South African Institute of Taxation

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24 November 2023

To: The National Treasury
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The South African Revenue Service
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VIA EMAIL: **National Treasury** (2023AnnexCProp@treasury.gov.za)
SARS (acollins@sars.gov.za)

Dear Colleagues,

ANNEXURE C PROPOSALS FOR BUDGET 2024: VALUE-ADDED TAX

We attach hereto the proposals from the SAIT VAT Technical Work Group (the WG) as pertaining to Value-Added Tax and related matters. We appreciate and value the opportunity to participate in the legislative process and would welcome further dialogue and engagement where appropriate.

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

Yours sincerely,

SAIT Value-Added Tax Work Group

Unless otherwise indicated all references to legislation are to sections the Value Added Tax Act, No. 89 of 1991 (the VAT Act).

1. INTEREST ON DELAYED VALUE-ADDED TAX REFUNDS (Section 45)

1.1. Background

1.1.1. As part of the 2017 and 2018 Annexure C legislative cycle, we had previously submitted comments regarding the interest that is levied on delayed vat refunds. The below is a reiteration of the comments made in these submissions.

1.2. The legal nature of the problem

1.2.1. Interest payable by SARS on delayed VAT refunds is legislated in section 45 of the Value Added Tax Act (VAT Act). Section 45(1) (iA) of the VAT Act currently contains requirements that are not consistent with the requirements in section 187 of the Tax Administration Act, No. 28 of 2011 (TAA) that apply to the other forms of taxes.

1.3. Detailed factual description

1.3.1. SARS has 21 (twenty-one) 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 the vendor is not in default in respect of any of his obligations under the VAT Act or any other Act administered by the Commissioner, to furnish a return as required by such Act, as required in terms of section 45(1)(iA) of the VAT Act.

1.3.2. Section 45(1) (iA) of the VAT Act is therefore not aligned with section 187 of the TAA and does not apply similarly from an Income Tax perspective. It is submitted that interest is compensation for the utilisation of money lent or for delaying the payment of a debt. Interest should therefore be payable on delayed VAT refunds even though other tax returns may be outstanding. There are specific sections in the TAA which provides for administrative penalties to be levied by the Commissioner for the late filing of tax returns, as a result, writing off the interest for delayed VAT refunds and/or reducing such interest, as a result of a tax return being outstanding, will result in an unintended additional “penalty”.

1.3.3. The current legislation results in a disadvantage to the taxpayer, being a delay in the refund amount as well as a loss of interest.

1.4. **The nature of the businesses impacted.**

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

1.5. **Proposal**

1.5.1. We propose that section 45(1) (iA) of the VAT Act be repealed, as in interim measure, until section 45 of the VAT Act is substituted by s. 271 read with para. 134 of Schedule. 1 of Act No 28 of 2011 (date to be determined by the President by proclamation in the Gazette), which will more closely align the interest on VAT refunds with Chapter 12 of the TAA.

2. APPORTIONMENT OF INPUT TAX (Section 17 (1)) AND IMPORTED SERVICES

2.1. **Introduction**

2.1.1. There is a mismatch and unintended VAT outcome in applying the provisions of section 17 of the VAT Act together with the definition of imported services.

2.2. **The legal nature of the problem**

2.2.1. The general rule for the deduction of VAT incurred for the making of taxable supplies is stated in the definition of 'input tax'. According to the definition, a vendor that incurs VAT on a supply of goods or services and such supply was acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies, may deduct the VAT incurred as input tax.[1]

2.2.2. Where the vendor acquires the goods or services partly for taxable supplies, the vendor may deduct the VAT incurred to the extent that the vendor acquires those goods or services for such purpose. This exception is per the provisions of section 17(1) of the VAT Act.

2.2.3. Section 17(1) of the VAT Act allows a vendor who has incurred VAT partly for consumption, use or supply ('intended use') in the course of making taxable supplies to deduct that VAT to the extent of the intended use. In this regard, any VAT incurred wholly (and/or partly) for non-taxable supplies will not be deductible as input tax.

[1] Definition of input tax in section 1(1) of the VAT Act.

2.2.4. Where the intended use of goods or services in the course of making taxable supplies is no less than 95 per cent of the total intended use of such goods or services, the goods or services concerned may be regarded as having been acquired wholly for the purpose of making taxable supplies.[2] Thus, the vendor can deduct the full VAT incurred even though a portion of the VAT was incurred for other than taxable supplies.

