South African Institute of Tax Professionals

23 February 2016

The South African Revenue Service

Lehae La SARS

299 Bronkhorst Street

PRETORIA

8000

BY EMAIL: E Obermeyer (EObermeyer@sars.gov.za)

RE: INTERIM AMENDMENTS TO THE DIESEL FUEL TAX REFUND SYSTEM
(DRAFT AMENDMENTS TO PART 3 OF SCHEDULE 6 OF THE CUSTOMS & EXCISE ACT, 1964)

Provided below are SAIT's comments relating to the proposed interim amendments to the diesel fuel tax refund system. We understand that the diesel refund scheme policy review is being finalised and that there will be opportunity for stakeholder comments before its implementation.

1. Mining Rehabilitation

We welcome the insertion of Note 6(f)(iii)(uu)(l) to specifically include rehabilitation and management of all environmental impacts during the operational life of the mine as a qualifying activity if conducted in accordance with the Mineral and Petroleum Resources Development Act (MPRDA). However, we are concerned that the language appears to exclude rehabilitation activities after mining closure (i.e. appears to be limited to "during the operational life of the mine").

In terms of the MPRDA, a closure certificate cannot be issued for a mine until all the regulatory requirements of the Department of Mineral and Resources have been met. Even after all other mining operations have ceased, we submit that the rehabilitation activities remain an integral part of mining operations. This is evident from the fact that the MPRDA specifically requires that financial provision for remediation of environmental damage must be made to ensure compliance with the environmental management plan. Indeed, the income tax specifically recognises the need for relief

T: +27 86 177 7274
F: +27 86 626 0650
E: info@thesait.org.za
W: www.thesait.org.za

Riverwalk Office Park, Building A
C/O Garsfontein & Matroosberg Roads
Pretoria, South Africa
0081

PO Box 712
Menlyn Retail Park
0063

in terms of post-mining rehabilitation via the reserving provisions of section 37A (with the understanding that most rehabilitation occurs post-mine closure – not during the mining operations). We also fail to see why the diesel refund tax system should make a policy distinction based solely on timing.

We also recommend that the insertion of Note 6(f)(iii)(uu)(l) be introduced with retrospective effect to remove any uncertainty regarding whether or not rehabilitation activities qualified in the past. It is our view that rehabilitation activities qualified in the past even though they were not specifically listed but admit that SARS and taxpayer treatment may not have been consistent. We would request that the status quo remain in place for taxpayers that previously claimed diesel fuel tax refunds rather than leaving mining companies exposed to ongoing SARS audits.

2. Nature of tax invoices

We note that the draft amendments do not include an amendment to Note 6(d) in respect of what constitutes a "tax invoice". Section 20(4) of the VAT Act was amended with effect from 8 January 2016 (by the Taxation Laws Amendment Act, 2015) to provide that the words "tax invoice", "invoice" or "VAT invoice" may be reflected on the document. We suggest that Note 6(d) be aligned with the amendments to section 20(4) of the VAT Act to ensure that valid "tax invoices" for VAT Act purposes are also valid for diesel fuel tax refund purposes, especially given the fact that the two regimes work in tandem.

3. Joint ventures (unincorporated partnerships)

The explanatory memorandum clarifies that the amendments, including those to Note 6(f)(ii)(cc), do not cover joint ventures because these beneficiaries are currently being addressed through dispute resolution. We understand that there have been situations where SARS disallowed the diesel refunds claims at both the partner and partnership level (i.e. whether the taxpayer was the partner to the partnership claiming refunds or the actual partnership claimed refunds). At a technical level, we

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W: www.thesait.org.za

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understand that SARS disallowed the claim by the partnership because the partnership is not the legal holder of the right while, in other circumstances, SARS disallowed the claim by the partner holding the right because the partner did not conduct the actual mining. The net result was a situation where none of the parties benefited from otherwise qualifying activities.

Wide-spread use is made of joint ventures and partnerships in the mining industry as a way to comply with BB-BEE and mining legislation / regulations. Other joint ventures exist as a way of commercially sharing risk and reducing the cost of capital. These joint ventures are in essence driven by commercial norms as opposed to tax avoidance. We see no reason why this form of operation should be at a disadvantage.

Given the open legal nature of the disputes in the past, we believe that the legislation should at least be amended going forward. As a practical matter in terms of compliance (and given the operational nature of the refund), we suggest that the diesel refund claim be allowed in the hands of the partnership that uses the diesel to conduct the mining and that claims the input VAT thereon.

4. Logbooks

Although not part of these proposed amendments, the recent workshops held by SARS on diesel refund logbooks raised some concerns. In particular, concerns were raised specifically in respect of SARS' interpretation of when diesel refunds may be claimed on diesel litres consumed. Taxpayers currently claim diesel refunds when diesel is dispensed to a particular piece of equipment based on the number of litres dispensed, the type of equipment and what the diesel is used for.

In that meeting, SARS identified that taxpayers may be claiming diesel refunds early to the extent that diesel litres remain in the equipment at month end and have therefore not yet been consumed. SARS seemingly intended to require that vendors complete a reconciliation at month-end of the total litres dispensed to equipment to actual litres consumed and litres remaining in equipment.

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While this allocation has some theoretical justification, we submit that this form of reconciliation is wholly impractical. This form of arrangement would require an intensive ongoing physical interrogation that would be expensive and tedious. Given the amount of equipment used on a mine which consumes diesel, the location of the daily location of equipment, the 24-hours basis on which many mines are conducted, month-end reviews would be simply impossible with any meaningful level of accuracy. Taxpayers would effectively have to cease mining operations on the last day of every month to accurately determine the residual litres remaining in equipment (so as to deduct this from diesel refunds claimed). We suggest that compliance remain focused on financial data as opposed to exact physical measurement.

5. Small-scale sugarcane growers

The insertion of note 6(h)(vii) is welcomed. This serves to reinstate the mechanism for claiming diesel rebates (VAT flat rate formula) that was in place before SARS withdrew access to the refund and provides some relief for small-scale sugarcane growers who perform their own farming activities on a dry basis and are unable to maintain their own records. We would like to draw attention that the small-scale sugarcane growers who would benefit from this relief would be in an extreme minority as most small-scale sugarcane growers use contractors on a wet basis and would, therefore, still not qualify for the diesel refund under the current regime. We are therefore very pleased to be advised by National Treasury that the diesel refund scheme policy review that will address the use of contractors on a wet basis is being finalised.

Sincerely

Keith E Engel

Deputy CEO

cc: SARS Policy and Comments policycomments@sars.gov.za

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