South African Institute of Tax Professionals

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The National Treasury
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The South African Revenue Service
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RE: ANNEXURE C PROPOSALS FOR BUDGET 2019: VALUE-ADDED TAX

We have attached the Annexure C Proposals from the SAIT Value-Added Tax 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

Victor Terblanche

Chair of the Value-Added Tax Work Group

Enclosures: Annexure C Proposals

SAIT representatives to be invited to National Treasury workshops

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ANNEXURE C SUBMISSIONS FOR 2019 BUDGET: VALUE-ADDED TAX

1. CRYPTOCURRENCY VALUE-ADDED TAX TREATMENT

1.1 The legal nature of the problem

It has been proposed that the issue, acquisition, collection, buying or selling or transfer of ownership of any cryptocurrency be included in section 2(1)(o) of the VAT Act as a deemed financial service and hence an exempt supply. We continue to question the VAT impact where cryptocurrency is used by vendors as "consideration" for the supply of goods or services i.e. cryptocurrency used for payment of suppliers. Based on the current legislation, there will be a barter transaction resulting in the "consideration" for the supply being an "exempt supply". This occurs as a result of "cryptocurrency not being defined as "money" and/or excluded from the definition of "goods" or "services". The deemed financial service and consequential exemption from VAT makes sense from a cryptocurrency trader's perspective, but we submit that the VAT exemption could give rise to unintended apportionment consequences for others as the "consideration" will be regarded as an exempt supply.

1.2 Detailed factual description

Cryptocurrency could be used by vendors as "consideration" for the supply of goods or services i.e. cryptocurrency used for payment of suppliers as discussed above. Cryptocurrencies could also in some cases be used by customers to pay for the supply of goods or services, for example, where a retailer accepts cryptocurrency as a means of payment. In this case the original supply of goods or services should not give rise to a concern for the retailer. However, should the retailer subsequently sell or barter the cryptocurrency, such supply would be an exempt supply under the proposed amendment. The result will be that a portion of the retailer's supplies will be exempt from VAT, resulting in input tax apportionment issues in the hands of the retailer. Based on current legislation, the full amount of the sale of the cryptocurrency as well as the "consideration" paid for a supply will be exempt and not only the movement (profit or loss). This will have a substantial and unintended apportionment impact on vendors who accept cryptocurrency as payment.

1.3 The nature of the business impacted

Large retailers are starting to accept cryptocurrency as payment to remain competitive and to provide its customers with alternative methods of payment. When they dispose of the cryptocurrency, they will be making an exempt supply and will encounter apportionment issues. This situation will apply to any enterprise that accepts cryptocurrency as payment.

1.4 Proposal

We recommend that Treasury considers whether cryptocurrency should not rather be treated as "money" and exclude it from the definition of "goods" and "services" in section 1(1). In this regard we note that treating cryptocurrency akin to "money" for value-added tax purposes would not imply that it is in fact money, as it would only be a treatment for Value-Added Tax purposes. We don't think an exemption only, as proposed, is the best solution and suggest that the treatment in other jurisdictions also be considered.

We also understood during the National Treasury workshops on the 2018 draft tax bills that it would be made clear that the use of cryptocurrency for payment is not a barter transaction and recommend that National Treasury makes this clear.

Further, we also suggest that the term "cryptocurrency" be defined in the VAT Act to ensure legislative clarity. We believe that it will result in administrative and interpretational difficulties for both taxpayers and SARS alike if a clear definition is not provided in law.

2. VALUE-ADDED TAX ON ELECTRONIC SERVICES

2.1 The legal nature of the problem

Currently any person who supplies "electronic services" as defined in section 1(1) of the Value-Added Tax Act, 1991 ("VAT Act") is deemed to carry on an "enterprise" in South Africa and provided the value

of taxable supplies made by the supplier exceeds R50 000 per annum, that person is required to register for value-added tax ("VAT") purposes in South Africa.