2.2.5. In order for a supply to qualify as 'imported services' in the hands of the recipient, as defined in the VAT Act[3], the following requirements must be met:

2.2.5.1. There must be a supply of services.
2.2.5.2. Made by a supplier who is resident or carries on business outside the Republic.
2.2.5.3. To a recipient who is a resident of the Republic.
2.2.5.4. To the extent that such services are utilized or consumed in the Republic.
2.2.5.5. Otherwise, then for the purpose of making taxable supplies.

2.2.6. The provisions in section 14 of the VAT Act do not prescribe a method to determine the extent to which the services are utilized or consumed in South Africa for non-taxable purposes. The test to determine the non-taxable use is incorporated in the imported services definition in that it states that "*.... services that are made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic "will* constitute imported *services "... **to the extent** that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies".*

2.2.7. The section 17(1) provisions govern the method to be used to deduct VAT incurred as input tax where the expenses are partly consumed or used in the course of making taxable supplies. Whereas 'imported services' states that VAT is payable on certain non-taxable supplies. The issue is that these two concepts are practically interlinked but there is no correlation or relationship between these two provisions in the VAT Act.

2.3. Detailed factual description

2.3.1. In effect, section 17(1) states that a vendor can deduct VAT where the goods or services are acquired partly for taxable supplies. As such, any VAT incurred for non-taxable supplies cannot be deducted as input tax.

2.3.2. This is where the importance of the application of the '*de minimis*' rule comes into play. As per the rule, where the intended use is no less than 95%, the vendor will be able to deduct the full VAT incurred as input tax. However,

[2] Section 17(1)(i) of the VAT Act.
[3] Definition of imported services in section 1(1) of the VAT Act.

where 'imported services' are involved, the *de minimis* rule does not apply to the 'imported services.

2.3.3. The purpose of 'imported services' is to place a VAT liability obligation on a South African recipient who receives and consumes services in South Africa where those services are provided by a person who is not a vendor and consequently, has no obligation to levy and account for VAT.

2.3.4. The rationale for 'imported services' is that a South African supplier should not be disadvantaged in comparison to a foreign supplier due to the tax chargeable by the South African supplier[4] i.e., the South African recipient would opt to procure the services from the non-resident supplier as there would be no VAT incurred on the services. However, in this case the pendulum swings the other way since there will be the advantage to procure services from a local supplier where the de-minimis provision finds application for a local vendor.

2.3.5. The practical issue is two-fold, in that –

2.3.5.1. The law does not provide a method to determine the extent to which services are utilized or consumed for non-taxable purposes. We understand the current practice is to use the inverse of an apportionment ratio to determine the value of the non-taxable supplies i.e., the imported services value.

2.3.5.2. The *de minimis* rule in section 17 is not applicable to 'imported services. If the rule was applicable to 'imported services', the vendor would not have an 'imported services' liability in this instance where the apportionment ratio yields a taxable ratio in excess of 95%.

2.3.6. In effect, as the law currently states or is applicable, a vendor who has an apportionment ratio of 95% or above will be required to account for imported services VAT by applying the non-taxable ratio (i.e., a ratio between 0.01% and 4.99%)

2.3.7. As an example, say a vendor, ABC, predominantly receives taxable income as well as non-taxable income such as interest that is passive in nature. ABC applies and obtains a VAT ruling to exclude a portion of its investment income.

The apportionment ratio from the method is 96.35%.

As the ratio percentage is above 95%, ABC can deduct 100% of the VAT incurred on all locally incurred mixed-use costs.

[4] Explanatory Memorandum on the Regulations prescribing Electronic Services, 2019.

Since the de minimis rule is not applicable to 'imported services', it would mean that the 3.65% non-taxable use would translate in an 'imported services' liability.

Had ABC incurred the same cost from a local vendor a full input tax deduction would be claimable.

Therefore, ABC has an additional VAT liability by virtue of making use of a foreign service provider.

2.3.8. It was clearly not the legislator's intention that there be an additional tax burden/liability based on the fact that the supplier of services is a non-resident or is conducting business outside South Africa. In fact, 'imported services' was trying to curb/address that very issue.

2.4. **The nature of the business impacted.**

2.4.1. All vendors who make both taxable and non-taxable supplies and receive services from non-residents.

2.5. **Proposal**

2.5.1. An amendment to the VAT legislation to the effect that the principles laid down in section 17(1) of the VAT Act may be used to determine the non-taxable use of services acquired from non-residents. One way of achieving this is to include the principles in section 17(1) in the definition of "imported services" as the method to determine the non-taxable use.

