Submission File

16 August 2018

Ms Mmule Majola and Ms Adele Collins
National Treasury / South African Revenue Service

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Dear Majola and Ms Collins

SAICA COMMENTS TO THE DRAFT TAXATION LAWS AMENDMENT BILL AND TAX ADMINISTRATION LAWS AMENDMENT BILL 2018

The National Tax Committee on behalf of the South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make a submission to National Treasury (NT) and the South African Revenue Service (SARS) on the Draft Taxation Laws Amendment Bill (DTLAB18) and Tax Administration Laws Amendment Bill 2018 (DTALAB18). As opposed to prior years, where a single submission has been made, our submission this year has been divided into three parts, namely matters involving amendments to –

1. The Income Tax Act, 58 of 1962, as amended (the Act);

2. The Value Added Tax Act, 89 of 1991, as amended (the VAT Act); and

3. The Tax Administration Act, 28 of 2011, as amended (the TAA Act).

We have set out in detail in Annexure A our comments in relation to the matters referred to point 2. above pertaining to the Act.

We would like to thank National Treasury (NT) and the South African Revenue Service (SARS) for the opportunity to comment on the draft bills. Please do not hesitate to contact us should you have any queries in relation to anything contained in this submission.

Yours sincerely

Christo Theron
Chairperson: VAT sub-committee

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The South African Institute of Charted Accountants

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ANNEXURE A

CATEGORY – VALUED ADDED TAX & CUSTOMS

Definition of currency

Amendment to section 2(1) – Addition of 2(1)(o)

1 The proposed amendments seek to clarify the existing provisions dealing with cryptocurrencies in the South African tax law by adding cryptocurrencies under section 2 of the VAT Act, dealing with Financial Services.

a. We further acknowledge that the concept of a crypto currency is ever evolving and that it would be difficult to define what would constitute crypto currency.

2 Submission: We welcome the amendment to bring clarity to this area of uncertainty

3 We recommend though that an attempt should be made to define the main characteristics of what would constitute a crypto currency, either by way of legislation or a general ruling or interpretation note.

Amendment to section 2(2)(ii) of the VAT Act

4 It also essential, in our view, to include a definition of cryptocurrency in section 2(2) of the VAT Act.

5 In the absence of a definition in the VAT Act, the ordinary dictionary meaning will prevail. However, there are differences in the meaning ascribed to 'cryptocurrency' by the dictionaries that contain the word.

6 Also, if the meaning of the word in the various dictionaries is considered, then it could be interpreted that any form of electronic currency not issued by a country or a central bank, could fall within the meaning of the word. This may mean that electronic currencies issued by a bank, for example, in terms of a loyalty scheme, and electronic currencies created to acquire only certain specific goods or services, could also be considered to be a cryptocurrency.

7 We do not however believe that there is a need for an additional subsection in section 2(1) of the VAT Act. The definition of "*currency*" in section 2(2)(ii) can merely be modified to include crypto currencies.

8 Submission: The definition of "currency" in section 2(2)(ii) can merely be modified to include crypto currencies.

9	We further recommend that a definition of the word “cryptocurrency” be included in section 2(2) of the VAT Act, in order to clarify what is meant by the term. In this regard, we acknowledge that the concept of a crypto currency is ever evolving and that it would be difficult to define what would constitute crypto currency. We recommend though that an attempt should be made to define the main characteristics of what would constitute a crypto currency, either by way of legislation or a general ruling or interpretation note.

Insertion of a definition of “face value” under the provisions dealing with irrecoverable debts

Amendment to section 22 – Addition of 22(7)

10 The purpose of the addition of section 22(7) is to ensure that a deduction in respect of irrecoverable debts is not allowed to more than one vendor. We acknowledge the need for and welcome the amendment.

11 The proposed wording of the section is however confusing. The amendment can be simplified by simply limiting the amount of the deduction allowed for in section 22(1A) of the VAT Act to an amount that excludes any adjustment previously made under section 22 of the VAT Act by any other person.