National Treasury has issued proposed amendments to the definition of "electronic services" on 24 October 2018, to be effective 1 April 2019. The proposed amendments will essentially affect all supplies of services by any person from an "export country" (any country other than South Africa) to a recipient in South Africa (provided one other proxy is present). At present, only the services listed in the Regulation issued on 28 March 2014 constitute "electronic services".

While the proposed amendment to include all services within the ambit of the definition of "electronic services", which is in line with the proposal by the Davis Tax Committee, is accepted, the further proposal by the Davis Tax Committee that the ambit of the provision be limited to business-to-consumer ("B2C") supplies has been ignored. As forcefully argued by taxpayers at the workshop organised by National Treasury and SARS on 25 May 2018, and by the Davis Tax Committee, to include all business-to-business ("B2B") supplies within the ambit of the "electronic services" regime will unnecessarily place an enormous administrative and compliance burden on foreign suppliers of electronic services and SARS, with no tax effect where the recipient business is a VAT vendor and would in any case be entitled to claim back the VAT incurred. The OECD in its recently issued International VAT/GST Guidelines stated the following in regard to the possible exclusion of B2B transactions:

> "It is recommended that the (business) customer be liable to account for any VAT due to its local tax administration under the reverse charge mechanism ("imported services" in South Africa VAT parlance) where that is **consistent with the overall design of the national consumption tax system"** (emphasis added).

Internationally, nearly all VAT jurisdictions (with one exception as far as we are aware) that have adopted the e-commerce regime proposed by the OECD have opted to exclude B2B transactions - a clear indication of the sound tax policy imperative for doing so in this instance.

It is strongly argued that the present "imported services" regime is adequate to deal with those situations where the recipient South African business would not be entitled to claim input tax relief had VAT been imposed on the supply of "imported services". There is no indication or proof that the present imported services regime is ineffective. By contrast, many examples were given by participants at the workshop of the many foreign companies that would need to be registered for VAT in South Africa by virtue of the inclusion of all cross-border B2B transactions - especially in the group of company context.

While the proposed amendments provide for an exclusion where the electronic services are supplied by a foreign company to a local company and both companies form part of the same "group of companies", a "group of companies" as defined for purposes of the proposed amendments will be limited to a situation where the foreign and local company are 100% held. This "concession" will have no or very limited effect as most groups are not that closely held, given the commercial requirement to have some element of black ownership under the BBBEE regime. It also fails to recognise that many companies have share incentive schemes for employees in terms of which the employees hold at least some equity in the employer company.

2.2 Detailed factual description

The proposed amendments will essentially affect all supplies of electronic services by any person from an "export country" (any country other than South Africa) to a recipient in South Africa unless the 100% held group exclusion applies.

2.3 The nature of businesses affected

The proposed amendments will unnecessarily affect multi-national groups where electronic services are rendered by a foreign group company to a South African group country (B2B). They will also affect electronic services supplied by foreign third parties to South African businesses. We accept that they should properly apply to electronic services rendered by a foreign company to South African consumers (B2C).

2.4 Proposal

It is strongly recommended that B2B transactions, with the appropriate identification requirements, be excluded from the ambit of the proposed new "electronic services" regime.

In the alternative, while the preferred choice is to see B2B transactions totally excluded from the ambit of the proposed new "electronic services" regime for the very cogent reasons advanced by the OECD and the Davis Tax Committee, at the least it is proposed that "group of companies" as defined in section 1(1) of the Income Tax Act be adopted, that is, a common shareholding of at least 70%. It must be borne in mind that those companies that fall outside the exclusion will still be subject to the "imported services" provisions of the VAT Act.

3. VALUE-ADDED TAX ROLL-OVER RELIEF ON COMPANY REORGANISATIONS

3.1 The legal nature of the problem

Section 8(25) of the VAT Act provides for rollover relief for entities that embark on a restructure or reorganisation in terms of the so-called corporate rules, as long as the supplier entity and recipient entity are vendors and the requirements in terms of the Income Tax Act are complied with. However, in terms of a section 42 (asset for share) or section 45 (intra-group) transaction, section 8(25) requires that a going concern be supplied//disposed of, for the transaction to qualify for VAT rollover relief.

