Dear Sir / Madam

VALUE-ADDED TAX (“VAT”): COMMENTS ON SECOND DRAFT BINDING GENERAL RULING ON THE VAT TREATMENT OF THE SUPPLY AND IMPORTATION OF FRUIT AND VEGETABLES

1. We write with reference to SARS’ call for comments on the Second Draft Binding General Ruling on the VAT Treatment of the Supply and Importation of Fruit and Vegetables (“Draft BGR”). Please find the SAICA Value Added Tax Committee’s (a sub-committee of the SAICA National Tax Committee) response to the request for comments on the Draft BGR.

General comments

2. We support the stance taken by VATCOM1 that the favoured treatment of goods and services for VAT purposes is ill advised, and that this has been accepted globally.

3. The drive behind the zero-rating of basic foodstuffs in order to decrease the price of food used mainly by low-income families is acknowledged and understood. However, this approach has various shortcomings.

4. The application of a favourable VAT treatment to any goods or services generates problems relating to how the specific goods and services are defined, as well as how those definitions are interpreted. This in turn provides the opportunity for evasion and makes monitoring and enforcement more problematic.

5. This is specifically relevant given the current wording of the exclusions listed within Part B of Schedule 2 to the Value-Added Tax Act No. 89 of 1991 (“the VAT Act”). In the case of fruit and vegetables, such items, which have been dehydrated, dried, canned or bottled, are specifically excluded from the zero-rating.

6. These specific processes as well as other processes (cutting, slicing, dicing, etc.) are either not used in the governing statutes or, where they are, are not defined in the VAT Act.

7. These terms must consequently be given their ordinary, general meaning. This leads to uncertainties, notwithstanding the administrative and compliance burden on vendors who supply such foodstuff. This situation is highly undesirable when dealing with exceptions in tax law.

8. The specific comments below deal primarily with the interpretational challenges. We are concerned that the BGR process is used in this case to create law rather than interpret it.

Specific Comments

Preamble-Bullet 5

9. “199” should read “1991”

Paragraph 2.1 – process of preservation

10. The essential distinguishing factor between fruit and vegetables qualifying to be supplied at the zero rate of VAT and those that do not, is whether any process that the fruit or vegetable have undergone was for the sole purpose of preserving the fruit and vegetables.

11. With regards to fruit or vegetables that are cut, diced, sliced, peeled, shredded or de-pitted, the primary enquiry is whether SARS considers such processes to be “fruit or vegetables … treated in any manner except for the purpose of preserving such … fruit or vegetables … in their natural state”.

12. If the above activities are not considered to be a process to preserve the fruit or vegetables in their natural state, it could conceivably be argued that if any of the above processes are applied to fruit and vegetables, the fruit and vegetables cannot be supplied at the zero-rate.

13. We recommend that the final BGR clearly states that the processes of cutting, dicing, slicing, peeling, shredding and de-pitting of fruit and vegetables, are regarded as processes as envisaged in Items 12 & 13 of Part B of Schedule 2 to the VAT Act and that such activities are regarded as activities to preserve the fruit and vegetables in their natural state.
Paragraph 2.1 – labelling

14. The last paragraph in Paragraph 2.1 of the draft BGR read with Paragraph 2.2 (f) of the BGR creates confusion. If sliced mixed fruit is sold in a supermarket as fruit salad, does the mere labelling of the product as fruit salad make the supply thereof subject to VAT at the standard rate, notwithstanding the fact that the essence of the supply is cut, diced and sliced fruit sold as a mixture.

Paragraph 2.2 – excluded items

15. The introductory paragraph to Paragraph 2.2 of the draft BGR states, “The supply of fruit and vegetables in the following instances is specifically excluded from Items 12 and 13 respectively …”.

16. The above wording creates the impression that the exclusion emanates from the wording of Items 12 and 13 of Part B of Schedule 2 to the VAT Act. On closer scrutiny it is clear that two items only exclude dehydrated, dried, canned or bottled vegetables, and dehydrated, dried, canned or bottled fruit and nuts.

17. Based on the above specific exclusions, we submit that only item (d) (“Dehydrated, dried or compressed fruit and vegetables, for example compressed dates”) would not qualify to be zero-rated.

18. In our view items (a), (b) & (c) would be excluded (if they are excluded) as a result of the “processes to preserve test” and items (e) & (f) would be excluded by the “meal ready for consumption test”.

Paragraph 2.2 – types of processing

19. Uncertainty exists in practice as to the appropriate cut-off point where fruit and vegetables are merely cut, sliced, diced or shredded (qualifying to be zero-rated) and where such fruit or vegetables are “minced, crushed or pureed” (resulting in such supplies being standard rated).

Paragraph 2.2 – added items

20. Paragraph 2.2 (a)(i) of the draft BGR states “a sachet of spices added to sliced mushrooms… whether or not it is packaged separately in the same container” is subject to VAT at the standard rate. In our opinion, this approach ignores the impact of section 8(15) of the VAT Act that states: “For the purposes of this Act, where a single supply of goods or services or of goods and services would, if separate considerations had been payable, have been charged with tax in part at the rate applicable under section 7(1)(a) and in part at the rate applicable under section 11, each part of the supply concerned shall be deemed to be separate supply.” We recommend that this issue be clarified in the final BGR.
Paragraph 2.2 – meals in terms of carrying on an agreement

21. Paragraph 2.2(f) of the draft BGR states that “Fruit and vegetables supplied in the course of the furnishing or serving of any meal, refreshment, cooked or prepared food does not qualify to be zero-rated”.

22. Paragraph 2 of Part B of Schedule 2 to the VAT Act determines that the zero-rate will not apply where: “…any goods mentioned in that paragraph are supplied in the course of carrying out any agreement for the furnishing or serving of any meal, refreshment, cooked or prepared food or drink, as the case may be, so as to be ready for immediate consumption when so supplied.”.

23. In our opinion, when regard is had to the requirement that the fruit or vegetables must be supplied “in the course of carrying on any agreement for the …”, the application of the prohibition to zero-rated supplies is much narrower than the application afforded to it in the draft BGR. This issue should be considered carefully before the final BGR is issued.

Conclusion

24. In our opinion, in its current version, there are too many inconsistencies between the draft BGR and governing statute. The interpretation of too many issues is still not adequately addressed.

25. We therefore do not recommend that the draft BGR be issued without consideration to the issues raised above.

Yours sincerely

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