SUBMISSIONS

DRAFT RATES AND MONETARY AMOUNTS AND AMENDMENTS TO REVENUE LAWS BILL 2016

SUBMISSIONS MADE BY REDISA NPC IN RESPECT OF SEC 13(2) OF THE BILL READ WITH SCHEDULE II OF PART III

Section 13(2) of the Bill

1. This submission is made in respect of section 13(2) of the Bill read with Schedule II Part III, which has the effect of imposing an environmental levy of R2.30 per kilogram of tyre on manufacturers and importers from 1 October 2016.
2. As the Minister of Finance stated in his budget speech in February this year, and as stated in the Treasury's presentation to this Committee on 19 April 2016, the purpose of introducing the levy is to replace the fee that is currently being collected to fund REDISA NPC under its industry waste management plan – a plan approved by the Minister of Environmental Affairs under the Waste Tyre Regulations and the Waste Act[1].
3. It is also evident that Treasury and the Department of Environmental Affairs consider the Bill to constitute the 'money bill' required to be passed in accordance with section 77 of the Constitution as provided for in section 13B of the Waste Act. Under that section, the statute is required to give effect to the pricing strategy (recently published in terms of section 13A of that Act) to impose a waste management charge and, at the same time, to provide for the funding of industry waste management plans. For the reasons outlined below that is, among others, a fundamental mistake of law.
4. The consequence of section 13 of the Bill in so far as it affects tyres will be that REDISA's funding will be cut off from 1 October 2016. It is important to note that in doing so Treasury have put no alternative mechanism in place to fund REDISA NPC from that date.

[1] The National Environment Management: Waste Act, 2008

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REDISA Plan

5. In order to contextualise the imposition of this levy it is necessary to briefly describe the REDISA Plan and how its fees are collected and spent.
6. There is currently a monthly fee of R2.30 per kilogram of tyre paid by manufacturers and importers to REDISA NPC under an industry waste management plan approved by the Minister of Environmental Affairs under the Waste Tyre Regulations, 2008. It is the only industry waste management plan that has been approved despite the National Environmental Management: Waste Act, 2008 being in force since 2008.
7. The model informing the REDISA Plan is a radically innovative way of both protecting the environment and the creation of an industry (and with it employment) – a self-sustaining industry over time in which tyres are collected, stored and processed whether through recycling or other means. It is an endeavour to turn a product without value (which is why it is dumped) into one that has value and therefor collected and processed. It is about creating a circular economy.
8. The advantage of this model is that, whilst the State has the necessary supervisory power to make sure that the Plan is implemented and achieves its targets, the State bears no financial responsibility to make sure this happens - waste producers fund the Plan which REDISA is obliged to implement.
9. The plan is for a renewable period of five years. It is three and a half years into its first period of five years.
10. In terms of that plan, REDISA NPC takes on the environmental responsibility of tyre manufacturers and importers and on their behalf collects, stores and remediates waste tyres. According to the audited figures at December 2015[2], 187 611 tonnes of waste tyres have been collected and stored and accordingly diverted from landfill. A further 51 837 tonnes have been collected and stored since December. Prior to the commencement of the plan only 4% of waste tyres were being diverted from landfill. Today over 60% of waste tyres are being diverted. REDISA's collection network extends to 1385 tyre dealers (90% of the total).
11. In order to do that, the plan contracts with micro-collector cooperatives and transporters to collect waste tyres, depots to store the tyres, and recyclers to recycle them – these are the services that the fee pays for.
12. The plan provides though that this must be done in a manner that creates employment and promotes small businesses with a specific emphasis on historically disadvantaged communities. To this end REDISA has developed a programme of training, creation of employment opportunities and the

[2] PWC Report: Review of the submission to the Treasury on the implications of stopping the revenue on 1 April 2016

incubation of small businesses. According to the audited figures by PWC at December 2015 -

12.1. 3011 employment opportunities have been created – REDISA estimates that the figure is now 3 286;
12.2. 226 SMME's have been created;
12.3. 22 depots have been established, 21 of which are black owned;
12.4. 76 transporters have been contracted of which 75 are black owned;
12.5. 74 micro collector co-operatives established;
12.6. it supplies 16 recycling processors with waste tyres.

