis of taxation required rules to determine what constitutes foreign currency in relation to a South African resident, a foreign branch of a South African resident or a controlled foreign entity.

It is proposed that the definition of foreign currency be amended to provide that foreign currency in relation to any permanent establishment of a person is any currency which is not legal tender in the country in which that permanent establishment is situated. The definition also deals with situations where exchange items of a resident or a foreign entity cannot be attributed to a permanent establishment.

A definition of “local currency” is introduced which mirrors the definition of “foreign currency”.

The definition of “spot rate” is amended to delete the reference to the delivery of currency within a period of two business days. The reason for the amendment is to enable the application of the definition in an international context.

The development of capital gains tax provisions to deal with the foreign currency gains and loss element of the disposal of foreign currency assets and other foreign assets

required a review of the provisions of section 24I. The scope of the provisions is to be extended to include all foreign currency gains and losses of companies, trusts which are carrying on any trade and any natural person who holds any exchange item as trading stock. This results in a clear distinction between the provisions of section 24I and the Eighth Schedule based on the type of taxpayer.

The proposed amendment will result in certain exchange items which were not dealt with under section 24I becoming subject to the provisions of that section. Provision is made for a deemed acquisition of those exchange items on 1 October 2001 at the ruling exchange rate on that date.

It is proposed that a provision be introduced to prevent the deduction of an exchange loss by a resident from a transaction with a controlled foreign entity in relation to that resident or any connected person in relation to that controlled foreign entity, to the extent that the income attributable to that transaction is not included in the net income of that controlled foreign entity for purposes of section 9D.

The exchange gain or loss element attributable to the period of ownership of certain foreign assets is not subject to tax on disposal of those assets in terms of paragraph 42 of the Eighth Schedule. Where the foreign asset is financed by utilising a foreign loan, advance or debt, exchange differences may arise on that loan, advance or debt. This results in a mismatch for tax purposes. In order to create parity in the tax treatment of the exchange differences in respect of the asset and the financing of the asset it is proposed that exchange differences on such a loan, advance or debt not be allowed for tax purposes. Any exchange difference in respect of a forward exchange contract or foreign currency option contract entered into to hedge the above loan, advance or debt will for the same reason not be taken into account for tax purposes.

In the case of an exchange item of a company or trust which is denominated in the local currency of a foreign permanent establishment, the attribution of the exchange item to the permanent establishment or ceasing of attribution to the permanent establishment may result in the non recognition of exchange gains or losses. In order to address this deficiency it is proposed that the attribution of an exchange item of a company or trust to the permanent establishment is deemed to be realised for purposes of section 24I. Likewise, when the exchange item ceases to be attributable to the permanent establishment of a company or trust, it is deemed to be an exchange item which has been acquired for purposes of section 24I.

Certain obsolete provisions dealing with transitional rules which were required when the section was introduced in 1993 are also repealed.

CLAUSE 37

Income Tax: Amendment of section 25D of the Income Tax Act, 1962

The taxation of income of South African residents on a world-wide basis has the result that foreign income is derived in foreign currency. These amounts have to be translated into South African currency in order to determine taxable income.

It is proposed that the current provisions which require a translation to the currency of the Republic on the last day of the year of assessment be amended. It is proposed that taxable income from income attributable to a permanent establishment of a resident outside the Republic, be determined in the relevant currency of the country in which that permanent establishment is situated, if the financial records of that permanent establishment are kept in that currency. The amount of the taxable income so determined must be converted on the last day of the relevant year of assessment to the currency of the Republic.

Where income is not attributable to a foreign permanent establishment in the circumstance described above, the taxable income must be determined in the currency of the Republic.

CLAUSE 38

Income Tax: Repeal of section 28bis of the Income Tax Act, 1962

This amendment is consequential upon the introduction of the special rules in Part III of Chapter II. See NOTES on CORPORATE RULES above.

CLAUSE 39

Income Tax: Amendment of section 29A of the Income Tax Act, 1962

Section 29A of the Income Tax Act, 1962, was amended by the Taxation Laws Amendment Act, 2001 (Act No. 5 of 2001), to *inter alia* provide that the four funds shall be deemed to be separate persons and connected persons for purposes of certain provisions of the Act, including the Eighth Schedule to the Act.

Although the taxable capital gain of a person is determined in terms of the Eighth Schedule, the amount of that taxable capital gain is included in the taxable income of a person in terms of section 26A. It is, therefore, proposed that a reference to section 26A should be specifically included.

It is, furthermore, proposed that the four funds of an insurer must also be deemed to be separate companies for purposes of section 20, which relates to the set-off of assessed losses. The effect thereof will be that a loss may not be transferred from one fund of the insurer to another. The funds must also be deemed to be separate companies for purposes of section 24I as it should also apply in respect of the four funds of an insurer.

CLAUSE 40

Income Tax: Amendment of section 33 of the Income Tax Act, 1962

This amendment is of a textual nature.

CLAUSE 41

Income Tax: Amendment of section 36 of the Income Tax Act, 1962

This amendment is consequential upon the amendment of section 37 of the Income Tax Act, 1962.

CLAUSE 42

Income Tax: Amendment of section 37 of the Income Tax Act, 1962

Section 37 of the Income Tax Act, 1962, deals with the calculation of capital expenditure on the change of ownership of mining property. Whenever assets of a mine (which includes both mining property and development assets) are sold, the Director-General: Minerals and Energy determines an effective value to be placed on all the assets passing. The effective value placed on the development assets serves to determine for tax purposes the recoupment in the hands of the seller as well the amount of the development asset to be allowable as a deduction in the hands of the new owner.

The courts have recently held that mining property is limited to fixed property and does not include, for example, mineral rights. Where only the right to mine or minerals is disposed of, the recoupment provisions in section 37 are circumvented. Furthermore, if there is no change of ownership in the mining property, but only a lease of the mining property, the provisions of section 37 are also not activated.

To overcome this difficulty, it is proposed that—

- a definition of mining property be inserted to specifically include rights to mine and to minerals, as well as leases or sub-leases of such rights;
- the lease, transfer or cession of mining property also triggers the operation of section 37.

CLAUSE 43

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

This amendment is consequential upon the introduction of section 30 in the Income Tax Act, 1962, relating to public benefit organisations.

CLAUSE 44

Income Tax: Insertion of Part III in Chapter II of the Income Tax Act, 1962

See NOTES on CORPORATE RULES above.

CLAUSE 45

Income Tax: Amendment of section 56 of the Income Tax Act, 1962

This amendment provides for an exemption from donations tax of an asset transferred by a company in terms of an intra-group transaction. See NOTES on CORPORATE RULES above.

CLAUSE 46

Income Tax: Amendment of section 60 of the Income Tax Act, 1962

See NOTES on SIYAKHA above.

CLAUSE 47

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

This amendment is of a textual nature.

CLAUSE 48

Income Tax: Amendment of section 64B of the Income Tax Act, 1968

Subclause (a), (b) and (c): A holding company for purposes of section 64B means any company which holds for its own benefit whether directly, or indirectly through one or more intermediate companies, together with shares held in terms of a share incentive scheme, all the equity share capital of any other company.

Similarly, an intermediate company means any company all of whose equity share capital is, together with shares held in terms of a share incentive scheme, held by a holding company or one or more other intermediary companies.

It is proposed to amend these definitions to delete the reference to the shares held in terms of the share incentive scheme and to reduce the required holding to at least 75 per cent of the equity share capital. This will bring the definitions in line with the provisions contained in the corporate rules. See notes on CORPORATE RULES above.

Subclause (d): Section 64B(5)*(c)* confers an exemption from secondary tax on companies (STC) on capital profits and pre-31 March 1993 revenue profits distributed in the course of or in anticipation of liquidation or deregistration. To qualify companies must be wound up or deregistered within 6 months of the distribution or such further period as is reasonable in the circumstances.

The six-month period for deregistration frequently proves inadequate with the result that SARS is constantly approached to grant extensions, thereby creating an unnecessary administrative burden for taxpayers and SARS alike.

It is, therefore proposed that section 64B(5)*(c)* be amended to delete the requirement that the company must be liquidated within a period of six months and to merely provide that the company must within a period of six month take such steps, as may be prescribed by the Minister of Finance by regulation, to liquidate, wind up or deregister the company.

Subclause (e): Section 64B(5)*(f)*(i) provides that there shall be exempt from STC any dividend declared by any company to its holding company or intermediate company, if such holding company or intermediate company, as the case may be, was, on the date of such declaration and throughout the period of 12 months ending on the date of such declaration a holding company or intermediate company, as the case may be, in relation to such affected company. Section 64B(5)*(f)*(iiA) provides sufficient protection against the possibility that transactions be entered into solely to strip the dividends from companies which are aquired for that purpose only. The provisions contained in subparagraph (i), therefore, serve no additional purpose and it is proposed that it be deleted.

CLAUSE 49

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

Section 70A prescribes what information concerning capital gains and capital losses of unit holders the unit portfolios are required to be included in the annual return they have to submit to the Commissioner. The section prescribes in detail what information is required.

Concern has been expressed that not all the information required will be immediately available as systems have to be modified to produce the information. In order to allow flexibility it is proposed that the details of the information be removed from the section and the Commissioner be allowed to prescribe the information required.

CLAUSE 50

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

Section 70B prescribes what information concerning capital gains and capital losses of their clients the portfolio administrators are required to include in the annual returns they have to submit to the Commissioner. The section prescribes in detail what information is required.

Concern has been expressed that not all the information required will be immediately available as systems have to be modified to produce the information. In order to allow flexibility it is proposed that the details of the information be removed from the section and the Commissioner be allowed to prescribe the information required.

CLAUSE 51

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

See NOTES on SIYAKHA above.

CLAUSE 52

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

In terms of the provisions of section 99 of the Income Tax Act, 1962, the Commissioner may declare a person to be the agent of a taxpayer for purposes of the Act. That person must then make payment of any amount due to the Commissioner by that taxpayer from any moneys which that person holds on behalf of that taxpayer.

When appointed as an agent, that person becomes the representative taxpayer of that taxpayer and may be personally liable for any outstanding amount due by the taxpayer, if that person disposes of any of those moneys held while the amount remains unpaid.

It is, however, proposed that if a person so appointed as agent without lawful cause fails to comply with the provisions of section 99, he or she shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 12 months.

CLAUSE 53

Income Tax: Amendment of section 81 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 54

Income Tax: Amendment of section 83 of the Income Tax Act, 1962

See NOTES on OBJECTION AND APPEALS above.

CLAUSE 55

Income Tax: Amendment of section 83A of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 56

Income Tax: Amendment of section 84 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 57

Income Tax: Amendment of section 85 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 58

Income Tax: Amendment of section 86A of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 59

Income Tax: Amendment of section 87 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 60

Income Tax: Amendment of section 88 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 61

Income Tax: Amendment of section 102 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 62

Income Tax: Amendment of section 107 of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 63

Income Tax: Insertion of sections 107A and 107B of the Income Tax Act, 1962

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 64

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

Paragraph 2B was inserted in the Second Schedule to the Income Tax Act, 1962, by the Revenue Laws Amendment Act, 1999 (Act No. 53 of 1999), to provide that where a portion of any pension benefit in a pension fund, provident fund or retirement annuity fund becomes payable to the former spouse of a member, it shall be deemed to be an amount which accrues to the member on the date on which the benefit, of which such amount forms part, accrues to the member. This will apply where an endorsement was made in the records of the fund to give effect to a court order granting a divorce.

Although section 7(8) of the Divorce Act, 1979 (Act No. 70 of 1979), provides that an endorsement may be made in the records of the fund where the court makes an order that part of the pension interest of the member shall be paid to the former spouse of the member, such an endorsement is not always made. It is, therefore, proposed that this requirement be deleted and that paragraph 2B should apply in any instance where the court granting a decree of divorce makes an order that part of the pension interest shall be paid to the former spouse.

CLAUSE 65

Income Tax: Amendment of paragraph 1 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): The definition of "pre-valuation date asset" describes what the asset is and is used in the provisions dealing with the determination of base cost of these assets. Concern was expressed that assets acquired prior to valuation date but which had not been delivered by that date would not be "held" by the purchaser on valuation date as is required by the definition. To make the position clearer it is proposed that the words "is still held" be replaced with the words "has not been disposed of before" valuation date. The date an asset is "acquired " or "disposed of" is set out in paragraph 13(1) and (2) and using these prescribed rules will add certainty. Consequential amendments to paragraph 30 are proposed as a result of the amendments proposed to this definition.

