SAIT | Summit Place Business Park | Building 3, Ground Floor
221 Garsfontein Road | Menlyn | South Africa | 0081
www.thesait.org.za

6 November 2021

To: National Treasury
240 Madiba Street
PRETORIA
0001

To: SARS
Lehae La SARS
299 Bronkhorst Street
PRETORIA
0181

Via email: National Treasury 2020AnnexCProp@treasury.gov.za
SARS acollins@sars.gov.za

RE: COMMENTS ON THE DRAFT REGULATIONS ON DOMESTIC REVERSE CHARGE RELATING TO VALUABLE METALS,

Dear Colleagues,

We attach SAIT comments on the Draft Regulations on Domestic Reverse Charge Relating to Valuable Metals (**draft Regulations**), issued in terms of section 74 of Value-Added Tax Act, No. 89 of 1991 (**VAT Act**).

Subsequent to SARS' request for comments on draft legislation published for comment pertaining to the 'Domestic Reverse Charge Relating to Valuable Metals', the SAIT invited members of its Value-Added Tax Work Group (**VAT WG**) to submit their comments and recommendations via the SAIT office. The comments were collated and in some instances overlapped. The summary below represent the views of the VAT WG.

Discussion of and recommendations relating to the content of the draft Regulations

1. Title

The Draft Regulations are titled as follows:

> *"Draft Regulations on Domestic Reverse Charge relating to valuable metals, issued in terms of section 74 of value-added tax act, 1991 (act no. 89 of 1991)."*

Comment: Upon a reading of the Regulations, it appears that the Regulations are issued under section 74(2) of the VAT Act, which allows for the tax liability to be shifted to another person. Understandably, the implications thereof are significant.

We therefore recommend that the National Treasury clearly stipulate on whether these Regulations are made under section 74(1) or 74(2) of the VAT Act.

We proceed to set out below specific comment relating to the content contained in the schedule to the Draft Regulations

REGULATION 1: Definitions

- **Domestic reverse charge**

The following definition is provided for the term "domestic reverse charge":

> *"Domestic reverse charge" means…*
> *. . .*
> *(b) supplier is a vendor; and*
> *(c) recipient is a vendor"* [Own emphasis]

Comment: On the basis that the draft Regulations are intended to apply between a supplier and recipient who are both registered vendors, we recommend that the term 'vendor' be replaced with 'registered vendor' as a vendor constitutes a person who is or is required to be registered as a VAT vendor.

We further recommend that the concept of 'registered vendor' be consistently applied throughout the draft Regulation.

- **Valuable metal**

The following definition is provided for valuable metal:

> *"Valuable metal" means, any metallic good which is constituted of, but not limited to, gold, copper, zinc, magnesium, lead or uranium–*
> *(a) …*
> *(b) which is in the form of a gold bearing bar or similar item, including any ancillary supply in connection with paragraphs (a) and (b) above.."* [Own emphasis]

Comment: We are of the view that the phrases "but not limited to", "similar item" and "ancillary supply" (as underlined), should be elaborated upon and clarified further in order to give a taxpayer a clear understanding of what falls within the scope of the Regulation.

- **Exclusions to the definition of valuable metal**

We are of the view that the exclusions in the definition of "valuable metal" require further clarification. For example, point (ii) refers to *"goods contemplated in section 11(1)(f) or section 11(1)(k) of the Act"*. Upon reading this provision, we would like to gain clarity on whether it is the goods contemplated in the aforementioned subsections or the supply of goods qualifying to be zero rated under those subsections, that is excluded.
On the basis that the Regulations are considered to be secondary legislation, we are of the view that the Regulations should be as clear and as explicit as possible in order to avoid any need for further interpretation. It is our experience that SARS

may not provide guidance on the Regulations unless the Regulations confer such powers on SARS.

We therefore recommend that the Regulation should define or set out the commodities that are included and excluded, with greater clarity.