13. The Plan has therefore met and in certain aspects exceeded its ambitious performance targets. The REDISA Plan has won international accolades as being a world leading waste reprocessing model - as the Minister of Environmental Affairs herself has recognised:

    "The REDISA waste Tyre Management Plan launched in 2012 has been cited internationally as best practice for waste management" (May 2016 Budget speech)

14. The nature of the plan is such that it has a time horizon of several years – leases are entered into for three to five years at a time. Incubation periods for new SMME's which REDISA set up can take more than a year to run. Contracts with depot owners and processors have a time span of several years. REDISA is currently establishing an international standard Product Testing Institute in conjunction with the Nelson Mandela University in order to develop regulatory standards to environmentally certify tyres in order to encourage producers of tyres to manufacture technologies that will reduce or help eliminate waste. That project which includes the construction of a building to house the testing machinery in Coega in the Eastern Cape – a construction and establishment project that will take three years to complete.
15. It is able to enter into such contracts and programmes because it is assured of a monthly fee dependent on the volume of tyres manufactured or imported for so long as it meets its objectives. In other words, a change to its funding model radically affects its viability and its ability to meet its obligations and the targets approved by the Minister of Environmental Affairs.
16. But in order for REDISA to achieve its planned objectives it requires predictability in its funding over the long term.

The change in funding model

17. Without any discussion with REDISA NPC as to the consequences of changing its funding model, the Minister of Finance stated in his budget speech in February 2015 the intention to replace the 'existent levy arrangements for tyres as per the Departmental Affairs' regulations' with a tyre levy 'from the last quarter of 2015'.

18. Having failed to implement this change by October 2015, the Minister of Finance in February 2016 stated in his budget speech that he intended to replace the waste tyre fee paid directly to REDISA NPC with an environmental levy to be paid to SARS from 1 October 2016.
19. In order to achieve this, the Minister of Finance has included section 13 read with Schedule III the effect of which will be to impose an environmental levy on tyres in the amount of R2.30 per kilogram of tyre from 1 October 2016.
20. No amount has been earmarked for the funding of REDISA from that date on and accordingly its funding will become dependent on an annual determination by the Waste Bureau established under the Waste Act which in turn will depend on an annual appropriation in respect of the Department. And yet, the REDISA Plan is premised on a fixed monthly income over a minimum five-year time span and cannot operate on an uncertain annual appropriation channelled through the Department of Environmental Affairs. The effect of this change in funding model will dramatically affect its viability.

The reason for this change in the funding model

21. Treasury has made it clear that the reason for its insistence that SARS must collect the moneys to fund industry waste management plans is that the money paid to REDISA for its services is a tax and not a fee.
22. In its most recent meeting with REDISA, Treasury officials stated that it was tax because:
    - 22.1. no fee is authorised by the Waste Tyre Regulations or the Waste Act;
    - 22.2. the fee is compulsory; and
    - 22.3. there is no 'quid pro quo' – no reciprocal benefit for the fee paid.
23. REDISA has secured two opinions from Senior Counsel, both of which have been handed to Treasury[3]. Those opinions conclude that the fee paid to REDISA is not a tax – it is a fee. In summary the reasons are as follows:
    - 23.1. The fee is authorised. Regulation 9(1)(j) requires a waste tyre plan to provide estimates on the costs of implementing a waste management plan for the first five years and the 'manner in which the activities of the waste tyre management plan will be financed'. Regulation 9(1)(i) requires details on the 'manner in which the contribution of each member of the plan will be determined and how the contribution will be collected'.
    - 23.2. The fee is not compulsory. What is compulsory is for every tyre producer (manufacturer or importer) to either establish an approved plan of their own or belong to an approved plan – regulation 6(3). Although REDISA is the only approved plan, it is always open to a

[3] Electronic copies of the opinions of Adv Unterhalter SC and Adv Sholto-Douglas are available on the REDISA website at www.redisa.org.za

producer to opt out and to establish a plan of their own, which may be funded by means other than fees.

