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Submission File

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South African Revenue Service
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PRETORIA
0001

BY EMAIL: policycomments@sars.gov.za

Dear Sir/Madam

SUBMISSION: DELAYED VAT REFUNDS, INTEREST AND THE LEVY OF ADDITIONAL TAX/UNDERSTATEMENT/LATE PAYMENT PENALTIES

We refer to recent matters encountered regarding delayed value-added tax (“VAT”) refunds. The circumstances are not unique to these taxpayers but occur on a regular basis. We hereby present the SAICA National Tax Committee’s specific areas of concern as noted below.

Delayed vat refunds and interest

The matters relate to taxpayers which are involved with major capital projects.
The taxpayers are required to register as VAT vendors as their turnover in respect of supplies exceeds the threshold of R1 000 000. However, as is the case with all enterprises in the construction industry, consideration for supplies will be made upon completion of certain predetermined stages of construction. It is therefore inevitable that the taxpayers will incur expenditure related to goods or services acquired and as such will be entitled to VAT refunds of VAT levied by suppliers, i.e. the input tax credits will exceed the output tax payable.

Due to the mismatch in cash inflows and outflows, the management of the cash flow of such construction enterprises is crucial to the success of the enterprise and the profitability of the project concerned.

The quantum of the VAT refunds due is often significant and is in the region of amounts exceeding R10 – R50 million per month. As such, these amounts are always subject to audit by the South African Revenue Service (“SARS”).

Section 163(2) of the Tax Administration Act determines that a taxpayer may request a senior SARS official to suspend the payment of VAT or a portion thereof due under an assessment if the taxpayer intends to dispute or disputes the liability to pay such tax.

Where extensions are granted as envisaged above in practice, and VAT refunds become due in respect of subsequent tax periods, the SARS system currently by default treats the amount under dispute as an amount of tax outstanding, hence stopping such refunds until being advised that the amount are outstanding based on an agreement with SARS. The delays in refunds cause critical cash flows to be stuck as a result of an inadequate SARS process.
The taxpayers usually accept that SARS is entitled to review any VAT return submitted by a vendor and request information required to verify the information provided in the VAT return and usually comply with all requests for supporting information and do not prevent SARS from obtaining the relevant supporting documentation requested.

The request for submission of supporting documentation usually results in a delay of at least 2 months before the taxpayers receive any refunds of VAT due. There are, however, situations where refunds may be delayed for much longer and instances of delays of 6 months and more have been noted. There are a number of instances where taxpayers experience delays of up to 6 VAT returns, and based on the quantum of the VAT refunds due, cases have been noted where taxpayers are out-of-pocket for between R60 – R200 million at any one time.

The situation is further exacerbated by the fact that the taxpayers have to request SARS to pay interest on the delayed refunds. In this regard, I note the provisions of sections 44 and 45 of the Value-Added Tax Act, No 89 of 1991 (“the VAT Act”).

Section 44(1) of the VAT Act provides that “(A)ny amount of tax which is refundable to any vendor in terms of section 16(5) in respect of any tax period shall, to the extent that such amount has not been set off against unpaid tax in terms of subsection (6) of this section, be refunded to the vendor by the Commissioner: ...”.

The taxpayers often do not have any unpaid tax due and are therefore entitled to the VAT refunds in terms of this section.
Section 45(1) of the VAT Act provides that “(W)here the Commissioner does not within the period of 21 business days after the date on which the vendor’s return in respect of a tax period is received by an office of the South African Revenue Service refund any amount refundable in terms of section 44(1), interest shall be paid on such amount at the prescribed rate (...) and calculated for the period commencing at the end of the first-mentioned period to the date of payment of the amount so refundable: Provided that –

(i) where such return made by the vendor is incomplete or defective in any material respect the said period of 21 business days shall be reckoned from the date on which –

(aa) the vendor rectifies the return and satisfies the Commissioner in writing that the incompleteness or defectiveness of the return does not affect the amount refundable; or

(bb) information is received by the Commissioner to enable him to make an assessment upon the vendor reflecting the amount properly refundable to the vendor;

(iA) where the vendor is in default in respect of any of his obligations under this Act or any other Act administered by the Commissioner, to furnish a return as required by such Act, the said period of 21 business days shall be reckoned from the date on which any such outstanding return or returns furnished by the vendor as required by such Act are received by an office of the South African Revenue Service;
(ii) where the Commissioner is prevented from satisfying himself as to the amount refundable in terms of section 44(1) by reason of not being able to gain access to the books and records of the vendor concerned after having, within a reasonable time, made a request by registered post, facsimile transmission, electronic means or personal delivery, to the vendor for access to such books and records during the period of 21 business days contemplated in this subsection, the said period of 21 business days shall be suspended from the date of despatch of such request by registered post, facsimile transmission, electronic means or the date of delivery of the personal delivery, until the date on which such access is granted;”

Based on the provisions of section 45 of the VAT Act, the taxpayers should be refunded with interest and should not be obliged to submit requests to SARS for the remittance of VAT refunds due with interest determined in terms of the provisions of sections 44 and 45 of the VAT Act.

As the amounts are often significant and taxpayers are not receiving VAT refunds within the 21 day period noted in the VAT Act, taxpayers are suffering as a result of severe pressure on cash resources. This situation also impacts on the taxpayers’ ability to manage the projects within the financial constraints and budget agreed with the customers and places the successful completion of the capital projects at risk.

Whilst the example given relates to the construction industry, the same can be said for other enterprises, including the small and medium enterprises.
There is a perception that the VAT refund system is used to manage and facilitate cash flows of the *fiscus*, a situation which is detrimental to the South African economy as a whole and to the enterprises contributing the stability and growth of that economy.

**Levy of additional tax/understatement penalty**

A number of cases have been noted where SARS have issued a VAT: Notice of Assessment (“VAT217”) without supplying reasons for levying the additional tax/understatement penalty. The basis of calculation of the additional tax/understatement penalty is also not clear or cannot be determined. Request for reasons sent by taxpayers to the general SARS e-mail remain unanswered and taxpayers who call the SARS help-line are usually informed to send requests for reasons to these e-mail addresses which appears not to be attended to or simply ignored.

**Levy of penalty for late payment of VAT done via the e-filing system**

This situation seems to affect most vendors who submit their VAT returns via e-filing on the due date, i.e. the 25th of the month following the end of the VAT period and who pay the VAT using the credit push facility on e-filing. It is noted that SARS processes a penalty for late payment before the due date, i.e. the last business day of the month, which is reflected on the statement of account.

Section 28(1)(iii) of the VAT Act provides that “*a vendor is deemed to have submitted the return and made payment within the period contemplated in*
subsection (1) if the vendor submits the returns and makes full payment of the amount of tax electronically and in the prescribed form and manner within the period ending on the last business day of the month during which that twenty-fifth day falls”. In terms of this provision, the payment is not late and hence the processing of the penalty by SARS contra to the legislation.

This has significant implications as any tax clearance certificate application between the 25th of the month the VAT return is due and the payment on the last business day of that month will probably be declined due to non-payment of VAT which is not yet due. We respectfully request that SARS consider this and make changes to the system to ensure that a taxpayer is not denied a tax clearance certificate in these circumstances.

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully

Piet Nel CA(SA)
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*The South African Institute of Chartered Accountants*