REGULATION 2: Responsibilities of the supplier of valuable metal, being a vendor

- **Regulation 2(a)**

Regulation 2(a) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor making the supply shall–*
> *(a) take reasonable steps to ensure that the recipient of the supply is a vendor;..."*

Comment: We request that clarity be provided on the exact nature of what will be considered to be *"reasonable steps*" taken by the supplier. Furthermore, we suggest that explicit clarity be provided regarding how often a vendor is required to verify the recipient's VAT vendor status, considering that there could be numerous instances where supplies are continuously made to the same recipient.

- **Regulation 2(b)**

Regulation 2(b) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor making the supply shall–*
> *(a) ...*
> *(b) notwithstanding the 21-day period contemplated in section 20(1) and (1B) of the Act, issue a tax invoice in accordance with section 20 of the Act and subject to the further requirements stated in Regulation 4 hereto;.."*

Comment: We note that Regulation 2(b) does not explicitly make it clear that the invoice must be issued by the supplier on the date of the supply. This is elaborated upon in the Explanatory Memorandum (EM) (see page 7) but does not come out clearly in the wording of the draft Regulation.

As such, we note that the wording of the draft Regulation and the wording of the EM does not appear to be aligned and we are of the view that this may cause confusion and not achieve the intended result.

Additionally, consideration should be given to whether the requirement to issue a tax invoice can be implemented in practice: It is not always practical for the seller to ascertain the value of the precious metals on the date of supply, due to the fact that the precious metal may be subject to a quality and measurement test before the value is determined. To require a seller to issue a tax invoice on the date of supply may also cause undue pressure on the taxpayers to comply with these Regulations.

Similarly, a supplier may experience system problems on the date of supply, for example the supplier's system may be off-line. This may prevent the supplier from issuing the tax invoice immediately, which may in turn result in unintended non-compliance.

- **Regulation 2(c)**

Regulation 2(c) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor making the supply shall–*
> *(a) ...;*
> *(b) ...*
> *(c) only account for the value of the supply, in accordance with Regulation 6(a) and not the VAT charged on the supply of the valuable metals;"*

Comment: We suggest that clarity be provided stating that, notwithstanding the provisions of section 16(4) of the VAT Act (that provide for the calculation of output tax in relation to a supply made by a vendor), the supplier is not required to account for VAT on the supply of valuable metals.

- **Regulation 2(d) - This appears to be a duplication – refer to Regulation 7.**

- **Regulation 2(e)**

Regulation 2(e) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor making the supply shall–*
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(e) issue a debit or credit note in accordance with section 21 of the Act and subject to the further requirements stated in Regulation 5 hereto"*

Comment: Regulation 2(c) states that the supplier must not account for the VAT charged on the supply. However, in the event of a credit or debit note event, it is not clear if a similar position applies. We suggest that clarification be provided on the requirements under each of these circumstances. It is worth noting that Regulation 5(b) only requires a statement that the recipient is liable.

- **Regulation 2(f)**

Regulation 2(f) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor making the supply shall–*
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(e) ...*
> *(f) in addition to the normal VAT record-keeping requirements, obtain, retain and maintain, as part of the VAT record-keeping requirements, a list of all supplies subject to the domestic reverse charge contemplated in these Regulations and the documentary evidence contemplated in subparagraph (a) and Regulation 3(a)."*

Comment: The requirement to obtain and retain a "list of supplies" that are subject to the domestic reverse charge must be clarified to state the contents of this list. Furthermore, this requirement creates an additional administrative burden on the supplier, as they have retained invoices and other supporting documentation as per these Regulations.

REGULATION 3 – Responsibilities of the recipient of valuable metal, being a vendor

- **Regulation 3(a)**

Regulation 3(a) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor to whom the supply is made must–*
> *(a) furnish proof to the supplier that the person is a vendor;"*

Comment: We request that clarity be provided in the Regulation regarding which type of proof must be supplied. For example, would the VAT103, tax clearance certificate or a screenshot of the VAT vendor search outcome be sufficient?