23.3. There is a quid pro quo. REDISA NPC discharges the producers' waste management obligations by taking on those obligations and discharging them by providing a waste management service (the collection and remediation of waste tyres) for a fee which is directly proportional to the mass of tyres put onto the market.

24. In this respect it is not different from the imposition of a fee on all employers and employees in an industry to fund a bargaining council or statutory council under the Labour Relations Act to provide dispute resolution functions and benefit funds in the industry. Like REDISA it is a voluntarily established body that performs a public function (dispute resolution and the management of benefit funds) funded by employers and employees in the industry.
25. The fact that industry funds an industry waste management plan approved by the Minister of Environmental Affairs in order to perform a public function (the management of waste, employment creation, and small business development) does not make the money a tax as Treasury claims.
26. Accordingly the basis advanced for changing the funding model does not exist – the REDISA fee is not a tax. Moreover REDISA NPC has submitted those opinions

The impact of the change in the funding model

27. The impact is not limited to the fulfilment of the REDISA Plan. Treasury's insistence that an industry waste management plan or an extended producer responsibility measure can only be funded by a tax and not a fee will prevent the kind of innovation that the REDISA Plan has introduced in respect of such plans and measures in other waste streams. It will choke off at source a central mechanism in the creation of a circular economy.
28. Its impact on the REDISA Plan is the following:

28.1. It means that REDISA NPC will not be able to discharge its obligations, which obligations are public obligations, under the Plan because by their very nature the Plan is premised on the minimum of a five-year horizon.

28.2. It means that it will have to change its time horizons to an annual appropriation the amount of which can never be certain, firstly because the amount that might be allocated to the Department of Environmental Affairs for industry waste management plans is uncertain and secondly because the portion of that amount the Waste Bureau determines should be allocated to the REDISA Plan each year is uncertain.

28.3. Its more immediate effect will be that it will have to alter its contracting periods which will lead to an unwillingness to invest in the processing of waste tyres which is so central to the creation of a circular economy.

28.4. This lack of predictability in funding will hamper the full realisation of both its environmental and non-environmental obligations, particularly the creation of jobs and small businesses.

29. The lack of predictability and the limited time horizon of funding will prevent industry waste management plans like the REDISA Plan from reaching their full potential and will be a brake on the creation of a circular economy.

The imposition of the levy will lead to an overall loss in revenue for the fiscus

30. REDISA currently collects R550 million annually plus a further R77 million of output VAT which is collected and paid to SARS. If the fee is converted into a levy, the VAT falls away. Moreover SARS will have to pay for the administration of the collection of the levy.
31. The REDISA Plan currently requires this amount to fund the establishment and administration of a complex network of transport and depot businesses and the remediation of waste tyres through crumbing, pyrolysis, civil engineering applications and energy recovery. It has budgeted for 2017 on this amount.
32. Accordingly, the fiscus will lose VAT plus the costs of administering the collection of the levy if the Department of Environmental Affairs is committed to the Plan meeting its objectives.
33. REDISA has reason to suspect that the reason why no alternative funding mechanism has been put in place at the same time as cutting its funding is that Treasury will seek to recover this loss by reducing the amount to be paid to REDISA in its budget appropriation for the Department of Environmental Affairs.
34. Such a reduction will impact adversely on REDISA performing its public obligations in both the environmental and non-environmental obligations particularly since it takes place before its first 5-year cycle is complete. It will at best prevent REDISA from creating more jobs and small black businesses and at worst force it to cut back on jobs and small businesses because its primary reason for existence is to perform its environmental functions.

The failure to fund REDISA from 1 October

35. No good reason has been advanced as to why the cutting off of funds is not done simultaneously with the provision of an alternative source of funds.
36. The obligations and targets under the Plan were calculated on the basis of a five-year provision of funds. The effect of cutting off funds from 1 October will mean that it will lose between 6 and 18 months of funds of the 5 years of funds secured under the Plan. Apart from its immediate effects, which are described

below, this 6 month reduction means that it has effectively been denied 10% and 30% of its funds with the impact that will have on REDISA meeting its public obligations under the Plan.