In instances where trading stock or a capital asset (e.g. fixed property) is transferred in terms of section 42 or section 45, the rollover relief would not apply as no going concern or business is being transferred (refer to the proviso to section 8(25)) – this leads to a cash flow issue as the supplier entity has to levy VAT at the standard rate of 15% on the transfer of the assets to the recipient entity.

3.2 Detailed factual description

A company may embark on a restructure for various commercial reasons e.g. grouping core business functions, streamlining businesses to achieve savings, ensuring optimal asset utilisation, and so forth – these transactions do not always entail the transfer of a business (lock stock and barrel) or a stand-alone business, in order to achieve the desired outcomes. Currently, income tax rollover relief exists for these types of transactions but the VAT Act has a stringent requirement in that for rollover relief to apply (to a section 42 or section 45 transaction), a whole business / stand-alone business must be transferred (i.e. the disposal of a "going concern").

The Transfer Duty Act (where VAT does not apply) also provides for rollover relief for single transfers of fixed property in terms of section 42 or section 45, but if this transfer was a taxable supply, VAT would apply to the transfer/supply at the standard rate of 15%. Notwithstanding the fact that there is a "supply" by the supplier entity for VAT purposes, economically, there is no "consumption" of any goods that takes place by the recipient entity within the group;

There is no tax avoidance, scheme for obtaining an undue tax benefit, or consumption that occurs if VAT rollover relief was granted for asset transactions in terms of section 42 or section 45, where there was no disposal of a going concern.

3.3 The nature of the businesses impacted

Group entities that embark on a restructure/ reorganisation for commercial reasons.

3.4 Proposal

We propose that the going concern proviso be deleted.

Previously reported matters include

4. ZERO-RATING OF TRIANGULAR TRANSACTIONS IN RELATION TO SERVICES SUPPLIED BY A VENDOR TO A NON-RESIDENT NON-VENDOR

4.1The legal nature of the problem

A triangular transaction in relation to services takes place where a South African vendor supplies services to a non-resident non-vendor by rendering these services on its behalf to another South African vendor. There is currently no provision available to provide for the zero-rating of triangular transactions in relation to services (unless they are tied to movable property) as the section 11(2)(l) zero-rating requires that the recipient must not be a resident of the Republic

4.2 Detailed factual description

Triangular transactions for services normally take place in the context of global master agreements where the holding company of a global group of companies negotiates a master service agreement with the global head office of a global firm. The global firm then sub-contracts its local firms to render the services to the group companies in their local jurisdictions for practical reasons, e.g. it has the local expertise available on a more economical basis. E.g in terms of the master service agreement and related SA local service agreement, firm Optimisation UK, a non-resident non-vendor, is contracted by its client company ManufacturingCo SA, a South African vendor, to perform services for ManufacturingCo SA. Optimisation UK sub-contracts its South African firm, Optimisation SA to render the services to ManufacturingCo SA on its behalf. Optimisation SA renders the services and invoices Optimisation UK who invoices ManufacturingCo SA.

4.3 The nature of the businesses impacted

Multinational groups where a South African Client contracts with the offshore company/firm for the rendering of services who, in turn, sub-contracts some of the work to a South African group company/firm.

4.4 Proposal

Triangular transactions in relation to services should be zero-rated provided that the ultimate recipients of those services (the South African vendor) is fully taxable.

5. INTEREST ON DELAYED VALUE-ADDED TAX REFUNDS

5.1 The legal nature of the problem

Interest payable by SARS on delayed VAT refunds is legislated in section 45 of the VAT Act. Section 45 of the VAT Act currently contains requirements that are not consistent with the requirements in section 187 of the Tax Administration Act (TAA) that apply to the other forms of taxes.

5.2 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.

5.3 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.

5.4 Proposal

The proposed substitution of section 45 of the VAT Act will more closely align the interest on VAT refunds with Chapter 12 of the TAA and should be brought into effect.

SAIT REPRESENTATIVES TO BE INVITED TO NATIONAL TREASURY WORKSHOPS

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