12	Submission: We recommend that the desired outcome be achieved by adding a proviso to section 22(1A) along the following lines:
13	*“Provided that no deduction shall be allowed under this sub-section to the extent that any other person has previously been allowed a deduction in terms of this section in respect of the account receivable transferred to the vendor.”*

14 The proposed amendment clarifies the meaning of the term ‘face value’ and removes any uncertainty in this regard. The reference to the ‘net value of the account receivable’ is, however, not clear, as it could be interpreted to be the open market value of the account receivable at the time of transfer.

15	Submission: We recommend that the following amendments to the proposed section 22(7) be considered as an alternative to the above recommendation. “(7) For purposes of this section, ‘face value’ in relation to the transfer of an account receivable by a vendor to any other person, means the [net value] amount of the account receivable at the time of transfer less adjustments made for debit and credit notes and [bad debts] amounts already written off as irrecoverable by the vendor as contemplated in subsection (1);”

Duplication

Amendment to section 25 of the VAT Act

16 Submission: This amendment in clause 90 of the DTLAB18 is duplicated in clause 12 of the Draft Tax Administration Laws Amendment Bill, 2018, though the DTLAB18 version has a specific effective date.

Amendment to section 41 of the VAT Act

17 Submission: This amendment in clause 91 of the DTLAB18 is duplicated in clause 14 of the Draft Tax Administration Laws Amendment Bill, 2018, though the DTLAB18 version has a specific effective date.

Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2018

Clause 8

18 Clause 8 of the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill, 2018 seems to have amended the VAT rate only in section 7(1) from 14% to 15%.

19 Submission: The VAT rate referred to in section 7(3)(a) should also be amended from 14% to 15%.

TAX ADMINISTRATION-TALAB2018 VAT

VAT Act-Issuing tax invoices

Insertion of subsection (1B) of section 20

20 We welcome the proposed amendment to create clarity, but in practice the proposed implementation of the new rules may prove to be challenging.

21 The draft Explanatory Memorandum states that the proposed insertion of subsection 1B purposes to clarify section 20(1) (i) of the VAT Act that it shall not be lawful to issue more than one tax invoice for each taxable supply, in circumstances where the incorrect tax invoice issued cannot be corrected under the provisions contemplated in section 21(1)(a) to (e) of the VAT Act are not applicable.

22 The amendment proposes in subsection 1B (i) that the supplier or recipient must "cancel the original tax invoice and issue a tax invoice with the correct information". In most cases, the accounting systems are designed such that once the invoice is created, the invoice can be cancelled by only the credit note. Such system controls

are in place to prevent instances such as duplication of payments. The invoice of the same supply can be created twice but it would reflect as a duplicate therefore resulting to unintended consequences such as duplication of output VAT.

23 The requirements proposed in subsection 1(B)(ii) and 1(B)(iii) provides matching particulars contained in section 21(3)(a)(vi),(v) and 21(3)(b)(vi),(v), where the supplier or the recipient must obtain and retain information sufficient to identify the transaction to which the credit note or debit note refers and document the reasons that gave rise to the issuance of a credit note or debit note.

24 Submission: Based on the analysis above, the current legislation already provides for subsection 1(B)(ii) and 1(B)(iii) under section 21 of the VAT Act.

25 It is proposed that the amendment be moved from section 20 to section 21(1) as one of the circumstances that the credit or debit note can be issued under the new proposed subparagraph (f) as follows "an error has occurred in stipulating the details to comply with the valid tax invoice to deduct input tax in terms of section 16(2) of the Act."

26 It is also proposed that subparagraph 1B (i) be deleted.

VAT Act-Issue of credit note

Amendment to section 21 of the VAT Act

27 The Explanatory memorandum sets out that the proposed amendment aims to clarify that where an enterprise is sold as a going concern, the purchaser of the enterprise is allowed to issue a credit note in respect of goods that were supplied by the seller of the enterprise but is returned to the purchaser. The proposed amendment will ease the compliance for purchasing vendors and consequently VAT will not be a cost to the business.