Subclause (b): A definition of “ruling price” of a listed financial instrument is proposed to be used in the paragraphs 29 and 31 which deal with the market value of assets. The proposed definition provides that the ruling price of a listed financial instrument on a recognised exchange in the Republic is the last sale price of that instrument at close of business of the exchange, unless there is a higher bid or a lower offer on that day subsequent to the last sale, in which case the higher bid or lower offer will prevail. This is the method used by the JSE Securities Exchange SA. A "bid" is the buyer's price, namely the price offered by a buyer to buy a number of securities at a certain stated price. An "offer" is the seller's price, that is, the price at which a seller is prepared to sell securities on the market

In the case of financial instruments listed on a recognised exchange outside the Republic, the ruling price is the same as described above if the exchange calculates the price in this manner, and if not, is the last price quoted in respect of the financial instrument at the close of business of the exchange.

Subclause (c): The definition of "value-shifting arrangement" describes the arrangement whereby an interest in a company, trust or partnership is retained but as a result of changes in rights in that interest the value in the interest is transferred from one person to another. Concern has been expressed that this anti-avoidance measure might have too wide an effect and bring within its ambit transactions that are entered into for purely commercial reasons. As value-shifting arrangements are normally entered into between "connected persons", it is proposed that the anti-avoidance measures be restricted to arrangements between these parties.

CLAUSE 66

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

Paragraph 2 provides that the provisions of the Eighth Schedule shall apply to non-residents in respect of *inter alia* immovable property in the Republic or any interest or right of whatever nature in immovable property.

An interest in immovable property includes for this purpose a direct or indirect interest of at least 20 per cent held by that non-resident in the equity share capital of a company or other entity, if 80 per cent or more of the value of the net assets of the company or other entity is attributable to immovable property situated in the Republic.

Where, however, the immovable property constitutes trading stock of the company or other entity, any gain from the disposal thereof will constitute business profits which will not be taxable as a capital gain. It is, therefore, proposed that paragraph 2 be amended to specifically exclude any immovable property held by the company or entity as trading stock.

CLAUSE 67

Income Tax: Amendment of paragraph 3 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 3 of the Eighth Schedule describes how a capital gain is determined. The proposed amendments to paragraph 3 clarifies the position regarding amounts received or accrued prior to the disposal of an asset. A receipt or accrual causally connected to a disposal will qualify as part of the proceeds from such disposal in spite of the fact that such receipt or accrual may have preceded that disposal. The determining factor proposed will now be whether the proceeds were received in respect of the disposal and not in consequence thereof.

CLAUSE 68

Income Tax: Amendment of paragraph 4 of the Eighth Schedule of the Income Tax Act, 1962

Subclauses (a) and (b): Paragraph 4 describes how a capital loss is determined. The proposed amendments to paragraph 4 clarifies the position regarding amounts received or accrued prior to the time of disposal of an asset. A receipt or accrual causally connected to a disposal will qualify as part of the proceeds from such disposal in spite of the fact that such receipt or accrual may have preceded that disposal. The determining factor proposed will now be whether the proceeds were received in respect of the disposal and not in consequence thereof.

CLAUSE 69

Income Tax: Amendment of paragraph 6 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): Paragraph 6 of the Eighth Schedule to the Income Tax Act, 1962, determines what constitutes the aggregate capital gain for the year, i.e. the amount by which the sum of the capital gains for the year exceeds the sum of the losses and the annual exclusion for the year. The person's capital gains are determined in terms of paragraph 3.

There are, however, certain other provisions in the Eighth Schedule which provide that an amount must be taken into account in the determination of the aggregate capital gain or aggregate capital loss of a person. This, for example, may include a capital gain of another person which is attributed to that person. It is, therefore, proposed that paragraph 6 be amended to specifically refer to those amounts which are required to be taken into account in the determination of the aggregate capital gain or aggregate capital loss of a person.

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

CLAUSE 70

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

Paragraph 7 of the Eighth Schedule to the Income Tax Act, 1962, determines what constitutes the aggregate capital loss for the year, i.e. the amount by which the sum of the capital losses for the year exceeds the sum of the gains and the annual exclusion for the year. The person's capital losses are determined in terms of paragraph 4.

There are, however, certain other provisions in the Eighth Schedule which provide that an amount must be taken into account in the determination of the aggregate capital gain or aggregate capital loss of a person. This, for example, may include a capital gain of another person which is attributed to that person. It is, therefore, proposed that

paragraph 7 be amended to specifically refer to those amounts which are required to be taken into account in the determination of the aggregate capital gain or aggregate capital loss of a person.

CLAUSE 71

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

Subclause (a): It is proposed that the cancellation of shares by a company not be treated as a disposal in the hands of a company. This is consistent with the treatment of the issue of shares by a company.

Subclause (b): Paragraph 11(2)*(f)* provides that there is not a disposal of an asset by a trustee, executor, curator or administrator on the appointment or termination of the appointment of a trustee, executor, curator or administrator.

Some practitioners have contended that it is possible to sell a trust by the payment of an amount to a trustee to resign from his or her office and to agree to the appointment of a new trustee. It was further contended that paragraph 11(2)*(f)* excludes the transaction from the ambit of CGT.

The view is held that a payment of this nature is likely to fall within the ambit of paragraph *(d)* of the definition of "gross income" or alternatively be a payment for the disposal of an asset. In addition, assets held by trustees, executors curators and administrators are not held for their own benefit and changes in appointments do not result in the disposal of the underlying asset which are held on behalf of vested or contingent beneficiaries, heirs, legatees, etc. In order to prevent confusion it is, therefore, proposed that paragraph 11(2)*(f)* be deleted.

Subclause (c): In terms of the Insolvency Act, 1936 where a person becomes insolvent the assets of the spouse of the insolvent also vest in the Master of the High Court or a trustee, and only when it is proved that the assets do belong to the spouse are they released to the spouse. It is proposed that the vesting of the spouse's asset in the Master or trustee and the subsequent release of the assets not be regarded as a "disposal" for CGT purposes.

CLAUSE 72

Income Tax: Amendment of paragraph 12 of the Eighth Schedule of the Income Tax Act, 1962

Subclauses (a) and (b): Paragraph 12 provides that certain events described in the paragraph are to be treated as disposals and acquisitions of assets for CGT purposes. When the event occurs the person is treated as having disposed of the asset and immediately re-acquired it at a cost equal to its market value. This mechanism is used in some cases to trigger a capital gain or loss and in others to establish a base cost. There is concern that in the cases where the purpose is to establish a base cost, this will not be achieved on the current wording. To put the establishment of the base cost beyond

doubt, it is proposed that the paragraphs be amended to state that market value must be treated as expenditure actually incurred for the purposes of the provision dealing with base cost.

Subclause (c): The reduction or discharge of a debt may result in a gain in terms of paragraph *3(b)*(ii) or the reduction of the base cost of an asset in terms of paragraph 20(3). In order to avoid double taxation of the amount of the gain resulting from that reduction or discharge, it is proposed that any amount that is so taken into account be excluded from the amount of the gain included in terms of subparagraph (5).

CLAUSE 73

Income Tax: Amendment of paragraph 15 of the Eighth Schedule of the Income Tax Act, 1962

Subclauses (a) to (c): The vast majority of personal-use assets are excluded from capital gains tax but those that are included can be divided into two categories—

- assets the reduction in value of which is most likely attributable to personal use and consumption; and
- assets the reduction in value of which is most likely as a result of market fluctuations.

Paragraph 15 deals with the first category and provides that any capital losses on the disposal of the asset listed in that paragraph must be disregarded unless the assets are used for the purpose of carrying on of a trade. It is proposed that two assets be added to the list of asset. These are time share interests and shares in a shareblock company with a fixed life, the value of which decreases over time.

CLAUSE 74

Income Tax: Amendment of paragraph 18 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 18 deals with the disregarding of losses determined in respect of the disposal of an option other than by way of the exercise thereof. The reason the losses are not allowed is that they are personal-use assets which are not subject to CGT and their value decreases mainly as a result of personal-use. Subparagraph (2) provides that the provisions of that paragraph shall not apply in respect of certain assets, including certain coins, immovable property, financial instruments or a right or interest in any such asset.

As financial instruments include an option to acquire or dispose of an asset, it is proposed that subparagraph (2) be amended to only exclude options to acquire or dispose of the assets listed therein and not to the assets themselves.

CLAUSE 75

Income Tax: Amendment of paragraph 20 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 20 provides what is included in and excluded from base cost.

Subclause (a): The proposed amendment is textual and consequential upon the amendments to paragraph 32.

Subclause (b): Item (f) provides that the valuation date value of an option to acquire an asset after valuation date must be treated to be expenditure actually incurred on valuation date. The item does not make provision for options to dispose of assets and it is proposed that it be amended to cater for this situation.

Subclause (c): The proposed amendments to subparagraph (1)(*h*)(i) and (ii) are aimed at clarifying the position regarding the base cost of:

- rented assets the acquisition of which results in the recoupment, under section 8(5), of rent previously deducted;
- shares acquired in terms of a share incentive scheme falling under section 8A; and
- assets the acquisition of which results in a taxable fringe benefit under paragraph (I) of the definition of "gross income".

Subparagraph (1)(*a*) currently provides for the inclusion of the expense incurred in acquiring the asset in base cost while subparagraph (1)(*h*)(i) and (ii) provide for the inclusion of the gain or benefit taken into account under section 8A or the Seventh Schedule. However, the expense incurred in acquiring the asset will be excluded from that asset's base cost under paragraph (3)(a), as it will have been allowed as a deduction in determining the benefit to be included in taxable income under section 8A or the Seventh Schedule. Subparagraph (1)(a) and (h) read in conjunction with subparagraph (3)(a) may therefore have the effect of limiting the base cost of an asset, the acquisition of which falls under section 8A or the Seventh Schedule, to the amount of the gain or benefit determined under those provisions. The proposed amendments are aimed at obviating this possibility by treating assets acquired under section 8A or the Seventh Schedule as having been acquired, as a general rule, for an amount equal to that taken into account under section 8A or the Seventh Schedule. The reworded subparagraph (1)(h)(i) and (ii), together with the proposed amendment discussed below under subclause (*d*), ensure that both the expense incurred in acquiring the asset and the amount of any gain or benefit taken into account under section 8A or the Seventh Schedule are included in the base cost of that asset.

Subparagraph (1)(h)(iii) currently provides that, in the case where an asset constitutes an interest in a controlled foreign entity (CFE), the portion of the taxable capital gain included in the net income of the CFE is included in determining the increase in the base cost of the interest in the CFE. In order to fully reflect capital gains and losses arising in the CFE in the base cost of the interest of a resident in a CFE and to avoid double taxation a further adjustment is proposed. The portion of taxable capital gain should be excluded and the proportional amount of the net capital gain taken into account in determining the amount to be included in the income of the resident should be added to the base cost of the interest in the CFE.

Example

A South African resident individual owns all the shares in a foreign company, which qualifies as a CFE. The shares were acquired for R200 on 19 December 2001. The receipts and accruals of the foreign company consist of the following:

Foreign dividends	200
Capital gain on disposal of shares	400
Capital loss on disposal of shares	100
Net capital gain	300
Taxable capital gain	75

The net income of the CFE as contemplated in section 9D is R275

The base cost of the shares is determined as follows:

Expenditure incurred to acquire the shares		200
Add:	Net income	275
Less:	Taxable capital gain	(75)
Add:	Net capital gain	300
Calculated base cost		R700

Subclause (d): The proposed amendment is of a textual nature. It reconfirms the principle that the expenditure contemplated in subparagraph (1)(a) to (g) forming part of an asset's base cost in terms of paragraph 20 does not include any expenditure allowable in determining taxable income otherwise than in terms of the Eighth Schedule. This provision prevents the double deduction of expenditure. Expenditure qualifying under subparagraph (1)(g) as part of the base cost of an asset used wholly and exclusively for business purposes, for example the cost of repairing that asset or interest on money borrowed to finance the acquisition of that asset, will therefore have to be excluded from that asset's base cost under subparagraph (3)(a), if it is deductible in terms of section 11(a) or 11(d).

Subclause (e): The base cost of an asset may not include any expenditure contemplated in paragraph 20(1) that has been recovered or recouped in any manner. The amount so recovered may well include an amount taxed as a recoupment under paragraph (j) of gross income or under section 8(4)(a). Section 8(4)(a) relates only to expenditure allowable as a deduction otherwise than in terms of the Eighth Schedule. Such expenditure (for example expenditure deductible under section 11(a)) is, however, excluded from an asset's base cost under subparagraph (3)(a). Recoupments that represent the recovery of amounts so excluded from an asset's base cost should therefore not be deducted from that asset's base cost. The proposed amendment makes it clear that the exclusion in subparagraph (3)(b) applies only in respect of recoupments that do not represent the recovery of amounts excluded from base cost in terms of subparagraph (3)(a) or (c).

CLAUSE 76

Income Tax: Amendment of paragraph 24 of the Eighth Schedule to the income Tax Act, 1962

Paragraph 24 prescribes the treatment of capital gains and losses of immigrants disposing of assets after they have become resident in the Republic. Amendments are proposed to clarify and correct the paragraph.

It is proposed that the paragraph only apply to assets of immigrants acquired before they became resident in the Republic and not to assets of immigrants who became resident before valuation date.