- **Regulation 3(c)**

Regulation 3(c) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor to whom the supply is made must–*
> *(a) ...*
> *(b) ...*
> *(c) account for and pay the VAT charged on the supply in accordance with Regulation 6(b) in the tax period in which the tax invoice is issued by the vendor making the supply;"*

Comment: We request that clarity be provided regarding what steps the recipient should take if the seller does not provide the recipient with a tax invoice on the date of the supply?

Furthermore, we request clarification on what the outcome will be if the value of the supply is not determined on the date the supply occurs. Will interest and penalties be levied for the late payment? If so, how would these be calculated?

- **Regulation 3(e)**

Regulation 3(e) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor to whom the supply is made must–*
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(e) not deduct the input tax contemplated in subparagraph (d) if the VAT contemplated in subparagraph (c) has not been accounted for and paid to SARS, which input tax must be deducted in a tax period which ends no later than 12 months after the end of the tax period during which the tax invoice for that supply was issued;"*

Comment: In order to avoid any ambiguity, we recommend that clarity be provided regarding what this requirement entails for the recipient. Is the inclusion of a 12-month period in which to deduct input tax a separate prescription rule? If so, we are of the view that this position is contrary to the general 5-year prescription rule and appears to be inconsistent with the general input tax deduction rules.

To the extent that this provision is aimed at the late payment of the domestic reverse charge VAT, it is unclear why the limitation of the input tax is imposed if the VAT is paid by the recipient albeit late. This appears to be in contradiction with one of the fundamental principles of VAT, that is, VAT should not be a cost to business. We recommend that this provision be deleted.

- **Regulation 3(f)**

Regulation 3(f) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor to whom the supply is made must–*
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(e) ...*
> *(f) notify the vendor making the supply, in writing by means of a statement within 21 days of the end of the calendar month during which a tax invoice was issued, of the following particulars"*

Comment: Clarification is required on whether the reference to 21-days is intended to mean business or calendar days. Furthermore, consideration should also be given to the practical implementation of this requirement as the VAT return and payment are generally filed and paid over to SARS at the end of the next month after the supply has been made.

Additionally, the particulars required to be contained within the statement seems to be a duplication, especially (ii) and (iii). We are of the view that it is sufficient for the supplier to require a statement listing the tax invoice number, the tax period within which it was declared, and the payment reference number issued by SARS for such payment.

- **Regulation 3(f)(iv)**

Regulation 3(f)(iv) states the following:

> *"Where a vendor makes a supply of valuable metal to another vendor in the Republic, the vendor to whom the supply is made must–*
> *(a) ...*
> *(b) ...*
> *(c) ...*
> *(d) ...*
> *(e) ...*
> *(f) notify the vendor making the supply, in writing by means of a statement within 21 days of the end of the calendar month during which a tax invoice was issued, of the following particulars:*
> *(i) ...*
> *(ii) ...*
> *(iii) ...*

> *(iv) confirmation that the VAT charged by the vendor making the supply was accounted for and paid to SARS by reflecting the applicable tax period and payment under the payment reference number issued by SARS, provided that, where the statement is not provided in accordance with this subparagraph and a deduction of input tax was made on the supply, VAT is payable on the amount equivalent to the input tax deduction made, in the tax period corresponding to the date on which the said 21-day period lapses;"*

Comment: To the extent that the VAT return ultimately submitted results in a refund due to the recipient, we recommend that consideration be given as to what the recipient is required to document (i.e., payment reference number issued by SARS) in the statement if the domestic reverse charge was already disclosed on the VAT return.

Additionally, it is not clear why the input tax amount becomes a denied expense in the absence of a statement, if the VAT was indeed accounted for to SARS? We are of the view that this is a documentary aspect which should not impact the deduction of input tax. We are of the view that approach may not be in line with the provisions and principles of the VAT Act.

Additionally, should SARS seek to penalise the recipient for not issuing the statement, it would be prudent for SARS to make provision for the recipient to deduct the adjusted VAT in the tax period when it issues the statement. To reiterate our abovementioned point, the VAT should not become a cost to the recipient.