3. Foreign lessors of aircraft engines who are registered vendors -Sections 8 and 10

3.1. **Problem statement**

Before the 1 April 2021 amendment to the definition of 'enterprise', to effectively exclude foreign lessors of aircraft and rolling stock from the definition, if certain conditions are met, SARS issued section 72 rulings to lessors of aircraft, rolling stock and aircraft engines. However, since the said amendment only applied to foreign lessors of aircraft, and not foreign lessors of engines and other parts, the said amendment did not find application to foreign lessors of aircraft engines. Hence with effect from 1 January 2022, when section 72 rulings were no longer issued in respect of foreign lessors of aircraft engines to local vendors, such entities were required, to register for VAT. The further amendment to the definition to also exclude foreign lessors of aircraft engines, provided certain conditions are met, only became effective from 1 January 2023. Although this further amendment to the definition of 'enterprise' is welcomed, it implies that foreign lessors of aircraft engines who are registered or required to be

registered, where the leases spanned or commenced on or after 1 January 2022, whilst foreign lessors who enter into leases for engines after the effective date of the proposed amendment, will not be required to be registered. This has resulted in aircraft engine lessors that did register for VAT being in a worse position when compared to the defaulting vendors that did not register for VAT. For instance, lessors that registered for VAT has a liability in terms of section 8(2) when their enterprise activities cease but the defaulting vendors do not have this liability. Nevertheless, both foreign lessors of aircraft engines that are duly registered and those who erroneously did not register, will incur a section 8(2) VAT liability upon deregistration, which VAT will become a permanent cost to the non-resident vendor. Further, this additional VAT will effectively amount to double VAT being paid.

3.2. **Proposed amendment**

3.2.1. In order to overcome this unintended result, it is proposed that a further deeming provision in section 8 be introduced in terms of which foreign lessors of aircraft engines who satisfy the provisions envisaged in paragraphs (aa) and (bb) of proviso (xiii) to the definition of 'enterprise' are, upon election, deemed to supply the engine in terms of a sale agreement in the course of its enterprise, provided the lessor obtains and retains documentary proof that VAT was paid upon the original importation and, that such VAT was claimed as input tax either by the vendor or the lessee. In addition, it is proposed that a further subsection to section 10 be introduced which deems the value of the said deemed taxable supply to be nil.

3.3. **Effect of proposed amendments**

3.3.1. The above proposed amendments will ensure equity, remove the current cascading effect, and place all non-resident lessors of aircraft engines on the same footing.

4. Silver content in Gold containing material deposited for refining purposes.

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

4.1.1. Rand Refinery and its depositors historically successfully requested various class rulings from SARS in terms of section 72 and 41B of the VAT Act in terms of which Rand Refinery, as opposed to the depositors, is permitted to obtain, and retain documentary support in respect of gold exported by depositors. In order to avoid the continuous issuing of such rulings by SARS to overcome the practical difficulties, National Treasury proposed an amendment to introduce a new section 54(2C) in the VAT Act in the 2023 Draft Taxation

Laws Amendment Bill (TLAB) published for comment on 31 July 2023. Following the TLAB, we made a submission in which we proposed that the amendment also be made applicable to silver. However, this proposal was not accepted, based on the Draft Response Document on the TLAB dated 25 October 2023, which is based on hearings by the Standing Committee of Finance in Parliament. In particular it was stated in paragraph 14.3 that our proposal is not accepted on the basis that "*The checks and balances present with the refinery of gold and the export thereof are not the same as those relating to silver and other metals*."

4.1.2. As submitted in the said previous ruling requests, silver exports by depositors/principals poses identical difficulties with documentary support as gold exports. It is for this reason that a further submission is hereby made to also include silver in the proposed section 54(2C) of the TLAB.

4.2. **Detailed factual description**

4.2.1. As is the case with gold:

- the silver extracted comingles in the refining process with the result that it is not possible for the refiner to identify the silver deposited by any given depositor. Instead, the refiner is only able to determine what quantum of silver was deposited by a depositor and allocate a percentage of the total silver stock to a depositor.
- the refiner issues a silver certificate to the depositor which details, amongst others, the ounces of silver contained in the metal deposited for refining; and
- the quantity of silver specified on the silver certificate is credited to the unallocated account of the depositor/principal.

