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**RE: ANNEXURE C PROPOSALS FOR BUDGET 2019: VALUE-ADDED TAX**

We have attached the Annexure C Proposals from the VAT Technical Work Group. We appreciate the opportunity to participate in the process and would welcome further dialogue.

Please do not hesitate to contact us should you need further information.

Yours sincerely

**VAT Technical Work Group**

## **1. Interest on delayed value-added tax refunds**

### **1.1 The legal nature of the problem**

Interest must be paid by SARS on delayed Value-Added Tax ("VAT") refunds in terms of section 45 of the Value-Added Tax Act, 1991 ("the VAT Act"). The current application of section 45 of the VAT Act is not consistent with section 187 of the Tax Administration Act, 2011 (TAA) as there are various onerous conditions that applies before a taxpayer qualifies for interest on delayed VAT refunds.

Such onerous requirements are not applicable to other taxes administered by SARS which creates an unfair position for taxpayers seeking interest on delayed VAT refunds.

Paragraph 134 of Schedule 1 of section 271 of the TAA amends section 45 of the VAT Act to align interest on delayed refunds with the other taxes administered by SARS with Chapter 12 of the TAA. However, these provisions still must be proclaimed with effect from a date to be determined by the President. More than 7 years have lapsed since introduction of the amendments without proclamation.

### **1.2 Detailed factual description**

SARS has 21 business days after the date on which the VAT return for a specific tax period was received to refund any amount refundable. If SARS does not refund the taxpayer within this period, interest will accrue on the refund amount at the prescribed rate commencing on the 22nd business day, provided that a number of requirements that are more onerous than section 187 of the TAA are met.

For example, section 45(1)(iA) of the VAT Act provides for interest not to be paid where the vendor is in default, under any Act administered by the Commissioner, to furnish a return. This is not consistent with section 187 of the TAA and does not apply similarly from an Income Tax perspective. Interest should be calculated and paid on delayed VAT refunds even though other tax returns may be outstanding. There are specific sections in the TAA which has its own penalties and procedures for the late filing of tax returns. As a result, writing off the interest for delayed VAT refunds may result in a duplication of penalties.

The current legislation results in a disadvantage to the taxpayer, being a delay in the refund amount as well as a loss of interest. This may also result in administrative abuse by SARS where VAT refunds are delayed without legitimate cause and no sanction in the form of interest payable on delayed refunds are applicable to discourage such actions.

The office of the Tax Ombud confirmed in its 2018/2019 report that the biggest issue remains the delaying of VAT refunds by SARS. It is evident that such delays may result from the fact that interest in these instances are not paid by SARS as a direct result of the onerous legislation contained in section 45 of the VAT Act which can be easily remedied with the proclamation of the relevant law in the TAA. This will most certainly ensure that VAT refunds are no longer delayed as SARS will be obliged to pay interest automatically as with other taxes.

### **1.3 *The nature of the businesses impacted***

All vendors who are in a refund position, or who will claim a refund from SARS in future could be affected.

### **1.4 *Proposal***

We suggest that the date of commencement of paragraph 134 of Schedule 1 of the TAA be proclaimed. Subsequently where any amount is refundable under the TAA, interest will be paid on such amount in accordance with Chapter 12 of the TAA.

## **2. *Dispute resolution for interest on delayed VAT refunds***

### **2.1 *The legal nature of the problem***

There seems to be no legal means for a taxpayer to object and appeal to a decision made by SARS not to pay interest on delayed refunds in both the VAT Act and the TAA. Neither section 32 of the VAT Act, nor section 104 of the TAA specifically provides for an objection to be lodged against a decision by SARS not to pay interest on delayed refunds.

It follows that a narrow interpretation of section 104(2)(c) of the TAA is applied by SARS in which an objection is only allowed if the VAT Act makes provision for such an objection.

The position is not aligned with PAJA and creates a question mark from an administrative justice perspective.

### **2.2 *Proposal***

We propose that the issue be addressed in the TAA and the VAT Act by adding it as one of the reasons why a taxpayer can object and appeal.

