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RE: DRAFT TAXATION LAWS AMENDMENT BILL, 2019 (draft TLAB)

We have attached the comments from the SAIT Value-Added Tax Work Group on the draft Taxation Laws Amendment Bill (draft TLAB). 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

The SAIT Value-Added Tax Technical Work Group

Proposed Amendments to the Value-Added Tax Act, No.89 of 91.

All references to 'the VAT Act' in this document will be to the Value-Added Tax Act, No. 89 of 91.

1. Refining the VAT treatment of foreign donor funded projects

[Applicable provision: the definition of "enterprise" in section 1(1) of the Act]

[Clause 64 of the Bill]

Proposed amendment

The aim of the amendment, in paragraph (b) of subparagraph (v) to the definition of "enterprise", is to further clarify what will qualify as a foreign donor funded project for VAT purposes in instances where the foreign donor has contracted directly with various implementing parties.

The amendments in paragraph (a) bring an implementing agency into the definition of enterprise and define an implementing agency. It is accepted and no comment is required on this point.

The amended definition then introduces (paragraph (b)), a requirement that project must have "been approved by the Minister of Finance as a foreign donor funded project for the purposes of the definition".

Problem identified and suggested solution

Ministerial approval – lack of clarity

There is a concern with the requirement that the Minister of Finance must approve. It is accepted that the Minister must approve, but some indication must be given of why this approval is required. It is submitted that the proposal adds one additional level. This is a duplication as section 10(1)(bA)(ii) of the Income Tax Act already requires this step and the official development assistance agreement is already published in a *Gazette*.

With regard to the proposed amendments to foreign donor funded projects, the introduction of the further requirement that all FDFP's have been approved by the Minister of Finance as a FDFP for the purposes of the definition is onerous and would lead to delays in the receipt of the funding if this approval cannot be easily obtained.

It is clear from the amendment that the Minister of Finance needs to approve the foreign donor funded project “for purposes of the definition”. The importance of this approval is that the funds received by the implementing agent will then be zero rated in terms of section 11(2)(q) of the VAT Act and that the implementing agent be entitled to make a deduction of input tax on taxable costs incurred in the course of the activities of the foreign donor funded project. This results that no VAT will be incurred on the foreign donor funding.

It is not clear what the Minister must then approve – is it that it constitutes an enterprise and qualifies for exemption from normal tax?

The biggest concern is what happens with the existing approved projects. How must agreements entered into before the effective date of this amendment be dealt with? It is requested that this matter be clarified. Specifically, clear guidelines are required explaining the process and timing to ensure the administrative requirements can be met so that the funding is not delayed.

Transitional rules should also be included to provide clarity on the treatment of existing FDFP’s on the effective date of the amendments so that it does not negatively impact on projects which are already considered to be FDFP’s.

Guideline

The Draft Explanatory Memorandum states that “... a guideline will be issued by SARS outlining what requirements will need to be met before the Minister of Finance will approve a project as a FDFP. The guideline will further outline a streamlined process to be followed in order to obtain such approval.” We also recommended that SARS, or the Minister of Finance, publishes the list of approved foreign donor funded projects.

The term ‘official development assistance agreement’

The term ‘official development assistance agreement’ is one that is used by the OECD. It is suggested that the term ‘official development assistance agreement’ be clarified in the legislation.

Implementing agency

In circumstances where a university for instance accepts the role as implementing agency and has concluded the necessary contracts in this regard, each FDFP is required to be registered for VAT independently from the university receiving such funding (i.e. requiring multiple registrations).

The current legislation poses significant challenges for universities since they are required to, *inter alia* -

- Administer multiple VAT registrations (this could vary depending on the number of foreign donor funding received) and consequently submit multiple VAT returns on a monthly basis; and
- Adjust their procurement process to ensure that the goods and services are procured under the specific trading name and VAT number of the foreign donor funded project. This will become even more challenging for suppliers as they will have to determine when they are contracting with the university and individual foreign donor funded project. Failure to achieve accuracy in this process will result in SARS continuously denying input tax deductions as a result of invalid tax invoices.

We request that National Treasury consider eliminating this requirement and allow for all the foreign donor funded projects VAT affairs to be administered under the VAT number of the university or under a single separate VAT branch registered by the university. This would be more practical approach and less cumbersome.

It is important to mention that there is an established audit trail for SARS to follow to identify expenditure funded by foreign donor funds as universities are required to prepare financial accounts detailing the expenditure of foreign donor funds. This report is independently audited by accountants appointed by the foreign donor funder. In light of this, any potential tax risks are mitigated by this independent process.

The effective date of the proposed changes also needs to take account of the more onerous administrative requirements and sufficient time should be allowed for all parties to properly plan and implement the required changes before the change becomes effective.

2. Clarifying financial services to include the transfer of reinsurance relating to long term reinsurance policies

[Applicable provision: section 2(1)(i) of the VAT Act]

[Clause 65 of the Bill]

Proposed amendment

The aim of the proposed amendment is “to provide clarity as to the VAT treatment of the transfer of ownership of reinsurance relating to long-term insurance to another reinsurer”. The proposal then specifically includes these as activities falling within financial services.

Problem identified and suggested solution

In terms of clause 65(2), the amendment is to come into operation on 1 April 2020.