CLAUSE 77

Income Tax: Amendment of paragraph 25 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 25 provides that the base cost of a pre-valuation asset is the sum of the valuation day value of the asset and any allowable expenditure incurred after valuation date. It is proposed that the base cost of identical assets be determined in terms of paragraph 32 and not paragraph 25 and it is therefore proposed that these assets be excluded from paragraph 25. It is also proposed that the base cost of interest instruments referred to in paragraph 28 also be included in paragraph 25 as this was the intention.

CLAUSE 78

Income Tax: Amendment of paragraph 26 of the Eighth Schedule of the Income Tax Act, 1962

The primary purpose of paragraph 26 is to prescribe the method of determining the valuation date value of assets acquired before the valuation date and disposed of after that date where the proceeds from the disposal of the assets exceed all the expenditure incurred in respect of that asset.

Subclause (a): It is proposed that the base cost of identical assets be determined in terms of paragraph 32 and the amendments proposed remove references to identical assets from paragraph 26. The matter will be dealt with more fully in the notes on paragraph 32.

Subclause (b): Paragraph 26(3) provides that when a person adopts the market value as the valuation date value of an asset and the proceeds from the disposal of the asset do not exceed the market value, the valuation date value of the asset is the higher of—

- expenditure in respect of the asset incurred before valuation date: or
- proceeds less the expenditure in respect of the asset incurred after valuation date.

The effect of this is that there is no capital loss or capital gain and the purpose of the paragraph is to eliminate "phantom" capital losses. It is a requirement for paragraph 26

to operate that the person must have made a capital gain based on proceeds and expenditure incurred in respect of that asset. Since it is impossible for expenditure incurred before the valuation date to exceed the proceeds where a person has an actual capital gain, the first alternative is superfluous and it is proposed that it be deleted.

CLAUSE 79

Income Tax: Amendment of paragraph 27 of the Eighth Schedule of the Income Tax Act, 1962

The primary purpose of paragraph 27 is to prescribe the method of determining the valuation date value of assets acquired before the valuation date and disposed of after that date where the proceeds from the disposal of the assets do not exceed all the expenditure incurred in respect of that asset.

It is proposed that the base cost of identical assets be determined in terms of paragraph 32 and the amendments proposed remove references to identical assets from paragraph 26. This matter will be dealt with more fully in the notes on paragraph 32. In order to make the paragraph more understandable it has been redrafted and divided into more subparagraphs.

As presently worded paragraph 27(2) gives relief to a person where a pre-valuation date asset is disposed of at a capital loss having regard to expenditure incurred but there is a market value gain (i.e., where proceeds exceed market value on valuation date). The effect of this is that there is no capital loss or gain and the purpose of the paragraph is to eliminate "phantom " capital gains. This relief does not, however, apply where an asset is disposed of for an amount equal to the expenditure incurred before the valuation date (a break even situation). This leads to the following anomalous situation.

Example

	Case 1	**Case 2**
Cost	100	100
Market value	60	60
Proceeds	99	100
Market value gain	39	40
Gain disregarded?	Yes	No

In terms of the present paragraph 27(2) the person in case 2 would be obliged to use the lower of market value and time-apportionment base cost, and as a result would be taxed on a "phantom" gain.

The proposed amendment to paragraph 27(3) rectifies this problem by catering for the situation where the expenditure is equal to the proceeds.

It is proposed that a market value calculated and published by the Commissioner in terms of paragraph 29 also be taken into account when applying this paragraph.

CLAUSE 80

Income Tax: Amendment of paragraph 28 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a) and (b): The paragraph deals with the valuation of interest-bearing arrangements such as bank deposits, loans, stock, bonds, debentures and similar assets. Instead of referring to the market value as determined in paragraph 31, it is proposed that a valuation date value rule be introduced in the paragraph.

Subclause (c): In the case of assets that are required to be valued in terms of paragraphs 26 and 27 the so-called "kink" tests ensure that any "phantom" loss as a result of an inflated market value chosen on valuation date is reduced. There is not a similar test in this paragraph. It is proposed that where a person has adopted the adjusted initial amount of an instrument as the valuation date value and the proceeds from the disposal of that instrument are less than that amount, the valuation date value of that instrument be the time-apportionment base cost of that instrument. The effect of the proposal will be to prevent the full amount of a loss incurred before valuation date from being claimed after that date.

Without this provision a person would effectively be entitled to a deduction against income as well as the expenditure being included in base cost in the determination of a capital gain or capital loss, or alternatively the person would be allowed a deduction for expenditure that has been recovered.

CLAUSE 81

Income Tax: Amendment of paragraph 29 of the Eighth Schedule of the Income Tax Act, 1962

Subclauses (a) to (d): Paragraph 29(1)*(a)* sets out the method of determining the market value of financial instruments listed on a recognised exchange on valuation date. The paragraph provides that market value of financial instruments on a recognised exchange in the Republic will be the average of the buying and selling prices at close of business on each of the five days preceding the valuation date. These calculations are to be done by SARS and are to be published in the Government *Gazette.*

In the case of recognised exchanges outside the Republic, the paragraph provides that the market value is the last price quoted in respect of that financial instrument on that exchange on the last trading date before valuation date.

There is concern that the closing prices of the financial instruments will be manipulated, particularly where the instruments are thinly traded. The paragraph also does not make provision for instruments that have been suspended on the exchange.

It is, therefore, proposed that a new method of determination of the market value on valuation date be applied to financial instruments on recognised exchanges in the Republic. It is proposed that the aggregate transaction value (i.e. total selling price) of each financial instrument be determined for the last five business days preceding

valuation date and that it be divided by the total quantity of instruments traded during the same period. This will give an average price which will be difficult to manipulate.

Subclause (e): It is also proposed that the Commissioner, after consultation with the recognised exchange in the Republic and the Financial Services Board, determine the market value of a financial instrument in certain circumstances.

Where—

- an instrument was not traded during the last five business days preceding valuation date;
- an instrument is suspended for any period during September 2001; or
- the market value of the instrument for the five days preceding valuation date as determined using the method described in the previous paragraph, exceeds the average of the ruling price of that instrument determined for the first fourteen business day of September 2001 by five per cent or more,

the Commissioner must determine the market value of that instrument. The Commissioner must have regard to the actual value of the instrument, and if suspended, the reason for the suspension. If there has been an increase in value above five per cent, the Commissioner must consider the reason for the increase. Any decision of the Commissioner in this regard is subject to objection and appeal.

A definition of “ruling price” of a listed financial instrument has been proposed and is used in a number of subparagraphs in the paragraph instead of the phrase “last price quoted”.

Subclause (f): Where a person owns a controlling interest in a listed company and the price of the shares deviates from the ruling price as a result of the fact that the person owns the controlling interest the value of the shares on valuation date may be increased or decreased. A controlling interest is defined to mean an interest of more than 50 per cent and it is proposed that this requirement be relaxed and interests of more than 35 per cent be regarded as controlling interests.

CLAUSE 82

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

Subclauses (a) to (d): Paragraph 30 provides the formula for determining the time-apportionment base cost of a pre-valuation date asset. As a result of the changes made to the definition of "pre-valuation date asset" in paragraph 1, consequential amendments are proposed to this paragraph which do not affect the substance of the provision. A correction of a printing error in the formula is also proposed.

Concerns have been expressed that some ambiguity exists as to how fractions of a year are to be dealt with in the formula. It is, therefore, proposed that the symbols ‘N’ and ‘T’ be clarified by deleting the words ‘or part thereof’ and by inserting a proviso which stipulates that part of a year is to be treated as a full year. For example, if an asset was acquired three years and 1 day prior to valuation date, ‘N’ will be treated as 4 years. Likewise if the asset was disposed of three years and 1 day after valuation date, ‘T’ will

be treated as 4 years. This treatment is intended to eliminate the need for complex fractions, and assists where the exact day on which an asset was purchased is unknown.

CLAUSE 83

Income Tax: Amendment of paragraph 31 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 31 provides how the market value of assets is to be determined. Subparagraph (1)*(a)* of the paragraph provides that the market value of financial instruments listed on a recognised exchange is the average of the buying and selling price of the instrument at the close of business on the last trading day before the disposal of the instrument. It is proposed that instead of this formulation, the defined term the "ruling price" be introduced which is more difficult to manipulate.

Subparagraph *(b)* clarifies that in determining the value of a fiduciary or usufructuary right, the life expectancy of the person acquiring the right must be used in the calculation.

CLAUSE 84

Income Tax: Amendment of paragraph 32 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 32 provides the rule for the determination of the base cost of "identical assets" which forms part of a group and which may not be individually distinguishable except for identifying numbers. Examples are Kruger Rands, units in a unit trust and shares. It is expected that many owners of units in a unit trust and shares will use the weighted average method of valuing the units and shares as unit trusts and portfolio administrators will report on this basis to unit- and shareholders. It is of importance, therefore, to ensure that this method operates as simply as possible. It was found that if weighted average method was chosen and persons had to apply the tests required in paragraphs 26 and 27, several different pools of assets at different values would have to be maintained to provide the required information.

A further simplified method of determining the base cost of assets, which are traditionally valued by means of the weighted average method, is proposed and assets valued using this method will not be required to pass the "kink tests" in paragraphs 26 and 27. The proposal will substantially reduce record keeping. A number of amendments consequential on this proposed amendment have been proposed to paragraphs 25, 26 and 27.

Subclause (a): The proposed amendment is textual.

Subclause (b): It is proposed that persons must value identical assets using the specific identification or first in first out methods and may only use the weighted average method for certain classes of assets set out in the proposed subparagraph (3A).

Subclause (c): The weighted average method may only be used for the determination of the base cost of the following identical assets—

- financial instruments listed on a recognised exchange for which a price is quoted on that exchange;
- units, shares or interests in any unit portfolio comprised in any approved unit trust scheme in securities other than property shares carried on in the Republic for which the prices of shares are regularly published in a national or international newspaper;
- units, shares or interests in any unit portfolio comprised in any approved unit trust scheme in property shares not listed on a recognised exchange carried on in the Republic for which the prices are regularly published in a national or international newspaper;
- units, shares or interests in any arrangement or scheme carried on outside the Republic in pursuance of which members are invited or permitted to invest in a portfolio of a collective investment scheme for which the prices are regularly published in a national or international newspaper;
- coins made mainly from gold or platinum, where the prices of the coins are regularly published in a national or international newspaper.

Where a person uses the weighted average method for any of these identical assets, the person must use it for all identical assets of the same class. The three classes of assets are financial instruments listed on a recognised exchange, any interest in a unit trust scheme and coins made mainly from gold or platinum.

Subclause (d): It is proposed that the weighted average method of determining base cost of an identical asset be determined as follows—

- ***on valuation date*** - the aggregate market value determined in terms of paragraph 29 of the pre-valuation date identical assets divided by the number of pre-valuation date identical assets;
- ***after valuation date*** - after each acquisition of an identical asset or incurral of allowable expenditure after valuation date, the expenditure incurred must be added to the base cost of the identical assets on hand and divided by the number of identical assets on hand.

Subclause (e) : The proposed deletion of subparagraph (5) is a consequential amendment.

Subclause (f): The proposed amendment is textual and consequential upon the amendments to the other subparagraphs of the paragraph.

CLAUSE 85

Income Tax: Amendment of paragraph 34 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 34 provides that where a debtor reduces or discharges a debt by disposing of an asset to a creditor, that asset must be treated as having been acquired by the creditor at a cost equal to its market value at the time of disposal to him or her. Concern has been expressed that technically this amount may not qualify as base cost. It is proposed

that to put it beyond doubt that these amounts be treated as expenditure actually incurred for the purposes of the provision dealing with base cost.

CLAUSE 86

Income Tax: Amendment of paragraph 35 of the Eighth Schedule of the Income Tax Act, 1962

The proposed amendments of paragraph 35(1) clarifies the position regarding amounts received or accrued prior to the time of disposal of an asset. A receipt and accrual causally connected to a disposal will qualify as part of the proceeds from such disposal in spite of the fact that such receipt or accrual may have preceded that disposal.

CLAUSE 87

Income Tax: Amendment of paragraph 38 of the Eighth Schedule of the Income Tax Act, 1962

Subclauses (a) and (c): Paragraph 38 substitutes the market value of an asset for the actual consideration to which the parties agreed in the case of a disposal by means of a donation, for a consideration not measurable in money and a disposal to a connected person for a consideration that does not reflect an arm's length price.

In the case of share incentive schemes and share option schemes the share trust and companies disposing of shares and options are often connected persons in relation to the employees and directors, and the rules of the paragraph will apply to transactions between these parties. The effect in certain circumstances is that the consideration between the parties is inflated and employees will be taxed on gains they never made or allowed losses they did not suffer. It is proposed that the rules not apply to the disposal of a right to acquire marketable securities as contemplated in section 8A(1)*(a)*, and the disposal of those rights by employees in the circumstances contemplated in section 10(1)*(n*E*)*.