4.2.2. The silver included in the deposits by depositors is exported, which export is facilitated by the refiner on behalf of the depositor/principal, albeit that silver is generally accumulated over a period of time until it is viable to be exported, given the small quantum extracted from gold deposits through the refining process. A small portion of the silver is sold locally by the refiner which silver is obtained out of its retention. These supplies are subject to VAT in the ordinary course.

4.2.3. As far as silver deposits and sales are concerned, the following reporting obligations are made by the refiner to:

- STAT SA – A monthly report reflecting the total silver sales per local depositing customer (mine), including the settlement value.
- Department of Minerals and Energy (DME) – a monthly report reflecting the total silver jewellery sold to the local market from locally sourced metal, plus the monthly silver deposit list for local mines and silver exported from locally soured metal.
- SARS – a monthly report reflecting the total silver deposit list (intake for International and local mines)
- South African Diamond and Precious Metals Regulator (SADPMR) – a

PMR2 Report required to be submitted quarterly reflecting the silver intake (local and international) and the silver sale transactions and settlement/ payments thereof (ounces and ZAR value) for Local and international Depositors.

4.2.4. As far as gold deposits and sales are concerned, the following reporting obligations are made by the refiner to:

- STAT SA – a monthly report reflecting the total gold sales, local depositing customer (mine), including the settlement value.
- SARB- a monthly report reflecting sales and settlement on behalf of local and international mines to local and international markets (banks and purchasing customers).
- DME — a monthly report reflecting the total gold jewellery sold to the local market from local sourced metal, plus the monthly gold deposit list for local mines and gold exported from local soured metal.
- SARS – a monthly report reflecting the total gold deposit list (intake for International and local mines).
- SADPMR- PMR2 – a quarterly report reflecting the gold intake (local and international) and gold sale transactions and settlement/ payments thereof (ounces and ZAR value) for local and international depositors.
- SADPMR - PMR7 – a quarterly report reflecting international mines intake on a quarterly basis.
- SADPMR PMR8 – a quarterly report reflecting all exports and country of origin for each export on a quarterly basis (gold and silver).
- PMR9 – a bi-annual report reflecting minted bars manufactured (quantity, ounces, and serial number) and monthly minted bars sold (product, name of customer, quantity, and bar number.
- Chamber of Mines – a bi-annual report reflecting all local intake (gold and silver).

4.2.5. Based on the above reporting requirements in respect of gold and silver deposits and sales to the various governmental departments, it is clear that they are similar for gold and silver in all material respects. It is thus inconceivable on what basis it is stated that "The checks and balances present with the refinery of gold and the export thereof are not the same as those relating to silver and other metals."

4.2.6. We therefore submit that the so-called checks and balances for the refinery of silver and export thereof are as sufficient as those applicable to gold.

4.3. **Nature of the business impacted.**

4.3.1. The companies who deposit gold containing material to a refiner.

4.4. **Proposal**

4.4.1. As previously requested, the proposed section 54(2C) should also include silver extracted in the refining process in as far as it relates to exports.

5. Agent/Principal relationship - Section 54 of the VAT Act

5.1. Introduction

5.1.1. The VAT Act has concessions for certain industries/vendors that have agent/principal relationships, by allowing the agent to account for VAT and deduct the related input tax, even though such agent is acting on behalf of a principal. Examples are auctioneers and pooling arrangements.

5.2. The legal nature of the problem

5.2.1. The application of section 54(1), (2), and (3) of the VAT Act provides that supplies made by or to an agent on behalf of a principal will be deemed to be made by and to the principal. Conversely, the application of section 54(2B) of the VAT Act provides for an "intermediary" to be deemed the principal supplier of electronic services, where the intermediary is registered for VAT, facilitates the electronic service and is responsible for the issuing of invoices and collection of payments.

5.2.2. Application of these rules is limited to the extent that the intermediary is acting on behalf of a principal that is:

- not a resident of the Republic and
- not a registered vendor
- supplying a service to a person in the Republic
- supplying a service that falls within the ambit of an electronic service.

5.2.3. It follows that allowing for the agent/intermediary to account for VAT on behalf of the principal is allowed in very limited instances for example, pooling arrangements and auctioneers, as discussed in more detail below.

5.2.4. With regard to goods imported into South Africa by an agent acting on behalf of a foreign principal, section 54 (2A) (b) deems the agent to be the principal for the purposes of that import into South Africa.

