CALL FOR COMMENTS: DRAFT LEGISLATION RELATING TO EXPORT REGULATIONS FOR GOODS EXPORTED BY ROAD OR RAIL

Dear Sir/Madam

We refer to your request for comments on the draft regulations issued in terms of section 74(1) read with paragraph (d) of the definition of exported in section 1 of the VAT Act. The comments cover legal interpretational and practical considerations.

Definition of the word “exported” for purpose of the Regulations

The issue

1. A VAT refund may only be claimed when the goods are exported within 90 days for the date of the invoice. We currently experience difficulty with the meaning of the word “exported” for the purpose of the regulations, and it seems that different meanings could be attributed to the word in different circumstances.

2. For example, In the case of a tourist that purchased goods in SA, he is entitled to a refund whilst he is still on the airside of customs at an airport, i.e. whilst the goods are still in South Africa (see paragraph 6(5) of the draft regulations), presumably on the basis that the goods are deemed to be “exported” for the purpose of the scheme once...
the tourist has passed through customs control. In the case of goods that are exported by ship, the question arises as to when are the goods deemed to be exported for purpose of the scheme, i.e. when the goods are shipped on board, when the bill of lading is issued, when the Bill of Entry (Export) is processed, when the ship departs from the harbour or the moment when the ship crosses into international waters. Each of these dates could be different.

3. The date of export is of critical importance in view of the time restrictions imposed in Part Four paragraph 21 of the Regulations and the time restrictions when the claim must be submitted to the VRA (paragraph 3(1)(b) of the Regulations), and it is therefore required that this date be clarified in the Regulations.

**Interpretation**

4. The word “exported” is not defined in the Regulations. The word “exported” is defined in section 1 of the Value-Added Tax Act, No 89 of 1991 (“the VAT Act”) for purposes of the Regulations in paragraph (d) as movable goods removed from the Republic by the recipient for conveyance to an export country in accordance with the provisions of an export incentive scheme approved by the Minister. The word “removed” is not defined in the Regulations and therefore takes on its ordinary meaning.

5. Remove is defined in the *Compact Oxford Dictionary* to mean “take away from the position occupied”. “Removed” therefore means that the goods must have been taken away or exported from South Africa. ”Export” is defined in the *Compact Oxford Dictionary* to mean “to send goods or services to another country for sale”. The Collins Concise Dictionary defines the word to mean: “goods or services sold to another country or countries”.

6. The exact date when goods physically leave the “Republic” as defined in the case of sea transport particularly, i.e. 200 Nautical Miles from the shoreline, cannot always be easily determined.

7. In our view the date of export for purposes of the Regulations should be aligned with the date of export as contemplated by the Customs and Excise Act, because section
13(6) of the VAT Act provides that the provisions of the Customs and Excise Act relating to the importation, transit, coastwise carriage and clearance of goods and the payment and recovery of duty shall mutatis mutandis apply as if enacted in the VAT Act, whether or not the said provisions apply for the purpose of any duties levied in terms of the Customs and Excise Act. The Regulations further require the export documentation as prescribed under the Customs and Excise Act, 1964 as supporting documentation to substantiate that the goods have been exported. This will then be the customs release note containing the bill of entry number and date allocated to that export transaction.

8. “Export” or “exported” is not defined in the Customs and Excise Act either. However, section 38(3) of the Customs and Excise Act provides that:

(a) Every exporter of any goods shall, before such goods are exported from the Republic, deliver, during the hours of any day prescribed by rule, to the Controller a bill of entry in the prescribed form, but the Commissioner may—

(i) if no export duty is payable on and no obligation or condition is to be fulfilled or complied with under any law in respect of such goods; or

(ii) in the case of goods to be exported overland by way of a vehicle (excluding an aircraft and a train) which are loaded for export at a place other than a place appointed under section 6 where goods may be entered for customs and excise purposes, allow such a bill of entry to be delivered at such time as he deems reasonable.

(b) For the purposes of paragraph (a), in relation to the delivery of a bill of entry, the goods referred to therein shall be deemed to have been exported from the Republic—

(i) in the case of goods to be exported in a ship, at the time when such goods are delivered to the port authority, a depot operator, the master of the ship concerned or a container operator, as the case may be;
(ii) in the case of goods to be exported in an aircraft, at the time when such goods are delivered to the transit shed operator or degrouping operator;

(iii) in the case of goods to be exported in a train, at the time when such goods are delivered to the railway authority;

(iv) in the case of goods to be exported overland in a vehicle (excluding an aircraft and a train), subject to the provisions of paragraph (a), at the time when such goods arrive at a place of entry appointed under section 6 where such goods may enter or leave the Republic.