## **3. *Removal of issuing of invoice in the case of a zero-rated supply***

### **3.1 *The legal nature of the problem***

Currently it is a requirement that a zero-rated tax invoice be issued to a recipient as one of the documents in support of the zero-rated supply. That is, as a source-document to show that the vendor is entitled to input VAT.

However, since a commercial invoice will have to be issued in any event in respect of the supply, it does not seem that a strict VAT invoice is required. Primarily because the additional information on a VAT invoice will contain supporting evidence as to the vendor's entitlement to have applied the zero rate.

A practical example is where a mining company did not issue zero-rated VAT invoices, only ordinary commercial invoices. As a result of the application of Interpretation Note 30, the vendor had to make an output tax adjustment.

### **3.2 Proposal**

We propose an amendment to the Regulation and the Interpretation Note so that in instances where sufficient information is available as per the commercial invoice, that such an invoice can be deemed to meet the requirements of a VAT invoice under certain circumstances.

## **4. Alignment between subsections (3) and (4) of section 16 of the VAT Act**

### **4.1 The legal nature of the problem**

Section 16(3) of the VAT Act requires a debit or credit note to be issued to substantiate a reduction in input tax (i.e. there is a reference to section 16(2)).

Section 16(4) does not contain a reference to section 16(2), and as such does not require a debit or credit note to be issued to substantiate a reduction in output tax when excessive output tax was declared.

### **4.2 Proposal**

We propose that in order to ensure uniformity, section 16(4) should also contain a reference to section 16(2) in the case where section 21(2)(b) applies.

## **5. Clarify the claiming of input tax on goods imported under certain circumstances**

### **5.1 The legal nature of the problem**

For the purposes of the VAT Act, a “vendor” means any person who is or is required to be registered under the Act.

However, under certain circumstances the VAT Act refers to a “registered vendor” – refer to section 54(2A)(b). The implication is that the provision only applies when a vendor has in fact registered.

Section 54(2A)(b) applies in respect of the claiming by the recipient of input tax on goods imported under certain circumstances.

The implication seems to be that the recipient may claim the input VAT, even though the vendor (but not registered) has not registered for VAT as required by the VAT Act. Examples here are:

- A sale of e.g. plant on turnkey (i.e. where the non-resident supplier has a registration obligation;
- A sale of consignment stock located in SA (i.e. where the non-resident has a registration liability); or
- A lease (i.e. where the non-resident has a registration liability).

However, it should be noted that the issue of VAT claimable on imports is not limited to section 54(2A) scenarios, but also applies to scenarios where a non-resident is liable to be VAT registered but arranges for the recipient in South Africa to clear the goods as importer of record. These scenarios apply to both goods supplied in terms of a lease/rental as well as goods supplied as part of a turnkey project.

The definition of “input tax” does not make it clear who is entitled to claim the VAT paid on importation in these circumstances. What often happens in practice is that the recipient claims the VAT paid on importation as input tax. Where the foreign supplier subsequently becomes aware that it has a VAT registration liability, it seeks to recover the VAT due by it from the recipient by issuing a tax invoice with standard rate VAT. The recipients then refuse to pay the VAT since they already paid and recovered the VAT on importation.

## **5.2 Proposal**

The wording “registered vendor” causes confusion, and seems to permit non-compliance. We request that the legislation be amended to provide clarity and so as to align the tax treatment with that of resident vendors.

Furthermore, as far as aircraft or aircraft engines are supplied by way of lease by non-residents to South African airlines, SARS has issued section 72 rulings which effectively provide that the foreign lessor is not required to register, and that the lessee is entitled to claim the VAT paid on importation. However, this concession is not made for other lessors or sellers of goods, hence the confusion.

In New Zealand the court has held that as far as VAT on importation is concerned, only the owner of the goods can claim the VAT on importation. Such a provision will appropriately address the difficulty, provided section 54(2A) is amended to read that “the principal is not a resident of the Republic and is not a vendor” (i.e. not a registered vendor as is currently the wording).