Subclause (b): As indicated the purchaser in a transaction falling within the ambit of this paragraph is treated as if he or she acquired the asset at the market value on the date of transaction. Concern has been expressed that technically this amount may not qualify as base cost. To put the establishment of the base cost beyond doubt it is proposed that the paragraph be amended to state that the market value must be treated as expenditure actually incurred for the purposes of the provisions dealing with base cost.

CLAUSE 88

Income Tax: Amendment of paragraph 39 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): Paragraph 39 provides that a person's loss determined in respect of the disposal of an asset to a connected person is "clogged" and may only be set off against

capital gains from the same connected person. The extent of the definition of "connected person" was reduced but it still includes a spouse. It is proposed that the reference to a spouse be deleted as far as disposal between spouses is dealt with in terms of paragraph 67.

Subclause (b): South African long-term insurers are required for income tax purposes to create four funds to conduct their business. The funds are regarded as separate persons for income tax purposes and disposals of assets between the funds are regarded as disposals on which CGT is imposed. In terms of section 29A (6) and (7) of the Income Tax Act the insurers are required to transfer assets between the different funds if there is a change in policyholders or a balancing of assets and liabilities is required. In view of the fact that these disposals are involuntary it is proposed that that for the purposes of this paragraph the different funds of the insurers not be connected persons. Any capital losses made on disposals between funds will, therefore, not be "clogged" under these circumstances.

CLAUSE 89

Income Tax: Amendment of paragraph 40 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): In terms of paragraph 40 a deceased is treated as having disposed of all his or her assets at market value on the date of death to his or her estate. When the assets are distributed on the winding up of the estate the heirs, legatees or trusts (other than surviving spouse or public benefit organisations) are treated as having acquired them at the market value on date of death.

Certain assets are excluded from taxation in the hands of the deceased and they are—

- assets transferred to the surviving spouse;
- assets bequeathed by the deceased to a public benefit organisation; and
- a long-term insurance policy of the deceased if the proceeds of the policy would have been excluded if paid to him.

The reason these assets are excluded is that there are special exclusions for the disposal of the assets and if they were taxed in the hands of the deceased it would defeat the purpose of the exclusions. Another class of assets which has been specifically excluded in terms of paragraph 54 are lump sum payments from pension, provident and retirement annuity funds and their foreign equivalents. If they are not also excluded in terms of paragraph 40, the interests in lump sum payments of persons who die before receipt of them will be subject to tax. It is proposed that these interests be excluded from the provisions of paragraph 40

Subclauses (b) and (c): In both the case of the amount treated as consideration for the acquisition of the assets by the estate and the acquisition of the assets by the heirs or legatee, concern has been expressed that technically these amount may not qualify as base cost. To put the establishment of base cost beyond doubt it is proposed that the paragraph be amended to state that the market value must be treated as expenditure actually incurred for the provisions dealing with base cost.

CLAUSE 90

Income Tax: Amendment of paragraph 42 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): Paragraph 42 is an anti-avoidance provision. It provides that if a person sells financial instruments (e.g. shares) and that person or a connected person buys those same financial instruments back within the 45 day period before or after the sale date, the seller is treated as having sold the assets at his or her base cost (i.e. no loss allowed) and the purchaser is treated as having acquired it for the sale price and the amount of the loss that the seller would have made.

Concern has been expressed that technically this amount may not qualify as base cost. To put the establishment of base cost beyond doubt it is proposed that the paragraph be amended to state that the market value must be treated as expenditure actually incurred for the provisions dealing with base cost.

Subclause (b): It is proposed that a spouse not be regarded as a 'connected person" for the purposes of this paragraph as a disposal between spouses is dealt with in terms of paragraph 67.

South African long-term insurers are required for income tax purposes to create four funds to conduct their business. The funds are regarded as separate persons for income tax purposes and disposals of assets between the funds are regarded as disposals on which CGT is imposed. In terms of section 29A (6) and (7) of the Income Tax Act the insurers are required to transfer assets between the different funds if there is a change in policyholders or a balancing of assets and liabilities is required. In view of the fact that these disposals are involuntary it is proposed that that for the purposes of this paragraph the different funds of the insurers not be connected persons and these provisions not apply to transactions between the funds under these circumstances.

CLAUSE 91

Income Tax: Amendment of paragraph 43 of the Eighth Schedule of the Income Tax Act, 1962

Subclauses (a) and (c): Paragraph 43 provides rules for the determination of capital gains or capital losses where the proceeds are received and the allowable expenditure are incurred in a foreign currency. The rules apply to all acquisitions and disposals of assets other than the conversion of foreign currency as the definition of "asset" excludes foreign currency.

It provides that a resident who disposes of an asset for proceeds denominated in a foreign currency, after having incurred expenditure in respect of that asset in the same currency, must determine the capital gain or loss on the disposal by translating both proceeds and the expenditure into the currency of the Republic at the ruling exchange rate on the date of disposal.

Textual amendments have been proposed to subparagraphs (1) and (2).

Subclause (b) and (d): It is proposed that the abovementioned rule should not apply to a "foreign equity instrument" which is defined to mean—

- a share listed on a recognised exchange;
- a unit in a unit portfolio or a participatory interest in a portfolio of a collective investment scheme or similar equity investment;
- a contractual right or obligation which derives its value from a specified index; or
- a coin made mainly from gold or platinum.

Concerns were publicly raised that the failure to tax currency gains in these foreign liquid investments created an easy mechanism to artificially shift funds offshore to the detriment of the capital account and ultimately the external value of the Rand. Furthermore, this failure would create an artificial incentive to buy shares in SA blue chip companies on foreign exchanges.

It is proposed that the capital gain or loss on disposal of a foreign equity instrument be determined by translating—

- the proceeds into local currency at the ruling exchange rate at the date of disposal;
- the valuation date value of the foreign equity instrument which is a pre-valuation date asset into the currency of the Republic at the ruling exchange rate on valuation date; and
- the expenditure incurred after valuation date in respect of that foreign financial equity instrument into the currency of the Republic at the ruling exchange rate on the date of incurral of the expenditure.

CLAUSE 92

Income Tax: Amendment of paragraph 44 of the Eighth Schedule of the Income Tax Act, 1962

At present the definition of 'an interest' in paragraph 44 excludes an interest in a trust. The intention of this exclusion was to preclude a person who had a vested or contingent right in a residence held by a trust from qualifying for the primary residence exclusion. Some commentators have argued that the provision was ineffective because it would not exclude a beneficiary who has a right of use or occupation.

It is proposed that the exclusion be amended to refer to a right or interest of whatever nature in a trust or an asset of a trust. The amended exclusion does not apply to the right of a lessee who is not a connected person in relation to the trust. This was done in order to remove *bona fide* lessees from the ambit of the exclusion.

CLAUSE 93

Income Tax: Amendment of paragraph 45 of the Eighth Schedule of the Income Tax Act, 1962

This amendment is of a textual nature. A "special trust" is a defined term and it is, therefore, proposed that any reference to "that trust" should be replaced by "that special trust".

CLAUSE 94

Income Tax: Amendment of paragraph 47 of the Eighth Schedule of the Income Tax Act, 1962

This amendment is of a textual nature. A "special trust" is a defined term and it is, therefore, proposed that any reference to "that trust" should be replaced by "that special trust".

CLAUSE 95

Income Tax: Amendment of paragraph 49 of the Eighth Schedule of the Income Tax Act, 1962

This amendment is of a textual nature. A "special trust" is a defined term and it is, therefore, proposed that any reference to "that trust" should be replaced by "that special trust".

CLAUSE 96

Income Tax: Amendment of paragraph 51 of the Eighth Schedule to the Income Tax Act, 1962

This amendment is of a textual nature.

CLAUSE 97

Income Tax: Amendment of paragraph 53 of the Eighth Schedule to the Income Tax Act, 1962

Paragraph 53 provides that all capital gains or losses determined in respect of the disposal of personal-use asset must be disregarded. Personal-use assets are all the assets of a natural person or special trust except to the extent that they are used for the purposes of carrying on a trade or are listed in subparagraph (3). There has been some confusion on how motor vehicles for which a travelling allowance is received should be dealt with.

In order to have certainty on the matter, it is proposed that assets of natural persons or a special trust to whom an allowance was paid or is payable in respect of the use of that asset for business purposes, be treated as being used mainly for purposes other than the carrying on of a trade. The effect of this will be that the capital gains or losses determined in respect of assets of these natural persons or special trusts will be disregarded. These assets include, for example, motor vehicles, cellular phones, etc.

CLAUSE 98

Income Tax: Amendment of paragraph 55 of the Eighth Schedule to the Income Tax Act, 1962

Paragraph 55 provides that capital gains or losses arising from an amount received in respect of an insurance policy in certain circumstances must be disregarded. Concern was expressed that subitem (a)(ii) would not operate if there was not a cession of the policy. It is proposed that the matter be clarified and that even if there is not a cession of the entire policy, as in the case of group schemes, the provisions will apply.

CLAUSE 99

Income Tax: Amendment of paragraph 56 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 56 provides that where a creditor disposes of a claim owed by a debtor who is a connected person in relation to the creditor, the creditor must disregard any capital loss determined in respect of that disposal even if the disposal is to an unconnected person. On the other hand paragraph 12(5) provides that where a debt owed by a debtor to a creditor has been reduced or discharged by the creditor without full consideration for the reduction or discharge, the debtor is treated as having a capital gain equal to the amount the debt was reduced or discharged.

It is proposed that the loss of the creditor not be disregarded in terms of paragraph 56 if the debtor is subject to tax in terms of paragraph 12(5).

CLAUSE 100

Income Tax: Amendment of paragraph 58 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 58 provides that the capital gain or capital loss in respect of the termination of an option as a result of the exercise thereof must be disregarded. The cost of acquisition of an option is included in the base cost of the asset acquired or disposed of by the exercise of the option and if the loss were to be allowed it would amount to a double benefit.

Concern has been expressed that the present wording might not prevent the claiming of the double benefit and new wording is proposed.

CLAUSE 101

Income Tax: Amendment of paragraph 59 of the Eighth Schedule of the Income Tax Act, 1962

This amendment is of a textual nature. A "special trust" is a defined term and it is, therefore, proposed that any reference to "that trust" should be replaced by "that special trust".

CLAUSE 102

Income Tax: Amendment of paragraph 61 of the Eighth Schedule of the Income Tax Act, 1962

Following upon the publication of the draft Taxation Laws Amendment Bill during December 2000, representations were made to extend the exclusion in paragraph 61 in respect of capital gains and losses arising in unit portfolios administered by management companies under section 4 of the Unit Trusts Control Act 54 of 1981 to unit trust schemes in property shares. Paragraph 61 was amended accordingly. It has, however, become clear, upon further reflection, that paragraph 61 will not achieve the desired result of extending the treatment afforded to holders of units in equity unit trusts to holders of units in property unit trusts.

Unit portfolios in unit trust schemes in property shares differ, for tax purposes, from other unit trust schemes in that the former are not treated as companies. The receipts and accruals of a unit portfolio in a property unit trust, therefore, vest in the holders of the units in that portfolio. This would mean, within the context of CGT, that gains and losses determined in respect of disposals by a property unit trust would vest in the holders of units in that unit trust in the tax year in which those gains and losses arise. Holders of units in a property unit trust would, therefore, have to take gains and losses arising in that unit trust into account as they arise. Their capital gains and losses would therefore not be deferred, as in the case of other unit trusts, to the date of disposal of their units. The proposed amendments are aimed at obviating this result.

The reworded exclusion in paragraph 61 will apply only in respect of gains and losses arising in equity unit trusts that are treated as companies. The position of a holder of a unit in such a unit trust scheme therefore remains unchanged, namely that a capital gain or loss needs to be determined in respect of that interest only upon the disposal of that unit. The proposed paragraph 67A is aimed at achieving the same result in the case of a property unit trust. It in effect defers all gains and losses arising in a property unit trust while a person holds a unit in that unit trust to the date of disposal of that unit.

CLAUSE 103

Income Tax: Amendment of paragraph 65 of the Eighth Schedule to the Income Tax Act, 1962

Subclause (a) and (b): Paragraph 65 provides that where a capital gain arises on the involuntary disposal of an asset through its expropriation, loss or destruction, this gain is

held over until the disposal of its replacement asset. In order to qualify for the concession an amount equal to the proceeds from the disposal must be used to acquire a replacement asset.

It is proposed that another instance where there is an involuntary disposal be catered for in the paragraph. Where a person is declared insolvent the assets of the spouse vest in the Master of the High Court and the spouse has to prove that the assets do not fall into the joint estate. Situations can occur where the assets are disposed of by the Master before proof can be submitted and the spouse then has a claim to the proceeds from the disposal of the assets. It is proposed that if the spouse uses the proceeds to acquire a replacement asset, the capital gain be held over.