(Our underlining)

9. Section 38(3)(a) requires in the introductory wording that every exporter of any goods must deliver a bill of entry to the Controller before the goods are exported. The Commissioner for the SARS may allow the bill of entry to be delivered at such time as he deems reasonable in the circumstances specified in section 38(3)(a) subparagraphs (i) and (ii). The Commissioner’s discretion is bound only by the circumstances specified. Therefore only if an export duty is payable or if the goods are subject to export control, must the bill of entry be delivered before the goods are exported. The bill of entry can therefore be delivered before or after the goods have been exported, and consequently the Bill of Entry (Export) date cannot represent the date of export.

10. In the case of *De Beers Marine (Pty) Ltd v Commissioner for SARS* [2002] 3 All SA 181 (A) the Court considered the various dictionary definitions of “export” for purposes of the Customs and Excise Act. The Court held that the narrower commercial sense of the word, which approximated the definition, was intended by the legislature as the word was used in a commercial context in the Customs Act.

11. The Court held that whether goods were exported or not depended on the purpose for which those goods were taken or delivered from a customs warehouse, rather than what in fact happened to the goods subsequently.

12. In relation to the delivery of a Bill of Entry (Export), the goods referred to therein are deemed in terms of the Customs Act to have been exported at the time when such
goods are delivered to the master of the ship concerned if transported by ship, or at the
time the goods are delivered to the transit shed operator or degrouping operator in the
case of air transport.

13. We therefore consider the date of export for purposes of the Regulations to be the date
on which the goods are delivered as contemplated by section 38(3) of the Customs
Act.

14. With regard to sea transport, the Bill of Lading is a legal document between the
shipper of goods and the shipping line, detailing the type, quantity and destination of
the goods being carried. It serves as a receipt by the shipping line that the goods have
been loaded onto the vessel, and it also serves as proof of completing a legal
obligation in relation to the delivery of the goods. The Bill of Lading further confers
title to the goods to the consignee noted on the Bill.

15. The Regulations should therefore require a copy of the Bill of Lading as proof of
export and to determine the date of export in the case of sea transport. The Bill of
Lading reflects the shipped on board date, which is the date on which the goods were
placed on board the ship, i.e. the date upon which the goods were delivered to the
master of the ship and are deemed to be exported in terms of the Customs and Excise
Act.

Proposed solution

16. For exports by sea the shipped on board date reflected on the Bill of Lading should be
considered to be the date of export for purposes of the Regulations. Similarly with
regard to air transport the air waybill date should be considered to be the date of
export for purpose of the Regulations because this document evidences the receipt of
the goods by the airline and the contract between the shipper and the airline for the
transportation of the goods. In the case of rail transport the goods received
notification issued by the railway authority should be considered to be the date of
export.

Definition of “agent”
17. Paragraph (b) of the definition is too restrictive by requiring that the movable goods must be delivered to the qualifying purchaser at an address in an export country. It often happens that a qualifying purchaser acquired goods in South Africa for sale and delivery to the qualifying purchaser’s client in the export country, or the goods may be sold by the qualifying purchaser on the high seas.

18. The agent will not always be required to consolidate movable goods before they are exported. The reference to consolidate should therefore be removed as it may be too restrictive and could disqualify exports for which no consolidation is required.

19. We recommend that paragraph (b) be amended to read:

“(b) that has been appointed by a qualifying purchaser to collect and deliver movable goods for a qualifying purchaser at an address in an export country”

**Definition of “cartage contractor”**

20. The requirement that the cartage contractor must be a registered vendor is too restrictive. The important factor to consider is whether the goods have been exported. The means of transport or the status of the cartage contractor merely transporting the goods should not have any impact on whether or not the export qualifies in terms of the Regulations. From a commercial perspective the qualifying purchaser will be limited with regard to the contractors that could be used, and the availability of registered contractors may also become an issue.

21. We propose that the requirement that the cartage contractor must be a registered vendor be removed.

**Definition of qualifying purchaser**

22. The requirement in paragraph (g) that the foreign enterprise must be registered as an importer or exporter in terms of the Customs Act will in our view render Part Three of the Regulations superfluous, as such persons will most probably also be registered as vendors for VAT purposes and who will claim the VAT paid to vendors on their VAT returns.
Definition of warehouse

23. The current definition refers to “the agent’s premises”. We assume that the term includes premises leased/rented by agents (i.e. not only directly owned premises). The recommend that this issue be clarified.

24. Furthermore, do the regulations envisage that outsourcing arrangements will be covered? If so, the GRN requirements contained in para. 13.2(b) need to be reconsidered – the warehouse would under these circumstances issue the GRN, not the agent.

Paragraph 1

25. Just a technical correction – reference to “VAT” in line 3 must read “Tax”

Paragraph 3(1)(b)(iii)

26. It is unclear as to why the qualifying purchaser is only entitled to submit the claim after the goods have been received by the qualifying purchaser. Where a qualifying purchaser acquired goods in SA for sale and shipment to a foreign customer of the qualifying purchaser, the goods will never be received by the qualifying purchaser. Similarly, if the goods are sold on the high seas, the qualifying purchaser will not receive the goods and will not be entitled to a refund.