Such amendments will ensure that in the case of a non-resident who is liable to be registered, whether in respect of goods to be supplied in terms of a lease/rental or components to be supplied and incorporated into plant to be constructed by the non-resident in SA, the non-resident will be able to claim the VAT on importation and be liable for VAT on the lease rentals or the supply of the plant. Where the non-resident is not liable to be registered, the relief in section 54(2A) can be used.

## **6. VAT treatment in respect of a JV/partnership**

### **6.1 The legal nature of the problem**

For a number of years, submissions have been made requesting clarity in law and practice regarding the position of partnerships and joint ventures in the VAT arena. It can be safely stated that there are a number of issues that require legislative intervention. We concentrate on one of these issues for the current legislative cycle.

Section 51 of the VAT Act creates a legal fiction and provides that where persons enter into a partnership or a co-ownership, the partnership/co-ownership carrying on the enterprise is deemed to be person separate from its members for VAT purposes.

For instance, assume two companies agree to purchase immovable property from a non-vendor for the purpose of developing the property and erecting a commercial building, to be held for rental purposes. The two companies could do so either as a partnership or in co-ownership.

What will happen is that the partnership/co-ownership will register as a vendor, will pay for all the rezoning, services, construction costs, etc, and claim this as input tax, and, of course, levy output tax on rentals once the building is tenanted and income-earning.

However, the individual owners will have paid transfer duty in acquiring the immovable property. Normally if a vendor acquires immovable property and pays transfer duty and the property is used in an enterprise, notional input tax can be claimed equal to the tax fraction multiplied by the cost of the immovable property. This effectively offsets the fact that transfer duty was paid. But in this case the two-owners/partners are not carrying on an enterprise – the partnership/co-ownership is the party carrying on the enterprise, and thus no notional input tax can be claimed, because the co-ownership/partnership did not incur the transfer duty – the owners did.

A similar problem would arise if the immovable property was acquired from a vendor, where the owners would have paid VAT, but they would have had nothing to claim it as input tax against, because the co-ownership is a separate person for VAT purposes.

In the past this problem has been solved in one of two ways:

- a. The first is that it is possible to get a ruling under section 72 of the VAT Act whereby whatever was paid by the co-owners/partners, whether transfer duty or VAT, will be allowed as a deduction in the VAT returns of the partnership/co-ownership. But a ruling has to be sought and obtained in each case.
- b. The other alternative is to enter into a complex arrangement in terms of which the purchasers of the immovable property are registered as vendors, they claim the input tax or notional input tax deduction, and then supposedly supply their undivided share in the property to the co-ownership/partnership. So, when they seek to withdraw their profits from the co-ownership/partnership, they issue a tax invoice equal to the share of profits plus VAT and account for the output tax. The co-ownership/partnership claims the input tax, with the result that it has a nil net position in each tax period.

## **6.2 Proposal**

Either of the solutions in points a. and b. is unsatisfactory. We request that the VAT Act be amended automatically to allow the alternative in point a. above.

## **7. Section 22 – irrecoverable debts**

### **7.1 The legal nature of the problem**

#### Background

Section 22(3) of the VAT Act deals with the position of the debtor and the principle contained in that subsection is that if the debtor has acquired goods or services and claimed input tax, but, within a period of twelve months, has not paid the full consideration, VAT on the amount not yet paid, must effectively be refunded to SARS.

Proviso (ii) to subsection (3) relates to the position where a vendor is sequestrated or is declared insolvent, or enters into a compromise in terms of section 155 of the Companies Act, 2008 (which would typically occur in a business rescue environment) or ceases to be a vendor. There are two difficulties arising out of the manner in which proviso (ii) is framed.

### First computation error

The first difficulty is that it states that, in the circumstances above, where within twelve months after the expiry of the tax period within which the deduction was made, the vendor has not paid the full consideration, "the vendor must account for output tax in terms of this section ***equal to the portion of the consideration which has not been paid***" (our emphasis).

Therefore, if the portion of the purchase price for the goods or services still owing is R115, then, in terms of the proviso, the output tax is R115, i.e. an amount equal to the consideration not yet paid. This is clearly incorrect, because the output tax should be R15.