CLAUSE 104

Income Tax: Amendment of paragraph 67 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 67 provides for a tax-free roll over of assets between spouses. It is proposed that paragraph 67(1) be amended as follows.

The disposing spouse

The existing paragraph 67(1) treats a spouse who transfers an asset to his or her spouse as having done so for proceeds equal to the base cost of the asset. Under the time-apportionment base cost method the base cost of an asset must be determined with reference to the proceeds of the asset. This created a circular reference and possible confusion with paragraph 38 which deems disposals between connected persons to take place at market value. The proposed subparagraph (1)*(a)* now simply provides that the disposing spouse must disregard any capital gain or capital loss when disposing of an asset to his or her spouse.

The acquiring spouse

The proposed insertion of subparagraph 1*(b)* ensures that the spouse to whom an asset is disposed of takes over all aspects of the history of the asset from that person's spouse, namely:

- the dates of acquisition and improvement
- the expenditure incurred, and
- the usage.

The dates and amounts of expenditure need to be taken over by the acquiring spouse for the purposes of determining the time-apportionment base cost of the asset. The usage of the asset needs to be taken over to ensure, for example, that any business usage of an otherwise exempt asset is taxed.

Example

John used 10% of his primary residence as an office from valuation date up until transferring the residence to his wife. When his wife ultimately disposes of the primary residence 10% of the capital gain in respect of the period prior to her acquiring it will be taxable in her hands.

The proposed amendment treats the asset as having been acquired for an amount equal to the expenditure incurred by the disposing spouse. It follows that any amounts paid by the acquiring spouse to the disposing spouse for the asset must be disregarded.

Paragraph 67 as presently worded permits a resident spouse to transfer an asset to a non-resident spouse without triggering a capital gain or loss. The resident spouse could thereafter emigrate and both spouses would escape CGT on the asset.

Example

Bruce and Sheila plan to emigrate to Australia. Sheila has no CGT assets and is the first to emigrate so as to set up their new home in Perth. After she has left Bruce transfers the following assets to Sheila:

	Base cost	Market Value
(a) holiday home at Plettenberg Bay	1 000 000	2 000 000
(b) listed shares	2 500 000	5 000 000

Bruce thereafter joins Sheila. As the shares no longer belong to him when he ceases to be a resident, Bruce has escaped CGT both on the transfer of his shares and on his ceasing to be a resident.

It is proposed that this loophole be closed by the insertion of a new subparagraph (3). This subparagraph will prevent a tax-free roll over to a non-resident spouse except in the case of:
(a) immovable property situated in the Republic or
(b) the assets of a permanent establishment through which a trade is carried on in the Republic.

Since the latter assets fall within the tax jurisdiction of the Republic even for non-residents, there is no need to preclude them from the roll over relief conferred by subparagraph (1).

Example

Bruce would now be subject to CGT on the capital gain of R2 500 000 on the transfer of the shares in terms of paragraph 38, whilst Sheila will only be liable for CGT when she disposes of the Plettenberg Bay property.

CLAUSE 105

Income Tax: Insertion of paragraph 67A in the Eighth Schedule of the Income Tax Act, 1962

The proposed paragraph 67A provides that a holder of a unit in a unit portfolio comprised in unit trust schemes in property shares must determine a capital gain or capital loss only upon disposal of the unit. The matter is dealt with in more detail in the NOTES on paragraph 61.

CLAUSE 106

Income Tax: Amendment of paragraph 74 of the Eighth Schedule to the Income Tax Act, 1962

It is proposed that the definition of a "share" in paragraph 74 be amended as follows:

- The word “issued” in “issued share capital” be deleted as its use is considered superfluous.
- The definition include a reference to “any right or interest in or to such share capital or member's interest”. This proposed amendment is discussed in more detail below.

The present definition of a “share” fails to deal with the situation where a capital distribution is received by or accrues to a person who does not own the shares but only has a right to dividends. This means that the base cost of a person who has a right to dividends only cannot be reduced in terms of paragraph 76. This could occur, for example, where a dividend is declared in anticipation of liquidation or deregistration. Such a dividend would comprise a capital distribution even though it is a dividend and would flow to a dividend beneficiary.

In summary, the proposed widened definition of a “share” will cover a person who has full ownership of a share, a bare dominium holder and a usufructuary.

Example

The ABC Trust holds shares in Tranz (Pty) Ltd. Kim has a vested right to the income of the trust, whilst Kim’s son Duncan has a vested right in the shares. Tranz (Pty) Ltd decides to liquidate and declares a dividend of R100 000 in anticipation of liquidation in terms of section 64B(5)*(c)*. The dividend is made up as follows:

Capital profits	65 000
Pre-1993 revenue profits	25 000
Revenue profits	10 000
	R100 000

The base cost of Kim’s right to the dividends is R80 000.

Since a distribution of profits in anticipation of liquidation is not regarded as a return of capital *ITC 101* 3 SATC 324, the above distribution would be regarded as income for purposes of the trust deed and would flow through to Kim. Since Kim does not own the shares in Tranz (Pty) Ltd she is not, as the law presently stands, obliged to reduce the base cost of her interest. Since Duncan has received nothing he too does not have to reduce the base cost of his shares.

Under this proposal Kim would reduce the base cost of her interest as follows:

Base cost	80 000
Less: Capital distribution	(90 000)
Negative base cost	(R10 000)

Upon dissolution of Tranz (Pty) Ltd there would be a disposal of her interest in terms of paragraph 11 in that her usufructuary right would have been extinguished. In terms of paragraph 76 Kim would be treated as having proceeds of R10 000 resulting in a capital gain of R10 000 in her hands.

The proposed amendment also brings the definition in line with the definition of "shareholder" in section 1, which includes a person who is not a registered shareholder but has a right to dividends.

CLAUSE 107

Income Tax: Amendment of paragraph 76 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): Paragraph 76(1) presently requires that the base cost of a share be reduced when a capital distribution is *received* by a shareholder. First, it is proposed that the subparagraph be expanded to include an *accrual* of a capital distribution. Secondly, it is proposed that subparagraph (1) be made subject to subparagraph (4). Subparagraph (1) cannot work without triggering a part-disposal where the time apportionment base cost method (TAB) is used. The reason is that under the TAB method the base cost can only be determined once a share has been disposed of.

Subclause (b): Where a shareholder disposes of a share and has adopted the time-apportionment base cost, he or she must reduce the expenditure in respect of the acquisition and holding of the share by the amount of any capital distribution. It is proposed that subparagraph (4) be clarified and the capital distributions after valuation date should also reduce the expenditure. If the capital distributions exceed the expenditure, it is proposed that the excess be treated as proceeds when the share is disposed of.

Example

ABC (Pty) Ltd was formed 10 years prior to valuation date with a share capital of R10 000. Mr Fender has held all the shares since the date of acquisition. Some years after the valuation date he decides to place the company into voluntary liquidation. ABC (Pty) Ltd's balance sheet appeared as follows before any final dividend distributions:

Capital employed		
Share capital		10 000
Capital profits		50 000
Revenue profits	– pre-1993	10 000
	- post-1993	20 000
		R90 000
Employment of capital		
Cash		R90 000

The company makes the following distributions.

Year ended 28 February 2010

Dividend	80 000

Year ended 28 February 2011

Share capital	10 000

The company was placed in liquidation on 31 March 2010 and finally dissolved on 28 February 2011. The dividend is declared in anticipation of liquidation and all the requirements of section 64B(5)(*c*) have been met.

Mr Fender adopts the time apportionment base cost (TAB) method to determine the valuation date value of his shares.

The capital gain or loss on disposal of Mr Fender's shares will be determined as follows:

Year ended 28 February 2010

Capital distribution (as defined in paragraph 74)

Capital profits	50 000
Pre-1993 revenue profits	10 000
	R60 000

In terms of the proposed amended paragraph 76(4) the capital distribution of R60 000 must be applied against the expenditure in respect of the shares.

Expenditure	10 000
Less: Capital distribution	(60 000)
Excess	(R50 000)

The excess is treated as proceeds on disposal in terms of paragraph 76(4).

Year ended 28 February 2011

Expenditure	0
Less: Capital distribution	10 000
Excess	(R10 000)
Less: Prior excess	(R50 000)
Total excess	(R60 000)

Note that the expenditure has already been reduced to nil by the first capital distribution. Once again, the excess of R10 000 is treated as proceeds on disposal of the shares. The shares are deemed to be disposed of on date of dissolution, or 28 February 2011, in terms of paragraph 77.

Proceeds	=	R50 000 + 10 000
	=	R60 000

TAB	=	0 + [(60 000 – 0) x 10/20]
	=	R30 000
Capital gain	=	Proceeds – TAB – post CGT expenditure
	=	60 000 – 30 000 – 0
	=	R30 000

CLAUSE 108

Income Tax: Amendment of paragraph 80 of the Eighth Schedule of the Income Tax Act, 1962

Paragraph 80 provides that the capital gain arising as result of the vesting of a trust asset in a beneficiary or the vesting of a capital gain arising from the disposal of a trust asset in a beneficiary in the year in which arises, must be disregarded in the hands of the trust and treated as a capital gain of the beneficiary.

A new subparagraph is proposed to deal with persons who have an interest in a trust which is not a resident. Where a resident acquires a vested interest to an amount representing the capital of a non-resident trust and—

- the capital arose from—
    - (i) a capital gain of the trust in any previous year of assessment during which the resident had a contingent right to the capital; or
    - (ii) any amount which would have constituted a capital gain if the trust was a resident; and
- the capital gain has not been subject to tax in the Republic,

the amount must be taken into account for the purposes of determining the aggregate capital gain or aggregate capital loss of the resident.

The provision does not have retrospective effect as "capital gain" is defined in the Act and refers only to capital gains arising on or after the valuation date.

CLAUSE 109

Income Tax: Amendment of paragraph 81 of the Eighth Schedule of the Income Tax Act, 1962

Subclause (a): Paragraph 81 deals with interests in discretionary trusts and subparagraph (1) provides that the base cost of an interest in a discretionary trust is nil. In order to prevent any argument that the provisions of paragraph 38, which provides that transactions between connected persons are treated as being for a consideration equal to market value are not in conflict with this paragraph, it is proposed that the words "Despite paragraph 38(b)" be added to this paragraph.

Subclause (b): Subparagraph (2) provided that where an asset vested in a beneficiary of a discretionary trust the beneficiary's interest in the trust increased. On reconsideration this is not correct as the beneficiary obtains a vested interest in the asset which constitutes a separate asset in the beneficiary's hands, in addition to any

remaining interest in the trust. The base cost of the interest in the trust, however, remains nil. It is proposed that the subparagraph be deleted.

CLAUSE 110

Income Tax: Amendment of paragraph 84 of the Eighth Schedule of the Income Tax Act, 1962

In terms of paragraph 84 of the Eighth Schedule the Minister of Finance must issue regulations to determine the capital gain or capital loss in respect of certain transactions in foreign currency. It is proposed that the regulations only apply to natural persons and trusts, excluding trusts carrying on any trade and natural persons who hold any foreign currency asset, foreign currency option contract or forward exchange contract for purposes of trade. The reason therefor is that exchange differences on foreign currency and other exchange items of companies and the persons excluded above are to be dealt with under the provisions of section 24I of the Act.

The assets in respect of which paragraph 84 apply are foreign currency assets, forward exchange contracts and foreign currency option contracts. The term "foreign currency asset" is defined to mean any foreign currency; and any—

- loan, advance or debt;
- stock, bond, debenture, bill, promissory note, certificate or similar arrangement; or
- deposit with a bank or other financial institution,

the value of which is denominated in and primarily determined with reference to any foreign currency, (but excluding any policy or right in a pension fund which gives rise to any benefit contemplated in paragraph 54 or an amount contemplated in section 10(1)*(g*C*)*).

CLAUSE 111

Income Tax: Repeal of paragraph 85 of Eighth Schedule to the Income Tax Act, 1962

This paragraph provides that where a person's capital losses determined in terms of the regulations issued under paragraph 84 exceed the capital gains determined in terms of those regulations the excess may not be utilised for tax purposes during the relevant year of assessment but must be treated as a capital loss in the following year of assessment.

It is proposed that the foreign currency capital loss "ring-fencing" provision be repealed. The repeal of this paragraph will have the effect that all capital losses calculated in accordance with the regulations will be taken into account in determining a taxable capital gain or assessed capital loss for capital gains tax purposes. This will, for example, enable a taxpayer who is a natural person to set off a foreign currency capital loss on the disposal of foreign currency against a capital gain on the disposal of a share during a year of assessment.

CLAUSE 112

Income Tax: Repeal of paragraph 86 of Eighth Schedule to the Income Tax Act, 1962

Paragraph 86 is a transitional anti-avoidance measure to prevent the artificial inflating of base cost before the valuation by transactions between connected persons.