REGULATION 4 - Additional requirements for tax invoices

- **Regulation 4(a)**

Regulation 4(a) states the following:

> *"The requirements for tax invoices contemplated in section 20 of the Act are applicable for the purposes of these Regulations, with the following additional requirements:*
> *(a) the tax invoice for the supply must be issued at the time contemplated in Regulation 2(b)"*

Comment: Regulation 2(b) does not specify the time when the tax invoice must be issued. Further to this, we have already mentioned the complexities with the requirement to request an invoice being issued immediately.

- **Regulation 4(b), (c) and (d)**

Regulation 4(b), (c) and (d) states the following:

> *"The requirements for tax invoices contemplated in section 20 of the Act are applicable for the purposes of these Regulations, with the following additional requirements:*
> *(a) ...*
> *(b) a clear reference on the tax invoice that the supply is subject to the domestic reverse charge as contemplated in these Regulations;*
> *(c) the VAT charged on the supply of valuable metal under these Regulations should not be included in the amount shown as VAT due by the vendor making the supply; and*
> *(d) a statement that the amount of VAT charged must be accounted for and paid (on behalf of the supplier) by the recipient, being a vendor."*

Comment: These requirements, whilst seemingly simplistic, may potentially become challenging due to system constraints. For example, a system may have limited characters that may prevent any further inclusions. It is proposed that consideration be given for these requirements to be supplied in an alternative form when it is not possible or practical to meet the current requirements.

As a general comment, we recommend that consideration be given as to how this will impact the practice of self-invoicing, as this is commonly used within this industry where the recipient may be in control of determining the value of the supply.

REGULATION 5 - Additional requirements for credit and debit notes

- **Regulation 5**

Comment: Upon our reading, it appears that Regulation 5 adds additional requirements for the issuing of credit or debit notes. It is recommended that Regulation 5 should additionally impose obligations on the recipient and supplier, as envisaged under Regulations 2 and 3. For example, the supplier must not account for the VAT and the recipient is liable to declare the relevant VAT.

REGULATION 6 - Additional reporting requirements in VAT returns

- **Regulation 6 (a)(i) and (ii)**

Regulation 6 (a)(i) and (ii) states the following:

> *"The requirements for returns and payment of tax contemplated in section 28 of the Act are applicable for the purposes of these Regulations, with the following additional requirements:*
> *(a) Supplier, being a vendor*

(i) the value of the supply of the valuable metal must be reported in Field 3 of its VAT return;
(ii) the value of the increase or the decrease as a result of the issue of a credit or debit note must be reported in Field 3 of its VAT return."

Comment: The requirement to report the value of the supply of the valuable metal in Field 3 of the VAT return may lead to unnecessary and multiple verifications and/or audits by SARS, as this field is reserved for the disclosure of exempt or non-supplies.

We request that consideration be given to whether an additional field may be incorporated into the VAT return to report VAT on domestic reverse charge transactions. This will have a major impact on business continuity in the case of multiple SARS verifications and refunds being withheld. Alternatively, SARS should consider renaming the Field 3 contents.

REGULATION 7 – Irrecoverable debts

- **Regulation 7**

Regulation 7 states the following:

> *"For purposes of these Regulations, the provisions of section 22 dealing with irrecoverable debts will not apply to the supplier of valuable metal, being a vendor, as contemplated in these Regulations."*

Comment: We request that consideration should be given to override the provisions of section 22(3) of the VAT Act for the recipient as well. There will not be full payment to the supplier as the VAT will be withheld and paid to SARS. Furthermore, if the VAT is not accounted for by the recipient, there is no input tax deduction and therefore the provisions of section 22(3) of the VAT Act would not find application.

REGULATION 8 – Liability for VAT

Comment: Upon a reading of this Regulation, we note that this Regulation does not outline sufficient detail relating to how and who SARS will assess. We recommend that this be clarified in greater detail.

It appears that the Regulation is very broad in ambit, more specifically, we are of the view that the Regulations should not impose a liability on a vendor, which does not exist under the VAT Act. In other words, to extend the liability for the vendors to "any Vat loss suffered by the fiscus" anywhere in the supply chain, is too broad. We recommend that the wording should be amended to state that the supplier and recipient will be jointly and severally liable for the output VAT on the supply which takes place between them only.