37. The immediate impact of the cutting off of its funds from 1 October 2016 together with the uncertainty of future funding is that the Board of REDISA NPC must act in accordance with the principles of good corporate governance, which means that it must take the necessary measures such as-
    37.1. not entering into new contracts or renewing contracts with small businesses which will impact on jobs;
    37.2. cutting back on its establishment and ongoing support for small businesses – support which includes compliance monitoring and assistance, business administration support and training;
    37.3. cutting back on subsidisation;
    37.4. putting a hold on the current phase of the roll out of the Plan.
38. The directors of the board of the REDISA NPC face personal liability if they default on their fiduciary duties.
39. The cutting off of funds and a slow down on the part of REDISA will mean that the entire network will fall apart. There is insufficient value in the waste tyres to sustain any part of the end-to-end chain from tyre dealer to processor and the market for waste tyres is not yet fully established which means supply exceeds demand. The impact of slowing down pre-processing and processing capability will exacerbate the gap between supply and demand. Without subsidisation and the setting up of depots, the existing depots will reach capacity within months and collection will grind to a halt. This would not only put an entire network of small black-owned transporters out of business but would also result in stock piles of waste tyres building up across the country and ultimately being dumped.

Retreaders and exporters

40. The REDISA Plan provides for credits or refunds as appropriate to tyre manufacturers and original equipment manufacturers (primarily motor manufacturers) who export tyres. That is because the tyre does not constitute an environmental hazard for South Africa, and failing to refund exporters would be both unfair and damaging to South Africa's international competitiveness. That exemption does not apply in respect of environmental levy to be imposed in terms of the Bill. The point is that the levy, although purporting to an environmental levy, is not informed by environmental policy.
41. The same applies to retreaders. The REDISA Plan exempts retreaders from the fee in respect of retreads of South African manufactured tyres. That is because it is one of the objectives of the Waste Act and the Waste Tyre Regulations to extend the life of a product that will end as waste and to re-use it, and

moreover the waste management fee for each tyre retreaded will have already been paid when the original tyre was produced. The environmental levy to be imposed by the Bill will impose the levy each time a tyre is retreaded. A tyre is normally retreaded between 2 and 4 times. Again, the levy cuts across environmental policy and penalises rather than promotes the extended use of tyres.

Constitutionality of section 13 of the Bill

42. Section 13 of the Bill in so far as it imposes a tyre levy is unconstitutional because it is irrational and liable to be set aside under the principle of legality (an aspect of the rule of law) for the following reasons:
    - 42.1. The failure to consult and to conduct a socio-economic impact assessment study has led to a failure to properly assess the consequences that the imposition will have in respect of the environment, jobs and black small businesses;
    - 42.2. The underlying reason for the section is the erroneous legal proposition that the moneys paid to REDISA for its services are a tax.
    - 42.3. Although the Bill purports to be a bill contemplated under section 13B of the Waste Act it is not, and cannot be, such a bill because it does not meet the requirements of the section, importantly that such a bill must include the 'procedures for the appropriation and allocation of funds for the implementation of approved industry waste management plans'.
    - 42.4. It cuts off REDISA's funds mid-term without providing it with alternative funding and without any reason and despite the serious impact it will have on its obligations under the Plan.

Conclusion

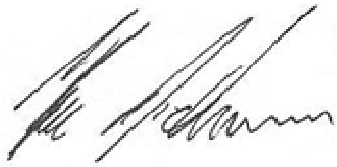
43. It is evident from everything above that the full implications of the imposition of the levy in terms of section 13 in so far as it affects tyres has not been thought through, which is also a function of the failure to consult before the decision was taken to impose the levy without prior consultation with REDISA NPC and the industry, which includes not only the manufacturers and importers of tyres but also the small businesses established and dependent on the continuation of the Plan and the waste tyre processors

Recommendation to the Committee

44. REDISA NPC recommends that section 13(2) and Part III of Schedule II of the Bill be deleted because it is unconstitutional.
45. *Alternatively* that in the light of the impact that the imposition of the levy without alternative funding being provided will have on the viability of the

Plan in the next 6 months it is recommended that the proposal be deferred to next year for fresh consideration on an informed basis by the Committee.

29 AUGUST 2016



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