South African long-term insurers are required for income tax purposes to create four funds to conduct their business. The funds are regarded as separate persons for income tax purposes and disposals of assets between the funds are regarded as disposals on which CGT is imposed. In terms of section 29A (6) and (7) of the Income Tax Act the insurers are required to transfer assets between the different funds if there is a change in policyholders or a balancing of assets and liabilities is required. In view of the fact that these disposals are involuntary it is proposed that for the purposes of this paragraph the different funds of the insurers not be connected persons and that these provisions not apply to transactions between the funds under these circumstances.

CLAUSE 113

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

The definitions of "container operator", "master" and "pilot" are amended to include any agent appointed as contemplated in section 97. The latter section is also amended as will be seen below.

The definition of "fuel levy goods" is amended to clarify that such goods do not include goods specified in any item of that Part for which a free rate of duty is prescribed as contemplated in section 37A(1)(a), which was so inserted exclusively for the purposes of administration of marked kerosene and aviation kerosene administered under that section. This amendment is deemed to have come into operation on 24 November 1999 and will not have a detrimental effect on any person.

The definition of "container terminal" is amended to indicate that it is a place contemplated in section 6(1)(hA) and licensed in terms of the provisions of this Act.

New definitions, are further "container terminal operator", "degrouping depot", "degrouping operator", "transit shed", "transit shed operator" and "wharf operator". Container terminals, degrouping depots, transit sheds and wharfs where imported goods are landed must be licensed under the provisions of the Act in terms of the definitions. The requirement that such places must be licensed is intended to improve control over goods imported or exported, as the case may be.

The definitions, other than the definition of "fuel levy goods", will come into operation on a date fixed by the President by proclamation in the *Gazette*.

CLAUSE 114

Customs and Excise: Amendment of section 3 of the Customs and Excise Act, 1964

Section 3 is amended to provide that any decision or determination made or any other act performed by the Commissioner or an officer under the provisions of this Act, including any amendment or withdrawal thereof, is deemed to be effective from the date any notice or communication in respect of such decision, determination or act is issued in writing. The date of notification may determine the date within which an administrative appeal may be filed as contemplated in section 95A.

CLAUSE 115

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

See NOTES on SECRECY PROVISIONS above.

CLAUSE 116

Customs and Excise: Amendment of section 6 of the Customs and Excise Act, 1964

Section 6 relates to the powers of the Commissioner to appoint or prescribe by rule various places, routes etc for the purposes of the Act.

Paragraph (1)(g) relating to transit sheds is amended and now enables the Commissioner to appoint or prescribe places where transit sheds may be established into which goods, before due entry thereof, may be removed from a ship, aircraft or vehicle or to which such goods may be removed after removal from such ship, aircraft or vehicle.

Provision is further made that wharfs and places where degrouping depots may be established may be appointed or prescribed. Air cargo may be removed to a degrouping depot from a transit shed before due entry thereof, for the storage, detention, unpacking or examination of consolidated packing or its contents, for removal to another transit shed or the delivery to importers of such contents, after due entry thereof, for the consolidation of air cargo for export and such other purposes as may be specified by rule.

In terms of subsection (6) no person may be in control of, or receive, deliver, remove, store or otherwise deal with any imported goods landed from any ship, aircraft or other vehicle before due entry unless such person is an approved container operator as contemplated in section 96A or is in control of or receives, delivers, removes, stores or otherwise deals with such goods in accordance with a licence issued under the Notes to the item of Schedule No. 8, the provisions of the Notes, the rules contemplated in section 60(1)(b) and any other provision of the Act relating to such goods, except if the Commissioner otherwise determines by rule. This subsection will come into operation on a date fixed by the President by promulgation in the Gazette.

CLAUSE 117

Customs and Excise: Amendment of section 8 of the Customs and Excise Act, 1964

Section 8 relates to manifests or other reports listing and describing cargo carried by or loaded on to any ship, aircraft, railway train or other vehicle and outturn reports or other reports concerning goods landed from or unpacked from or packed into or loaded on to any ship or aircraft. An outturn or other report is also required in respect of any imported goods unpacked while under the control of any person after landing thereof as contemplated in section 11 (subsection (1)(c) as it now will read according to the proposed amendment).

In terms of the new subsection (2)(a) the outturn or other report must reflect full particulars concerning any excess or deficiency in respect of any goods landed, received, unpacked, packed or loaded, as the case may be, according to any manifest or other report, or any subsequent outturn report or other report by any other person according to the sequence prescribed by rule.

Subsection (2)(b) provides for the procedure where any container or package is landed with visible evidence of tampering or where any deficiency is suspected.

Subsection (2)(c) is a penal provision. It is an offence if any person fails to report cargo landed or makes any false or misleading statement in connection with any report to which the section relates.

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

CLAUSE 118

Customs and Excise: Amendment of section 11 of the Customs and Excise Act, 1964

Section 11 deals with the landing of unentered goods.

The amendment to section 11 requires in subsection (1) that where goods imported by ship, aircraft or other vehicle are landed before due entry, the goods must be landed on a licensed wharf under the control of a wharf operator or placed into or delivered to any licensed container terminal, container depot, transit shed or degrouping depot. Alternatively, such goods must be delivered to any container operator or other premises licensed under the provisions of the Act or any other place approved by the Commissioner on furnishing such security as the Commissioner may require.

In terms of subsection (2), where any carrier fails to deal with goods landed before due entry as contemplated in subsection (1), such carrier is liable for the duty on the goods until they are duly entered for the purposes of this Act and is also guilty of an offence.

In terms of subsection (3) the Commissioner may licence any wharf, container terminal, transit shed or degrouping depot as a special customs and excise storage warehouse contemplated in section 21 and except where the Commissioner otherwise determines

by rule, the provisions of this Act relating to licensed storage warehouses shall *mutatis mutandis* apply to such wharf, container terminal, transit shed or degrouping depot.

The amendments to section 11 will come into operation on a date fixed by the President by proclamation in the *Gazette*.

CLAUSE 119

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

Section 18 deals with the removal of goods in bond.

The proposed amendment inserts, firstly, a new subsection (1B) which provides that any imported goods landed in the Republic when removed in bond to a destination in the Republic may only, except where the Commissioner otherwise determines by rule, be so removed to any premises licensed under the provisions of the Act.

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

Subsection (3) (b) is amended in respect of goods removed to a destination beyond the borders of the common customs area. The liability for duty of the person that removes the goods ceases when it is proved that the goods have been duly taken out of the common customs area or in terms of the proposed amendment, in the circumstances and in accordance with procedures prescribed by the Commissioner by rule that the goods have been duly accounted for in the country of destination.

CLAUSE 120

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

The amendment introduces the same provisions in subsection (2) as those of the amendment to section 18 (3)(b) (clause 119) to provide that where goods are exported from a customs and excise warehouse liability of the person who exports the goods will cease when it is proved that the goods have been duly taken out of the common customs area (the existing provision) or (the proposed amendment), in the circumstances and in accordance with procedures prescribed by the Commissioner by rule, that the goods have been duly accounted for in the country of destination.

CLAUSE 121

Customs and Excise: Insertion of section 21A in the Customs and Excise Act, 1964

This section is inserted to provide for the customs and excise administration of industrial development zones.

Subsection (1)(a) provides that for the purposes of the Act, Industrial Development Zone or IDZ and any other expression relating thereto must have the meaning, unless

otherwise specified in the Act or the context of any provision of the Act otherwise indicates, assigned thereto in the regulations made by the Minister of Trade and Industry under section 10(1) of the Manufacturing Development Act, 1993 (Act No. 187 of 1993), and published in Government Notice R1224 of 1 December 2000.

Any reference in the section to the regulations or the regulation is, unless otherwise specified, a reference to the regulations or a regulation so published.

Where any provision of the Manufacturing Development Act or a regulation is inconsistent or in conflict with any provision of the Customs and Excise Act governing the administration of the zones or the levying, rebate or refund of duty the provisions of the Customs and Excise Act will prevail.

In terms of subsection (2) the customs secured area (CSA) of the IDZ is deemed to be a special customs and excise manufacturing and storage warehouse contemplated in section 21.

The CSA must be licensed as such a warehouse by the IDZ operator.

Subsection (2)(c) to (e) provides for liability of duty on goods brought into the CSA or produced or manufactured in the CSA.

Subsection (3) deems goods manufactured in the CSA to be imported goods.

Subsection (4) empowers the Minister to specify the duty leviable on goods manufactured or produced in the CSA or any rebate, refund or drawback by notice in the *Gazette*.

In terms of subsection (5) the provisions of sections 65, 66 and 67 apply, subject to the rules, to the valuation of such goods.

In terms of subsection (6) the Commissioner is empowered to make rules in respect of various matters for the purposes of the administration of the CSA.

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

CLAUSE 122

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

Section 37A contains special provisions relating to the sale of marked goods (kerosene) mixed with distillate fuel or petrol.

Subsection (4)(a)(vi) is amended to prohibit that a person may not only not be in possession of any marked goods mixed in any proportion with distillate fuel or petrol, but may also not sell such goods.

The definition of "engine" in subsection (12) is amended to state that engine means any engine in any machine, machinery, plant, equipment, apparatus, vehicle or ship,

classifiable under any heading or subheading of Chapters 84 to 87 and 89 of Part 1 of Schedule No. 1. The definition of "engine" is deemed to have come into operation on 24 November 1999.

CLAUSE 123

Customs and Excise: Amendment of section 38 of the Customs and Excise Act, 1964

Section 38 deals with the entry and time of entry of goods.

Provision is made in subsection (1)(a) that every importer must within 7 days of the date on which goods are in terms of section 10 deemed to have been imported, except in respect of goods in a container depot as provided in section 43(1)(a), or within such further time as the Commissioner may prescribe by rule in respect of any means of carriage or any person having control of such goods after landing, make due entry of those goods as contemplated in section 39. Presently the extension of time is within the discretion of a delegated officer and it is considered to be in the interests of the effective control of imported goods to prescribe a uniform extension period. This will be done after consultation with representative organisations involved in the import trade.

A new paragraph (aA) is inserted in subsection (1) in terms of which the Commissioner may, in respect of goods imported by air of a value not exceeding R500 for which immediate clearance is requested (ie express consignments) allow a licensee of any premises licensed under the provisions of the Act, to remove such goods for home consumption and to pay the duties due at such time on compliance with the conditions as the Commissioner may specify by rule and impose in each case. The provision will enable the Commissioner to prescribe procedures to regulate and facilitate such importations.

CLAUSE 124

Customs and Excise: Amendment of section 43 of the Customs and Excise Act, 1964

This section which provides for procedures relating to *inter alia* the disposal of unentered imported goods is extensively amended. The provisions are intended to create a comprehensive and transparent legal basis for the disposal of uncleared goods, goods imported in contravention of any law, seized goods and abandoned goods.

In subsection (1) provision is made for procedures regarding the removal of unentered goods to the State Warehouse or other places. The Controller may also allow the goods to remain under the control of persons who have control thereof in terms of a provision of this Act.

In terms of subsection (2) any place which is not a State Warehouse to which goods are removed or where the goods are allowed to remain is deemed to be a State Warehouse. Paragraph (b) provides for the responsibilities and liability of the person in control of the premises where the goods are stored. Such a person is also entitled to payment of State Warehouse rent.

Paragraph (c) requires the Commissioner to compile a list of the goods and prescribes procedures to be followed in connection with notification and keeping of documents. Subparagraph (ii) is an evidentiary provision relating to the contents of the list.

In terms of subsection (3) the Commissioner may cause such goods, except goods imported in contravention of any law, to be sold. The section also provides for the application of the proceeds.

Subsection (5) prescribes procedures relating to goods imported in contravention of any law other than counterfeit goods.

Subsection (6) prescribes procedures to be followed where goods are imported in contravention of the Counterfeit Goods Act, 1997.

Subsection (7) provides for the disposal of goods which have been appropriated to the State as contemplated in subsection (3)(a) or condemned and forfeited as provided in subsections (5) and (6). The Commissioner may dispose of such goods according to various alternatives after consultation with the Directors-General of the National Treasury and of Trade and Industry or, where appropriate with the Director: General of any other department, as specified in paragraphs (a) and (b).

Subsection (8) provides that the provisions of subsections (5) and (6) apply, notwithstanding the provisions of section 90, *mutatis mutandis* to goods detained or seized under the Customs and Excise Act that were imported in contravention of that Act and any other law. In terms of a proviso the goods may be delivered to the owner where the owner proves that he did not know that the goods were imported in contravention of the Customs and Excise Act and such other law.

Subsection (9) provides that the provisions of subsection (7)(b)(iv) apply to any goods donated to the Commissioner by the owner of an intellectual property right after an appropriate order of court as contemplated in section 10 of the Counterfeit Goods Act.

Subsection (10)(a) provides for the disposal under the section of abandoned goods. Paragraph (b) provides that the provisions of sections 89, 90 and 96 apply *mutatis mutandis* to any goods to which subsection (5) or (6) relate.