### Second computation concern

The second difficulty is that the full amount of output tax has to be paid whenever there is a sequestration or insolvency or the compromise is entered into, i.e. the full amount of R15 (assuming the proviso is interpreted the way it should read) referred to above. But what happens if, in terms of the compromise, the creditors are paid 50 cents in the rand, i.e. R57.50? Subsection (4) then allows the vendor to claim the R7.50 as input tax. The problem is that this creates havoc with the arrangement with creditors. First, when the compromise arrangement was made to pay 50 cents in the rand, the business rescue practitioners would have budgeted on paying R7.50 to SARS and not R15 to SARS, so that there will be a shortfall in cash. The only way that they can pay R57.50 to the creditors is if they borrow R7.50 and then, when the VAT refund is received, repay the borrowing.

## **2.2 Proposal**

First computation concern: We propose that the proviso should state that the vendor must account for output tax equal to the tax fraction multiplied by the portion of the consideration, which has not yet been paid.

Second computation concern: In practice the prescribed method is ignored, and all that the business rescue practitioners do is pay to SARS the tax fraction of the portion of the consideration remaining after the creditors have been paid their compromised proportion. We request that the legislation be amended to give effect to this method, because this is the only practical way in which the arrangements can be given effect to.

## **8. Additional interest remittance provisions should be inserted**

### **8.1 The legal nature of the problem**

Higher penalties can trigger disengagement and resistance to the tax system, and perceived unfairness likewise drives down tax compliance.

There are certain areas in which interest imposition is considered by taxpayers to be unfair and excessive. This is primarily where the interest imposed is substantially higher than the actual loss to SARS or the fiscus.



Typical examples of this would include:

- where VAT was not correctly accounted for between two group companies (so one company underpaid, while the other overpaid or underclaimed, so that the fiscus is neutral); or
- where customs VAT was underpaid, although the amount was immediately recoverable as input tax and so the net loss to the fiscus would only have been for a few days.

## **8.2 Proposal**

We request that an interest remittance provision be inserted into the TAA, to apply to all relevant tax types, in terms of which SARS is authorised to remit, in whole or in part, interest imposed, to the extent that, having regard to both output tax and input tax, the failure to make payment of tax within the relevant period did not result in financial loss to the fiscus.

## **9. Valid VAT invoice – electronic invoicing**

### **9.1 The legal nature of the problem**

A valid tax invoice is essential in the VAT system for suppliers and recipients alike. Section 20(4) of the VAT Act sets out the requirements of a tax invoice.

A supplying vendor is obliged to issue a tax invoice complying with the requirements of the VAT Act within 21 days of making a taxable supply to a recipient. Similarly, a recipient vendor will only be entitled to claim an input tax deduction in respect of a VAT cost incurred for the purpose of making taxable supplies, to the extent that he or she is in possession of a valid tax invoice at the time of claiming the deduction.

A tax invoice is therefore an essential part of the audit trail of a vendor and its enterprise activities, and the failure to issue a tax invoice is a contravention of the VAT Act and an offence in terms of the Tax Administration Act, No 28 of 2011.

It is not, however, specifically prescribed in the VAT Act that an invoice sent electronically will be valid. The VAT Act requires a vendor to obtain and retain a “document” that constitutes a valid tax invoice. The Act furthermore provides that a “document” includes any printout of information generated, sent, received, stored, displayed or processed by electronic means. It would appear, therefore, that a tax invoice sent by email would qualify as a valid tax invoice if the formal requirements for a valid tax invoice have been met.

Essentially, all applicable legislation and publications must be considered and complied with, in order for “e-invoices” to be lawfully binding. Registered vendors wishing to submit an electronic invoice must comply with section 20 of the VAT Act, read with SARS’ VAT 404 Guide for Vendors and VAT NEWS 20.

### **9.2 Proposal**

We recommend, given that one cannot rely on postal services in South Africa and based on the fact that we operate more and more in a digital world, that section 20(4) be amended to directly include e-invoices sent per e-mail to create certainty in primary legislation instead of having to read several legislation and publications to reach the same conclusion.

End.