5.2.5. The summarised proposed amendment is for a VAT registered intermediary/agent who facilitates the supplies, issues the invoices, and collects the payment, to account for the VAT on these transactions despite the principal being registered for VAT, or being required to register for VAT, whether the transaction takes place in or outside the Republic and for this to be available in respect of all types of taxable supplies. The input tax that relates to these deemed supplies should then also be claimable by said intermediary/agent.

5.3. **Detailed factual description**

5.3.1. Increasingly we see legal constructs where a South African entity is engaged to facilitate supplies into South Africa but also into other African jurisdictions on behalf of the supplier.

5.3.2. The agent/intermediary has the relationship with the end customer and is often responsible for facilitating the supply, has sight of the detail behind the supply, invoicing, and payment and is therefore in the position to collect and remit the tax to SARS.

5.3.3. There have been instances in the past where SARS issued section 72 rulings to VAT vendors effectively acting as intermediaries/agents, allowing them to account for VAT on behalf of principal suppliers. This has enabled an agent to account for VAT as principal regardless of the registration status of the persons on whose behalf it acted. It has also enabled the agent to claim an input tax deduction in respect of the expenses attributable to these taxable supplies.

5.3.4. These concessions have not been enacted, leaving it up to the many different principal suppliers to account for the VAT.

5.3.5. Although section 54(2B) provides for "intermediaries" to be deemed the principal supplier of electronic services in specific circumstances, this section has limited application as detailed above. This creates difficulties for intermediaries required to be registered for VAT and to issue tax invoices on behalf of multiple principals, some of whom are registered, some not and some required to be registered. This requires very sophisticated and expensive system capabilities that can isolate these transactions. This also creates significant room for error where only some transactions are accounted for, whilst others need to be excluded.

5.3.6. In terms of section 54(1) and (2) of the VAT Act, although an agent may issue or receive tax invoices, debit notes and credit notes, the supply is still deemed to be made by the principal. A similar provision is already enacted for auctioneers where a similar problem arises (Refer section 54(5)). Therefore, having regard to the practical implications of the basic rule regarding agents, legislation was passed making an exception to the normal agent-principal rules for auctioneers.

5.3.7. Pooling arrangements create a similar precedent in section 52 of the VAT Act.

5.3.8. In practice, the pools, while being agents, were treated as separate entities.

5.3.9. The Value-Added Tax Committee (VATCOM) was requested to recommend to government that the pools be treated as entities separate from the participating farmers.

5.3.10. The section that was introduced provided that the pools may be treated as principals for VAT purposes. The same can be said of rental pools in section 52(2). Allowing the "pools" to operate in this manner, eliminates the practical difficulties which the manager of the rental pool scheme would have experienced if some supplies of accommodation were taxable (where the owner or shareholder is a vendor) whilst others were non-taxable (where the owner or shareholder is not a vendor).

5.3.11. The main purpose of section 52(2) was to create a situation where the operator is regarded as the principal and not the agent of the owners of the units. This allowed the input tax and output tax to be accounted for by the operator under one VAT registration, instead of by each owner under a number of VAT registrations.

5.3.12. The same mechanism should exist for intermediaries/agents making supplies on behalf of a principal to ensure that the output tax is declared (and related input tax is claimed) regardless of registration status or the principal. This would limit the risk of non-compliance and relieve the practical difficulties experienced, with the benefit of making South Africa the destination of choice to serve as the "hub" for supplies into Africa.

5.4. **The nature of the business impacted.**

5.4.1. The proposed amendment could find application in a multitude of industries and businesses.

5.5. **Proposal**

5.5.1. We propose that the ambit of section 54(2B) of the VAT Act be widened so that where the intermediary/agent facilitates a supply, issues the invoice and collects the payment for this supply, it is deemed to make this supply and is liable for and entitled to the output and input tax in relation to this supply:

- Whether or not the principal is a resident of the Republic.
- Whether or not the principal is a registered vendor or should be registered for VAT.
- Whether the supply takes place within or outside the Republic
- Whether this constitutes a supply of goods or services.

5.5.2. The mechanism of the amendment requested will limit the risk that the suppliers do not account for VAT and addresses the risk that the imported

services VAT is not accounted for.

5.5.3. This amendment can be subject to the parties electing to utilise this section and based on the proviso that the principal and intermediary/agent enter into a written agreement whereby the principal undertakes not to account for transactions dealt with by the intermediary/agent.

End.