Subsection (11) empowers the Commissioner to make rules.

CLAUSE 125

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

Where imported goods, before due entry thereof, may be delivered to premises licensed under the provisions of this Act, provision is made for the creation of liability for duty on such goods and also the circumstances in which such liability may cease.

Subsection (5)(b) states in which circumstances the terminal operator is liable for duty and when liability ceases.

In subsection (5)(c) provision is made when the liability of the licensee of the licensed place contemplated in section 11 ceases.

In subsection (5C)(c)(ii) it is stated that any outturn report or any discrepant report duly completed in accordance with section 8 and its rules shall, in respect of the goods concerned, be regarded to be a correct report of goods landed or received in a container, consolidated package or other package in a licensed place as contemplated in section 11.

In paragraph (d) provision is made that subject to compliance with any procedure prescribed by rule in respect of any goods or means of transport the liability of the master, pilot or other carrier, wharf operator, terminal operator, container operator or transit shed operator on any imported goods not consigned to a place in the Republic which are landed in the Republic, will cease when it is proved that the goods have been duly taken out of the common customs area. This provision could apply to such goods as transshipped cargo. These provisions will come into operation on a date fixed by the President by proclamation in the Gazette.

CLAUSE 126

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

Section 47 regulates the payment of duty and the determination of the rate applicable.

Subsection (7) has been redrafted to clarify that only goods classifiable in any tariff heading or subheading of Part 1 of Schedule No. 1 expressly quoted in any item of Part 2, 5 or 6 of the Schedule or Schedule No. 2 are deemed to be included in any such item.

Subsection (8) is amplified to state the interpretation of the provisions in Schedules to be subject to the Explanatory Notes of the Harmonised System issued by the Customs Co-operation Council, Brussels (now known as the World Customs Organisation).

Subsection (9)(a)(i) empowers the Commissioner to determine tariff headings, subheadings and items of any Schedule whereunder goods must be classified and whether goods may be or have been used, manufactured, exported or disposed of as provided in the tariff items or other items of Schedule No. 3, 4, 5 or 6.

It is further provided that the determination only operates in respect of the goods mentioned therein and the person in whose name it is issued. Subject to specified provisions, it operates from the date the determination is issued.

Subsection (9)(b) provides that any amount due in terms of any determination or amended determination or new determination remains payable as long as it remains in force notwithstanding that an internal administrative appeal has been filed in terms of section 95A or proceedings have been instituted in any court. In terms of a proviso the Commissioner may however suspend payment until the appeal is decided or a final judgment by the High Court or a judgment by the Supreme Court of Appeal.

Subsection (9)(b) further provides when a determination, amendment of a determination or new determination ceases to be in force and that the Commissioner is not liable to

pay interest on any amount refundable which remained payable while the determination remained in force.

Subsection (9)(d) specifies the circumstances in which any determination must be amended or withdrawn or a new determination made and the dates from which it must or may be made. Refunds of duty as a result of any amended or new determination are limited as provided for in section 76B and any increased liability for duty to a period of two years immediately preceding the date of such amendment or new determination.

Subsection (10) amends the savings provisions specified therein regarding a false declaration.

In subsection (11)(b) inspection of any books, accounts and other documents is defined.

Subsection (12) is inserted to provide for a binding tariff determination which means a tariff determination is binding on the Commissioner when it is issued to the applicant after compliance with the provisions of the subsection and the rules. The subsection *inter alia* provides that a binding tariff determination is issued in the name of and is only operative in respect of the holder, to which extent it is binding on the Commissioner, when it may be annulled and the period it will be valid. In subsection (13) provision is made to prescribe certain matters by rule. Subsection 12 will come into operation on a date fixed by the President by proclamation in the Gazette.

CLAUSE 127

Customs and Excise: Amendment of section 49 of the Customs and Excise Act 91 of 1964

The proposed amendment is of a textual nature and essentially relates to the enacting into law as part of the Act of any international agreement as contemplated in section 231 if the Constitution where such agreement includes matters which are required to be administered in terms of the provisions of the Act.

CLAUSES 128 AND 129

Customs and Excise: Amendment of sections 65 and 69 of the Customs and Excise Act, 1964

Sections 65 and 69 relate respectively to the customs value of imported goods and the excise value of locally produced goods. The relevant provisions in the sections relating to the determination of such values are amended in consequence of the amendment to section 47(9)(d).

CLAUSE 130

Customs and Excise: Amendment of section 75 of the Customs and Excise Act, 1964

Subsection (1)(b) is amended to provide for a rebate of duty on imported goods exported to the extent stated in, and subject to compliance with the provisions of the item of Schedule No. 4 wherein the goods are specified.

Similar provision is made for a rebate in respect of excisable or fuel levy goods exported, which may be specified in any item of Schedule No. 6. In subsection (1C) the definition of "user" is amended by the deletion of the further registration provided in subsection (4A).

Subsection (4A) is amended to provide that any person who registers for a diesel refund is deemed to have registered in addition for the purposes of section 59A.

In subsection (4A)(b)(ii) it is provided that any return for refund of levies must be submitted within two years from the date of purchase of the distillate fuel.

Subsection (4A)(h)(ii) in connection with the penal provision in subparagraph (h)(i), enacts that where any person falsely applies for a refund without having purchased the fuel, any forfeiture amount must be calculated on the basis of the usual retail price thereof on the date the false application was submitted or on the date of assessment of such amount, whichever is the greater.

In subsection (14)(b)(i) it is required that a refund for the levies must be submitted within the period contemplated in subsection (4A)(b)(ii), ie within two years from the date of purchase of the fuel.

In subsection (18) the Commissioner is empowered to allow a deduction from the dutiable quantity of a quantity not exceeding, in respect of spirits used in the manufacture of spirituous beverages, the actual manufacturing loss of the quantity entered and used or 1,5 per cent thereof, whichever is the least.

In the case of imported crude petroleum naphtha for use in refining of petroleum products, imported petroleum naphtha for use in the manufacture of ammonia or imported petrol the deduction is limited to 0,25 per cent of the quantity landed and entered for storage in a customs and excise warehouse. In respect of distillate fuel 0,15 per cent of the quantity landed and entered for storage in a customs and excise warehouse is allowed.

In the case of petrol manufactured in the Republic a deduction of 0,25 per cent of any quantity entered for removal and removed from a customs and excise manufacturing warehouse is allowed. In the case of distillate fuel manufactured in the Republic the allowance is 0,15 per cent.

The amendments to subsection (18) will come into operation on a date fixed by the President by proclamation in the *Gazette*.

CLAUSE 131

Customs and Excise: Amendment of section 89 of the Customs and Excise Act, 1964

This section is substituted to provide for the time within which a prospective litigant must give notice before serving any process for instituting any proceedings as contemplated in section 96(1)(a), when proceedings must be instituted and the circumstances within which goods are deemed to be condemned and forfeited.

CLAUSE 132

Customs and Excise: Amendment of section 90 of the Customs and Excise Act, 1964

This section is amended to provide in paragraph (b) for more comprehensive provisions in respect of seized goods which are of a perishable or dangerous nature.

Paragraphs (c), (d), (e) and (f) provide for procedures where goods are imported, exported, manufactured or used or otherwise dealt with in contravention of this Act and any other law.

CLAUSE 133

Customs and Excise: Amendment of section 91 of the Customs and Excise Act, 1964

Section 91 relates to the imposition of penalties by the Commissioner and in subsection (2) provides for an appeal to the Minister. In view of the provisions for internal administrative appeals in section 95A this subsection is deleted.

CLAUSE 134

Customs and Excise: Insertion of section 93A in the Customs and Excise Act, 1964

This section empowers the Minister to prescribe by regulation the circumstances under which the Commissioner may for the purpose of settlement of a dispute between the Commissioner and any person concerning any amount payable under the provisions of the Act, waive any claim against such person in whole or in part where such a settlement would be to the best advantage to the state (subsection1). The Minister must so prescribe the requirements for the reporting by the Commissioner of any claim against such person which has been waived in whole or in part by the Commissioner (subsection 2). The provisions contained in the Regulations must be incorporated in the Customs and Excise Act, 1964 within twelve months from the date the Regulations come into operation

CLAUSE 135

Customs and Excise: Insertion of section 95A in the Customs and Excise Act, 1964

Section 95A is inserted to provide for an internal administrative appeal process. In terms of subsection (2) any person who may institute proceedings in respect of any decision or determination by the Commissioner, a Controller or an officer made under the Act or any administrative action contemplated in section 6(2) of the Promotion of Administrative Justice Act (Act No. 3 of 2000), may file a notice of internal administrative appeal to the Commissioner. The subsection also states within which period it may be filed.

The section further *inter alia* states who may bring such appeal, specifies the particulars to be stated in such appeal (which must be in writing) and when the appeal must be considered by the Commissioner. The Commissioner may also keep a public record (subsections (8) and (9)).

The Commissioner may in terms of subsection (9) confirm or amend any determination or withdraw it and make a new determination from a specified date.

In terms of subsection (11) the Commissioner may make rules *inter alia* to delegate any of the powers that may be exercised or assign any of the duties that shall be performed by the Commissioner in accordance with the provisions of this section and any other provision of the Act to any committee composed of officers or officers and other persons.

CLAUSE 136

Customs and Excise: Amendment of section 96 of the Customs and Excise Act, 1964

In terms of the proposed amendment under subsection (1)(a) no process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of the Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the:

- cause of action;
- name and place of abode of the person who is to institute such proceedings (in the section referred to as the "litigant"); and
- name of his or her attorney or agent, if any.

Subject to the provisions of section 89, the period of extinctive prescription is one year (subsection (1)(b).

In terms of paragraph *(c)*(i) of subsection 1 the State, the Minister, the Commissioner or an officer may on good cause shown reduce the period specified in paragraph (a) or extend the period specified in paragraph (b) by agreement with the litigant.

Paragraph *(c)*(ii) provides that if the State, the Minister, the Commissioner or an officer refuses to reduce or extend any period as contemplated in paragraph (c) (i), a High Court may reduce or extend any such period if the interest of justice so requires.

The section does not apply to the recovery of a debt contemplated in any law providing for the recovery of a debt from an organ of state of a debt described in such law (subsection 2).

CLAUSE 137

Customs and Excise: Amendment of section 97 of the Customs and Excise Act, 1964

Section 97 is amended to provide that the container operator, master, pilot or other carrier may, and in certain circumstances shall appoint an agent.

The persons concerned shall appoint an agent where any means of carriage is not owned or chartered by, or the container operator is not, a legal person registered in the Republic in accordance with the laws of the Republic and which has its place of effective management in the Republic or by a natural person who is ordinarily resident in the Republic.

The agent appointed shall be such a legal or natural person.

The act performed by such agent on behalf of such carrier or container operator shall in all respects for the purposes of the Act be that of such carrier or container operator.

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

CLAUSE 138

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

Subsection (1) relates to the liability of the agent appointed by the master, container operator or pilot. The amendment includes "or other carrier" to indicate that the agent appointed by another carrier is liable as specified in the section.

CLAUSE 139

Customs and Excise: Amendment of section 109 of the Customs and Excise Act, 1964

This section is amended to provide that where it is necessary to give effect to any law for the safeguarding of public health or for the safety of the public or the State, the Commissioner may in concurrence with the authority administering such law at any time and at the expense and risk of the importer, exporter, owner, master or pilot concerned cause any goods under customs and excise control forthwith to be destroyed or otherwise disposed of or delay the departure of any ship or vehicle from any place in the Republic for a period not exceeding 48 hours.

CLAUSE 140

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

Paragraph (aC) is inserted to provide that goods stored in any licensed customs and excise warehouse will be subject to a lien as security until such goods have been duly entered and the liability for duty of the licensee ceases in terms of the Act.

CLAUSE 141

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

See NOTES on SIYAKHA above.

CLAUSE 142

Stamp Duties: Amendment of section 9 of the Stamp Duties Act, 1968

See NOTES on SIYAKHA above.

CLAUSE 143

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

See NOTES on SIYAKHA above.

CLAUSE 144

Stamp Duties: Amendment of section 31 of the Stamp Duties Act, 1968

See NOTES on SIYAKHA above.

CLAUSE 145

Stamp Duties: Insertion of section 32B of the Stamp Duties Act, 1968

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSE 146

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

The definition of a debit entry means an entry in terms of which a debit is posted to—

- a bank account from which money is withdrawable by cheque;
- an account in terms of a credit card scheme; or

- any other account at a banking institution or the Postbank, into which the depositor may deposit money and from which the institution or the Postbank where the account is held, may make a payment to any other person or electronically transfer an amount to the account of that person or of any other person.

The intention with the reference to the account of that same person was to refer to another account of that person held at another banking institution. It is, therefore, proposed that this provision be amended to state that specifically.