27. We recommend that the requirement that the application for the refund can only be made after receipt of the goods be removed.

28. It is unclear as to why subparagraph (iii)(aa) is required in the case of exports via commercial ports listed in paragraph 4(1) and 4(2). This should only be a requirement for exports via commercial ports listed in paragraph 4(3).

Paragraph 3(2)(a)

29. The cartage contractor enters into an agreement with the qualifying purchaser for the transportation of the goods, and acts on the instruction of the qualifying purchaser. The placing of an obligation on the cartage contractor to ensure that the goods must be
exported within 90 days from the date of the invoice is not commercially viable. It is
the responsibility of the qualifying purchaser to ensure that the goods are exported
within the 90 day period, and the qualifying purchaser would have an obligation to
instruct the qualifying purchaser accordingly.

30. We propose that subparagraph 2(a) be deleted.

**Paragraph 3(2)(c)**

31. Where a qualifying purchaser acquired goods in SA for sale and shipment to a foreign
customer of the qualifying purchaser, the goods will not be delivered to the qualifying
purchaser but to its customer. Similarly, if the goods are sold on the high seas, the
qualifying purchaser will not receive the goods.

32. We recommend that this paragraph be amended to read:

“(c) delivered to an address in an export country”

**Paragraph 5**

33. It is not clear as to what is a “letter of authorisation” or the “authorised person”
referred to in subparagraph 2(b). We recommend that these terms be defined in the
Regulations.

**Paragraph 6**

34. Currently the VRA also makes payment in US$ or € if required by the qualifying
purchaser. This does not seem to be provided for in the Regulations. We recommend
that the Regulations be amended accordingly.

35. In some instances the qualifying purchaser may require the VRA to make the refund
payment to a third party authorised by the qualifying purchaser. We recommend that
the Regulations should provide for the payment to be made by the VRA to a third
party if duly authorised by the qualifying purchaser.

36. Paragraph 6(5) refers to a form VAT 255 but the Regulations do not require a
qualifying purchaser to complete and submit such a form to the VRA. The purpose
and use of the form VAT 255 should be clarified in the Regulations. A form VAT 255 is also not available on the SARS website.

37. Paragraph 6(6) allows for the period in which the claims can be submitted to the VRA to be extended. In this regard it should be noted that we had experience with the VRA where their offices were closed (specifically during holiday periods) and were it was not possible to deliver the claims to the VRA. This issue should either be addressed with the VRA or in the Regulations. Also, electronic submission of the VAT claims should be catered for, where the original tax invoices are then subsequently submitted to the VRA.

38. Paragraph 6(b) provides for an extension of the period to submit a claim where the vendor incorrectly levied VAT at the zero rate and then subsequently levies VAT at the standard rate which is then paid by the qualifying purchaser. It often happens that the supplier rectifies the mistake by levying and accounting for the VAT himself because the qualifying purchaser cannot get central bank approval in his country for the payment of the additional amount on VAT that is subsequently levied. We request that the Regulations should also provide for a refund to be claimed by the qualifying purchaser in these circumstances, and for the VAT refund payment to be made to the supplier who paid the VAT, with the knowledge, consent and authorisation of the qualifying purchaser.

**Paragraph 7(b)(ii)**

39. It is not clear as to what is a “letter of authorisation” or the “authorised person” referred to in subparagraph (b)(ii). We recommend that these terms be defined in the Regulations.

**Part Three**

**Paragraph 12**

40. Subparagraph 2(d) only deals with the situation where the goods are consigned or delivered to the agent’s premises. However, the situation where the agent collects the goods from the vendor’s premises for export should also be included.
41. The purpose of paragraph 2(e)(iii) seems unclear. The inventory reconciliation may contain confidential information due to the fact that qualifying purchaser may not want to disclose the identity of his suppliers for commercial reasons, or the nature of the goods purchased. This requirement may therefore not be practical.

42. Subparagraph 2(f) should preferably clarify what documentation will be required.

43. Subparagraphs 12(3) and 13(3) place an obligation on the vendor and on the agent to account for VAT if the requirements are not complied with. The SARS is then entitled to claim VAT from both parties on a single supply by the vendor?

**Paragraph 13**

44. The requirement in subparagraph 2(b) that the agent must be registered as a customs client as well as a remover of goods in bond substantially limits the scope of the scheme to apply the zero rates there is only a limited number of agents that registered as removers of goods in bond. It is uncertain why this requirement is included as local purchases of goods will not be entered onto as customs bonded warehouse for export.