To further elaborate the aforementioned point, we recommend that consideration be given to who bears the liability for the domestic reverse charge. As a default approach, we are of the view that SARS should hold liable, the party that is instructed to collect and pay over the VAT to SARS as opposed to holding both parties jointly and severally liable.

Additionally, the requirement seems to favour the supplier and provides no measure for the recipient in the event that the recipient is dealing with a non-compliant supplier e.g., where the supplier fails to issue a tax invoice timeously.

REGULATION 9 –Transitional measures

- **Regulation 9(3)**

Regulation 9(3) states the following:

> *"A vendor will be allowed a period of one month from the date of implementation of these Regulations to ensure that it complies with the requirements."*

Comment: A period of one month to comply with the Regulations, is in our view, impractical considering all the changes that will be brought about by the Regulations.

Given the number of amendments that are envisaged to be brought about by these Regulations, we recommend that this period be extended to three months with a further clause that allows for an extension on application, taking into account the circumstances and constraints of the vendor. We believe that this will allow vendors to make changes to their ERP systems based on approved legislation.

REGULATION 10 –Re-validation of VAT registration status under chapter 3 of the Tax Administration Act

Comment: We recommend that the Tax Administration Act be defined or inserted in full (i.e., Tax Administration Act, No. 28 of 2011).

- **Regulation 10(1)**

Comment: The request contained in this Regulation, is reasonable in our view. However, confirmation is requested that SARS will have proper processes in place for the suppliers to effect such changes.

REGULATION 11 – Exports of valuable metal by a recipient, being a vendor

- **Regulation 11(1)**

Regulation 11(1) states the following:

> *"A recipient of valuable metal, being a vendor that exports such valuable metal in accordance with paragraph (a) or (d) of the definition of "exported" in section 1(1) of the Act, must, in addition to the provisions of section 11(3) of the Act, export the valuable metal under supervision, as contemplated in the Customs and Excise Act."*

Comment: It appears that this Regulation, which is aimed at the domestic reverse charge is now empowered to regulate the export of valuable metals. This aspect is a separate provision, which is already subject to existing regulations, namely the export regulations.

Furthermore, this Regulation requires the valuable metals to be exported under customs supervision "*as contemplated in the Customs Act*". In our view, this is currently not a requirement under the Customs and Excise Act, No 91 of 1964.

This Regulation will in effect require, primary legislation, being the Precious Metals Act, No. 37 of 2005 to be amended to make provision for the requirement for export under customs supervision.

Additionally, we recommend that consideration be given to the supervision requirement as contemplated by this Regulation. We are of the view that the requirement to have customs official physically present when valuable metals are exported may be impractical, particularly when considering the potential volumes of exported valuable metals. The challenge would be to ensure sufficient capacity of Customs and Excise officials.

REGULATION 13 – Short title and commencement

Comment: The title should be amended to Regulation **12** as opposed to 13.

We are of the view that the proposed implementation date of 1 January 2022 is impractical given the system changes that need to be implemented, particularly taking into account that the Regulations are still in draft format at this stage.

We recommend that consideration be given to extending the implementation date to 3 months after promulgation/gazetting of the Regulation by the Minister. This will allow vendors to make changes to their ERP systems based on approved legislation.

Conclusion

Generally, we believe that the draft Regulations are well drafted. However, these draft Regulations contain statements and provisions which leave significant room for interpretation. Since the Regulations are secondary legislation, in our view they should be very explicit and clear and as much as possible avoid any need for further interpretation. It is our experience that SARS may not provide guidance on the Regulations unless the Regulations confer such powers on SARS. In light of the above, we recommend that every concept contained in the Regulation be explained in detail and highlight the provisions of the VAT Act being overridden.

The VAT WG appreciates the opportunity to comment on these draft excise forms. We would welcome further engagement.

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

Yours faithfully,

SAIT VAT Work Group