CLAUSE 147

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

An exemption from stamp duties is proposed in respect of the issue of a share in terms of an intra-group transaction as contemplated in the special rules introduced in Part III of Chapter II of the Income Tax Act, 1962, or in respect of the registration of transfer of any marketable security disposed of in terms of any transaction contemplated in that Part.

CLAUSE 148

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

Subclause (a): The amendment, together with subclauses (*c*) and (*d*), is intended to make it clear that a supply of commercial accommodation does not take place when a dwelling, as defined, is let, the latter being an exempt supply and the former being subject to tax on 60 per cent of the value of the supply.

Subclauses (b) and *(e)* introduce definitions of "customs secured areas" and "industrial development zones".

Subclause (f): The amendment is of a textual nature.

Subclause (g): The amendment is consequential on the repeal of the Exchequer Act, 1975, the promulgation of the Public Finance Management Act, 1999 and the publishing of Treasury Regulations in *Government Gazette* No. 21249 dated 31 May 2001.

Subclause (h): The proposed amendment of the definition of "welfare organisation" takes account of the welfare, humanitarian and development aspects of the "public benefit organisation" concept recently introduced into the income tax legislation, but a VAT–specific list will be determined under the headings mentioned in the amendment.

CLAUSE 149

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

An anomaly arose in applying the definition of "debt security" in section 2 of the Act, in that the liability side of a debt and the transfer thereof are not specifically mentioned. Within the banking industry and in commerce in general, someone may be paid an

amount to take over another's debt or debt obligation. This is the converse of payment for the right to receive money, which section 2(2)(iii) provides for. The proposed amendment makes it clear that the transfer of a debt obligation is exempt from VAT.

CLAUSE 150

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

See NOTES on SECRECY PROVISIONS above.

CLAUSE 151

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

In principle, a person registered for VAT may claim an input tax deduction in respect of VAT paid on the acquisition of fixed property and on improvements made thereto. Similarly, when disposing of the property, he or she must declare and pay VAT in respect of the selling price.

As regards expropriation, the Cape of Good Hope Provincial Division found in *Shell's Annandale Farm (Pty) Ltd v CIR (Case No. 9499/93)* that expropriation of a vendor's fixed property did not constitute a "supply", as defined in section 1 of the Act, as it read at that stage. The definition of "supply" was therefore amended in 1999 to include supplies made whether voluntary, compulsory or by operation of law.

The proposed new subsection (21) makes it clear that a VAT vendor must levy VAT on the authority that expropriates the fixed property and declare and pay the VAT to the Commissioner. The State is bound by the provisions of the Act, in terms of section 86 thereof. The State or other authority must therefore take account of the VAT liability on the part of the vendor (owner) on expropriation, when determining the compensation payable.

CLAUSE 152

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

The amendments are textual

CLAUSE 153

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

The amendments in subclauses (*a*) and (*b*) are textual.

Subclause (*c*) introduces a new subsection in section 11 to permit supplies of goods to industrial development zones to be made at the zero rate of tax.

CLAUSE 154

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

The amendment proposed in subclause (*a*) is to clarify the intention of exempting from tax the supply of a dwelling in terms of an agreement for the letting and hiring thereof, but not the supply of commercial accommodation.

Sub-clause (*b*): All State schools, universities and technikons are exempt from VAT but certain private educational institutions enjoy exemption only if they provide pre-primary, primary or secondary education or provide educational services similar to a technikon and are registered with an educational authority. Previously, all private educational institutions were required to be registered with the National Government education department or a provincial education authority. Such registration was relied on for the exemption of VAT to apply. Over the last few years a revision of the relevant education legislation led to lapses in the registration process, causing difficulties in the application of the exemption.

The proposed amendment of section 12*(h)* will bring the requirements for VAT exemption in line with the new education legislation.

The proposed addition of subsection *(j)* proposed in sub-clause (*c*) provides for an exemption of child care by a creché, being a day nursery for very young children as well as after-school care. These facilities are used extensively by working parents. Previously such institutions were regarded as educational institutions.

CLAUSE 155

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

The proposed amendment to section 13(3) is consequential on the substitution of Schedule 1. Section 13(4) is amended to provide for payment of tax not paid when a person brings goods into the Republic.

CLAUSE 156

Value-Added Tax: Amendment of section 16(2) of the Value-Added Tax Act, 1991

The amendment of section 16(2)*(a)* of the Act is necessary because it has been found that some vendors issue invoices under names that bear no or insufficient relevance to their registered or trading names.

The insertion of section 16(2)*(e)* is to ensure that the vendor claiming input tax has proper substantiation of input tax deductions claimed, where his agent holds the tax invoices to supplies made to him on behalf of the vendor.

The insertion of section 16(3)(*l)* makes provision for a refund in lieu of the refund that may be claimed by registered vendors under section 75(1A) of the Customs and Excise

Act, 1964, in respect of diesel used in farming, to small-scale farmers who would not otherwise qualify as they are not registered as VAT vendors.

CLAUSE 157

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

The addition of a new sub-section (1A) is proposed to compel vendors to issue full tax invoices in respect of all supplies exceeding R1 000. Previously, tax invoices had to be issued only at the recipient's request. Better compliance is ensured by compelling vendors to issue tax invoices as this limits the opportunities to suppress sales. These provisions are similar to provisions introduced in foreign VAT legislation.

The amendment of section 20(4)*(e)* was necessitated by the fact that some vendors fail to furnish a proper description of the goods or services supplied to the extent that the nature or circumstances of the supply cannot be properly verified by VAT auditors.

The purpose of subsections (5) and (6) was to reduce compliance costs of vendors, who would not be required to issue full invoices for small amounts. The amendment of the amounts proposed are to compensate for the effect of inflation.

CLAUSE 158

Value-Added Tax: Amendment of section 28 of the Value-Added Tax Act, 1991

The amendment provides for the submission of returns by means of electronic transfer, if the vendor has met the requirements for the transfer of the tax by electronic means, by the last business day of the month during which it is required to be furnished, instead of the 25th day. This measure is introduced to encourage vendors to submit returns and payments electronically as it results in considerable labour and cost savings to SARS.

CLAUSES 159 TO 164

Value-Added Tax: Amendment of sections 32, 33, 33A, 34, 35 and 36 of the Value-Added Tax Act, 1991

See NOTES on OBJECTIONS AND APPEALS above

CLAUSE 165

Value-Added Tax: Amendment of section 38 of the Value-Added Tax Act, 1991

The amendment of section 38 is textual.

CLAUSE 166

Value-Added Tax: Amendment of section 39 of the Value-Added Tax Act, 1991

The amendment of section 39 is textual.

CLAUSE 167

Value-Added Tax: Amendment of section 41 of the Value-Added Tax Act, 1991

The amendment of section 41 is textual.

CLAUSE 168

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

The amendment of section 44 requires the submission of particulars of a vendor's banking account or account with a similar institution to enable the Commissioner to transfer any amount due to the vendor to his account. Should a banking account other than that of the vendor be nominated, the Commissioner must be indemnified against losses of amounts paid into such accounts.

CLAUSE 169

Value-Added Tax: Amendment of section 45 of the Value-Added Tax Act, 1991

The amendment of section 45 is textual.

CLAUSE 170

Value-Added Tax: Amendment of section 47 of the Value-Added Tax Act, 1991

The amendment of section 47 will prevent a person appointed as agent from simply ignoring such appointment. If he or she has sound reasons for not complying with the conditions attached to the appointment as an agent, the Commissioner must be informed in writing thereof, to enable the Commissioner to implement other recovery measures.

CLAUSE 171

Value-Added Tax: Amendment of section 52 of the Value-Added Tax Act, 1991

The amendment of section 52(1) is consequential on the amendment introduced by section 17 of Act 59 of 1997 to the Marketing of Agricultural Products Act, 1996, which empowers the Minister of Agriculture to arrange that a pool be conducted by a particular

body, on behalf of its members for the purchase and sale of a particular agricultural product or a class of products.

The amendment of subsection (2) serves to include as an enterprise a rental pool scheme operated or managed by members or owners of sectional title interests or shareholders in a Share Block Company. This enables the pool to register as a single vendor instead of each member having to register.

CLAUSE 172

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

The amendment of section 57 is textual.

CLAUSE 173

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

The addition of section 58*(n)* is to provide that a vendor who issues documents that purport to be tax invoices, but do not comply with the prescribed requirements, will be guilty of an offence.

In terms of the proposed section 58*(o)* a person who has been appointed as agent but who without lawful cause fails to comply with the notice of appointment, may be prosecuted.

CLAUSE 174

Value-Added Tax: Amendment of section 65 of the Value-Added Tax Act, 1991

The amendment of section 65 has become necessary due to misleading advertisements, claiming that the VAT will be refunded to purchasers, recently appearing in the media.

CLAUSE 175

Value-Added Tax: Amendment of section 66 of the Value-Added Tax Act, 1991

The proposed amendment of section 66 relates to the method of rounding-off of the tax.

CLAUSE 176

Value-Added Tax: Insertion of section 86A to the Value-Added Tax Act, 1991

This clause provides that a provision of the VAT Act will prevail where a provision of the Customs and Excise Act, 1964 or the Manufacturing Development Act, 1993 or a

regulation made thereunder governing the administration of industrial development zones is inconsistent or in conflict with it

CLAUSE 177

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

Section 13(3) of the Act provides for the exemption of VAT on importation of certain goods, as set forth in Schedule 1. The proposed Schedule 1 incorporates certain principles of the Customs and Excise Act, 1964 and, more extensively, requirements found in certain Schedules to that Act, as well as provisions previously contained in sections of the Value-Added Tax Act which apply in the case of exemption of VAT under section 13. In practice this should lead to a better understanding of the exemptions and greater ease of application.

CLAUSE 178

Income Tax: Amendment of section 60 of the Income Tax Act, 1993

This amendment is consequential upon the introduction of the special rules in Part III of Chapter II of the Income Tax Act, 1962. See NOTES on CORPORATE RULES above.

CLAUSE 179

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

This amendment is consequential upon the introduction of the special rules in Part III of Chapter II of the Income Tax Act, 1962. See NOTES on CORPORATE RULES above.

CLAUSE 180

Uncertificated Securities Tax: Amendment of section 6 of the Uncertificated Securities Tax Act, 1998

An exemption is introduced in respect of any change in beneficial ownership of a marketable security in terms of certain transactions contemplated in the special rules introduced in Part III of Chapter II of the Income Tax Act, 1962. See NOTES on CORPORATE RULES above.

CLAUSE 181

Uncertificated Securities Tax: Amendment of section 13 of the Uncertificated Securities Tax Act, 1998

See NOTES on SIYAKHA above.

CLAUSE 182

Uncertificated Securities Tax: Insertion of section 17A of the Uncertificated Securities Tax Act, 1998

See NOTES on OBJECTIONS AND APPEALS above.

CLAUSES 183 TO 185

Value-Added Tax: Amendment of sections 85, 86 and 106 of the Revenue Laws Amendment Act, 1999

The amendments contained in sections 85, 86 and 106 of the Revenue Laws Amendment Act, 1999, have not come into effect due *inter alia* to obstacles relating to Customs codes and systems. They are consequential upon the substitution of an amended Schedule 1 under clause 177 of this Bill.

CLAUSE 186

Taxation Laws Amendment Act: Amendment of section 15 of the Taxation Laws Amendment Act, 2001

This amendment is of a textual nature.

CLAUSE 187 to 189

Amendments to the Revenue Laws Amendment Act, 2001 (Act No. 19 of 2001)

Section 43 of the Revenue Laws Amendment Act, 2001, is repealed. This section provided for the insertion of subsection (13) of section 44 of the Customs and Excise Act, 1964, which was to have come into operation on a date fixed by the President by proclamation in the *Gazette*. Because of subsequent amendments in the Taxation Laws Amendment Bill this amendment is no longer necessary.

Section 45 of the Revenue Laws Amendment Act, 2001, is amended in order to effect an amendment to section 59A of the Customs and Excise Act, 1964, as the section is not yet in operation. Subsection (2) of section 59A is substituted to provide that the Commissioner may require security.

Section 50 of the Revenue Laws Amendment Act, 2001, which amended section 75 of the Customs and Excise Act, 1964, is amended to delete paragraphs (h) to (*l*) of subsection (1) of section 50.

Subsection (2) of section 50 is amended to provide only that subsection (1)(a), (b), (c), (d), (e), (f) and (g) is deemed to have come into operation on 4 July 2001 as stated in that subsection. The subsection also provides that paragraphs *(h)* to (*l*) will come into

operation on a date fixed by the President by proclamation in the *Gazette*. However, these provisions related to amendments to section 75(18) which are now included in amended form in this Taxation Laws Amendment Bill.

CLAUSE 190

Short Title and Commencement

This clause provides for the short title of the Act.

A provisions is also contained in the Act to provide that whenever any provisions of an amendment to the Customs and Excise Act, 1964, refers to section 95A or any subsection thereof, that provisions shall operate from the date section 95A comes into operation.