45. It appears from subparagraph 2(c) that the agent must enter the goods into a warehouse for the export transaction to qualify for the zero rate. Not all goods that are exported via an agent by road or rail are required to be entered into a warehouse. The requirement of entry into a warehouse should therefore be removed.

46. Subparagraph 2(d) requires a certified copy of the vendor’s tax invoice. The need for a certified copy seems unclear. We recommend that the requirement of a certified copy of the tax invoice be removed as a normal copy of the tax invoice should suffice. This will also bring this requirement in line with the rest of the Regulations.

47. With regard to subparagraph 2(e), please note that not all goods that are exported via an agent by road or rail are required to be entered into a warehouse. The reference to a warehouse should therefore be removed.

48. Paragraph 13.2(f)(iii) requires proof that the goods had been imported into the export country. We recommend that specific detail be provided of what is being required.
49. The purpose of paragraph 2(i) seems unclear. The inventory reconciliation may contain confidential information due to the fact that qualifying purchaser may not want to disclose the identity of his suppliers for commercial reasons, or the nature of the goods purchased. This requirement may therefore not be practical. We would recommend that such reconciliation be retained by the agent for review by SARS if required.

50. Paragraph 13.2(j) provides that the vendor/agent must provide security for VAT when required by the Commissioner. Clear guidelines need to be given under which circumstances SARS will apply this – the requirement to make a cash deposit may negate all the benefits of applying the zero-rate.

51. With regard to subparagraph 2(k), the goods that are exported may not be required to be entered into a warehouse.

52. Paragraph 13(2)(k) requires that the goods must be packed under customs supervision. If customs lacks the capacity to perform this duty effectively, SARS may be the party responsible for causing deadlines to be missed. Will SARS automatically grant further extensions where this occurs?

53. Regarding subparagraph 2(l), it may not be possible for the agent to obtain proof of the time payment of consideration is received by the vendor. The requirement to export within 90 days from the time payment of consideration is received by the vendor is therefore not practical to comply with by the agent. The words “or the time any payment of consideration is received by the vendor” should therefore be removed.

54. Subparagraphs 12(3) and 13(3) place an obligation on the vendor and on the agent to account for VAT if the requirements are not complied with. The SARS is then entitled to claim VAT from both the vendor and the agent on a single supply by the vendor?

Paragraph 14
55. The goods can be exported directly from the vendor’s premises to the qualifying purchaser in the foreign country without moving the goods into a warehouse of the agent first. The requirements of subparagraph 1(a) and (b) should therefore be reconsidered.

56. The qualifying purchaser may require that the goods be delivered to the qualifying purchaser’s foreign customer in the export country. Subparagraph 1(b) should therefore exclude the words “to the qualifying purchaser” and be replaced with the words “to an address in an export country”

Paragraph 15
57. The requirement in subparagraph (2) that the foreign enterprise must register as an exporter in terms of the Customs Act will in our view render Part Three of the Regulations superfluous, as such person will most probably also be registered a vendor for VAT purposes and who will claim the VAT paid to vendors on their VAT returns.

Paragraph 16
58. Not all goods will be required to be stored in a warehouse. We recommend that the reference to the storage in a warehouse be removed.

59. The agent will have difficulty in determining the date when the vendor received payment for the goods. The export should therefore qualify under Part Three of the Regulations if the goods are exported within 90 days from the date of the invoice, irrespective of when the vendor received payment.

Part Four

Paragraph 21
60. In some circumstances it would cause difficulty for the qualifying purchaser to obtain proof of the time payment of consideration. We recommend that the reference to the date payment is received by the vendor in subparagraph 1 be removed.

61. With regard to subparagraph 2(a) we recommend that the date referred to be clarified.
62. Subparagraph 3 should cross refer to subparagraph 2(b) only.

Paragraph 22
63. Subparagraph 1 stipulates the date from which the 90 day period is determined is the date the movable goods are required to be exported. We recommend that this date be replaced by “the date the movable goods are exported”.

64. With regard to subparagraph 3, there is currently no provision in section 16 of the VAT Act under which the amount previously paid can be deducted as input tax. This amount also does not fall within the ambit if the definition of “input tax”. We propose that section 16 and section 1, definition of “input tax” be amended accordingly.

65. Subparagraph 5 should be limited to subparagraph 4(b), (c) and (e).

66. With regard to subparagraph 7, there is currently no provision in section 16 of the VAT Act under which the amount previously paid can be deducted as input tax. This amount also does not fall within the ambit if the definition of “input tax”. We propose that section 16 and section 1, definition of “input tax” be amended accordingly.

67. Certain items cannot be entered into warehouses by reason of its sheer magnitude. Such goods are normally connected ex-factory and exported by road or rail. The Regulation should provide the Commissioner with a discretion to treat such instanced as falling within the ambit of the regulation.

Yours faithfully

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