SUBMISSION BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE DRAFT RATES AND MONETARY AMOUNTS AND AMENDMENT OF REVENUE LAWS BILLS

The Law Society of South Africa has reviewed the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill and the Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Bill released on 12 April 2016, and wish to comment as follows:

1. GENERAL COMMENT ON 2016 TAX AND EXCON "AMNESTY" IN TERMS OF THE DRAFT BILLS RELEASED ON 12 APRIL 2016

It appears that all references to the exchange control aspects have been removed in the 12 April 2016 versions of the Draft Bills, as compared with the versions released on Budget Day. Has draft legislation been released in this regard?

2. RATES AND MONETARY AMOUNTS AND AMENDMENT OF REVENUE LAWS (ADMINISTRATION) BILL

2.1 SECTION 2(1)

It appears that all the qualification requirements of Part B of Chapter 16 of the Tax Administration Act must be met and that the whole of the terms and consequences in Part B are applicable in addition to the provisions of the additional relief. Is this intended and could the interaction be clarified?

2.2 SECTION 2(b)

It is unlikely that applicants will have a knowledge of information disclosed to SARS by foreign institutions in terms of international tax agreements. We are unsure as to how this exclusion will be managed in practice.

3. RATES AND MONETARY AMOUNTS AND AMENDMENT OF REVENUE LAWS BILL – PART II

3.1 SECTION 13(1)

It needs to be clarified whether Sections 13 and 14 provide the exclusive treatment or whether the remaining provisions of Part B will also apply.

3.2 SECTION 13(2)

3.2.1 The exemption in Section 13(1)(a) applies only to normal tax. Does this imply that there is no exemption from other taxes, for example donations tax?

3.2.2 The revised Bill no longer contains a proposed section dealing with the persons who may apply for tax relief. However, in considering Section 13(2), it appears as though the only relief offered in terms of this Bill relates to normal tax in respect of
(1) an amount used to fund the acquisition of offshore assets and
(2) investment income received or accrued in respect of such assets.

This wording appears to be more restrictive than the wording of the first draft Bill. For example, in the absence of a specific section dealing with eligible applicants and viewed in isolation, Section 13(2) could possibly be interpreted to mean that the relief would not be applicable to persons who did not fund the acquisition of the offshore assets themselves, or themselves failing to make disclosures of amounts to SARS (e.g. beneficiaries of a trust settled by their late parent). In particular Section 13(2)(b) specifically refers back to the assets referred to in Section 13(2)(a).

Alternatively, Section 13(2) read with Section 14(2) and the election in Section 15, could be interpreted to mean that, if a beneficiary (not being the settlor) of an offshore trust brings an application in terms of this voluntary disclosure programme (VDP), there is a risk that 50% of the amount used to fund the acquisition of the foreign assets held in the foreign trust could be included in the income of such beneficiary – despite the fact that another person may have funded

the acquisition of such assets by the foreign trust. Alternatively, is the intention that the deemed asset election in such circumstances would be made by the deceased estate of the donor? If so, would there be an immediate deemed disposal of the assets of the trust at market value as at date of death of the deceased donor? These aspects need to be clarified in the legislation.

3.3 SECTION 14(1)

The provisions of Section 14(1) assumes that the whole amount of the funding was undisclosed. However, in general terms, it is possible, and indeed this is implicitly acknowledged in terms of Section 15(b), that the undeclared amount may only be a (small) part of the funding.

3.4 SECTION 14(2)

3.4.1 No reference is made to the amount used by the person (applicant) to fund the acquisition of foreign assets. See the comment above in respect of Section 13(2). Could it be inferred that a person other than the funder/settlor could be held liable in this regard?

3.4.2 There appears to be a mismatch between the dates in Section 13(1)(a) and Section 14(2). Is this intended?

3.5 SECTION 15(1)

We are of the view that the term “donor” is too narrow, given the wider concept used in Section 7 and Part V of the Income Tax Act.

3.6 SECTION 15(2)

3.6.1 Please see the comment above regarding the meaning of the terms “donor” and “donation”.

3.6.2 Is there a reason to limit tax contravention to those two Acts listed? The original version of the Bill made reference in part to amounts not declared in terms of any Tax Act, whereas the current revised wording of the Bill appears to be more restrictive.

3.6.3 It needs to be clarified in the legislation what the base cost of the deemed asset is, once the election has been made.

Please feel free to make contact with us to clarify any of the comments or submissions above.