It is proposed that the effective date of this amendment should be the date of promulgation of the Amendment Act since it seems that the amendment is proposed on the basis of clarification.

3. Refining the VAT treatment of foreign donor funded projects

[Applicable provision: section 8(5B) and section 8(25) of the VAT Act]

[Clause 66 of the Bill]

Proposed amendment

Paragraph (a) - The amendment to section 8(5B) is clear and no comment is required.

Paragraph (b) - The aim of the amendment to section 8(25) is to extend its application to also include the transfer of an asset where “the only asset transferred will be fixed property that will be leased back to the supplier once transfer of the property is completed.”

Problem identified and suggested solution

The requirement that the supplier will lease the fixed property from the recipient

It is evident from the Explanatory Memorandum, that the inclusion is additional relief in circumstances where the asset being transferred consists solely of fixed property, which is not transferred as a going concern, but which will be leased back after transfer.

The requirement that it must be disposed of as a going concern

The proposed amendment makes no change to the requirement, in section 8(25)(i), that section 8(25) applies where the supply is one in terms of which the enterprise, or part thereof, “is disposed of as a going concern”.

We have previously suggested that the reference to “going concern” in section 8(25) needs to be clarified. It is suggested that, for purposes of this amendment, a clarification of the going concern requirement is required.

4. Correct of a reference to the Income Tax Act.

[Applicable provision: section 8A(2)(c) of the VAT Act]

[Clause 67 of the Bill]

The correction of the current reference to section 24JA(5)(d), in section 8A(2)(c) of the VAT Act, to section 24JA(6)(a) is correct and also that the amendment is deemed to have come into operation on 2 November 2010.

5. The zero-rating of sanitary towels (pads)

[Applicable provision: section 8A(2)(c) of the VAT Act]

[Clauses 68 and 72 of the Bill]

Proposed amendment

The proposed insertion of subsection (1)(w) seeks to correctly capture the zero-rating of sanitary towels (pads), which were zero-rated from 1 April 2019. The amendment was incorrectly zero-rated under section 11(1)(j) of the VAT Act and this amendment now creates a new section 11(1)(w) of the VAT Act to cater for the new zero-rated items.

Problem identified and suggested solution

The inclusion of section 11(1)(w), together with paragraph 7(d) of Schedule 1, are as was requested by the Work Group and no further comment is required.

It is suggested that the zero-rating should not be limited sanitary towels (pads), and that the inclusion of tampons (as recommended by the VAT Panel), as well as menstrual cups be considered.

6. Requirement to register

[Applicable provision: section 24 of the VAT Act]

[Clauses 69 of the Bill]

The work group is happy with this amendment. It allows for a supplier of electronic services, value of taxable supplies below R1 million to now deregister as a vendor.

7. An implementing agency

[Applicable provision: section 50(1) of the VAT Act]

[Clauses 70 of the Bill]

No comment is required - an implementing agency is regarded as an enterprise carried on separately from that vendor's other enterprise activities.

8. Reviewing section 72 of the VAT Act

[Applicable provision: section 72 of the VAT Act]

[Clause 71 of the Bill]

Proposed amendment

The proposed amendment adds to the “difficulties, anomalies or incongruities” that have arisen or may arise in regard to the application of any of the provisions of the VAT Act, “similar difficulties, anomalies or incongruities have arisen or may arise for any other vendor or class of vendors of the same kind or who make similar supplies of goods or services”.

Problem identified and suggested solution

The work group is uncomfortable with the amendment.

The work group recognises that section 72 in its current form could be abused, but believes that the amendments concurred with (see below) are sufficient to contain any form of abuse.

The need for section 72

It is submitted that there is a very real need for this section: Although section 72 was introduced as a measure to deal with areas where a decision as to the manner in which such provisions shall be applied; the calculation or payment of tax; the circumstances still exist where legislation cannot be amended in time to give direction, thereby negatively impacting business. These circumstances arise because the business world is changing constantly and as such instances do crop up where there is need for the revenue authority to provide direction in line with policy, but where the legislation (at that time) does not suffice. As a highly transactional tax, where the instance of tax is immediate, VAT (more so than other taxes), require a measure of support in this regard.

It is recommended that no amendment be made to section 72(1)(i), since the suggested deletion of the word “substantially” will leave no room for circumstances where the financial impact on the fiscus will be negligible.

Further, the suggested deletion of the word “ultimate” will have the effect that the section will potentially never find application, should one consider the tax effects of the supplier and recipient individually and not collectively.

It is recommended that the references to “an arrangement” are not deleted, to ensure that SARS/National Treasury is able to make an arrangement to overcome the difficulty/anomaly/incongruity.

The proposal in proviso (ii) can stay - *contrary to the construct and policy intent of this Act as a whole or any specific provision in this Act.*

The effective date of 21 July 2019

There is a serious concern and reservation with regard to the proposed effective date. Whilst it seems common in Income Tax, Value-Added Tax is a transaction-based tax and vendors requiring a decision need certainty as to the applicable provisions at the time of making application. The only provisions applicable until the legislation is promulgated are the current provisions of section 72.

The main concern is how will current section 72 applications will be considered. It is suggested that matter be clarified.

End.