28 The proposed amendment is welcomed as it will provide certainty regarding the actions to be taken by a vendor where a tax invoice with incorrect information is issued.

29 Submission: We set out below our comments on the wording of the proposed amendment, for your consideration.

30 The new proposed section 20(1B) applies where an original tax invoice is issued which contains incorrect information which causes it not to be a valid tax invoice. The defined term in section 1(1) is 'tax invoice' and refers to a document provided as required by section 20. Although it seems clear what is meant by 'original tax invoice', such term could possibly give rise to interpretational difficulties as it is technically not a tax invoice as defined if it contains errors. I therefore recommend that the use of the term 'original tax invoice' be reconsidered.

31 The new proposed section 20(1B) applies where an original tax invoice is issued which contains a material error. As to whether an error on the tax invoice is material or not, is subjective and may be open for interpretation. The proposed amendment seems to be aimed at dealing with situations where some of the information reflected on the tax invoice may be incorrect or incomplete, thereby causing it not to be a valid tax invoice.[1] We recommend therefore that the reference to 'material' error be reconsidered in this context, as any incorrect information may render the document to be an invalid tax invoice, whether the error is subjectively considered to be material or not.

32 The proposed amendment makes it clear that even though the original tax invoice contained a material error, the time of supply in terms of section 9 is the 'date reflected on the original tax invoice'. The time of supply in section 9 is, however, not determined by the date reflected in the tax invoice, but by the date any invoice is issued, even though the date of issue of an invoice and the date reflected on the tax invoice may often be the same, but this is not always the case. I therefore recommend that the reference to 'the date reflected on the tax invoice' be reconsidered.

33 The proposed section 20(1B)(iii) requires the supplier or the recipient to document reasons for the cancellation of the original tax invoice and the issue of a corrected tax invoice. However, it is submitted that if the requirements of section 20(1B)(iii) are complied with and sufficient information is retained, such information should be sufficient to also determine the reasons for the cancellation of the original tax invoice. The requirement to document the reasons will place an additional administrative burden on the parties and would be a duplication of the information from which the reasons for the cancellation would in any event be evident. If the supplier or recipient does not specifically document the reasons for the cancellation, the question could then again arise as to whether an offence was committed by issuing two tax invoices.

34 Submission: In view of the above comments, we recommend that the following amendments to the proposed section 20(1B) be considered:

"(1B) Notwithstanding the provisions of subsection (1)(i), where [an original] a tax invoice issued by a supplier or recipient, as the case may be, contains [a material] an error or incorrect information (hereinafter referred to as the original tax invoice) and the circumstances contemplated in section 21(1)(a) to (e) of this Act are not applicable, the supplier or the recipient, as the case may be, must—

[1] *Draft Memorandum on the Objects of the Tax Administration Laws Amendment Bill*, 2018 par 2.10

(i) cancel the original tax invoice and issue a tax invoice, subject to this section, with the correct information, within 21 days from the date of the request to correct the original tax invoice: Provided that the time of supply contemplated in section 9 of this Act shall be determined **[in accordance]** with reference to the date **[reflected on]** the original tax invoice was issued, notwithstanding that **[the date reflected on]** the **[corrected]** tax invoice is issued on a different date **[may be different from the date reflected on the original tax invoice]**; and

(ii) obtain and retain information sufficient to identify the transaction to which the original tax invoice and the corrected tax invoice refers and the reasons for the cancellation **[; and**

(iii) **document the reasons for the cancellation of the original tax invoice and the issuance of the corrected tax invoice.]**

VAT Act-Clarity for goods returned

Amendment to section 21 of the VAT Act

35 The proposed amendment is welcomed as it clarifies the VAT implications for the recipient of an enterprise as a going concern who subsequently accepts goods returned which were previously supplied to customers by the supplier of the enterprise as a going concern. However, the wording of the proposed amendment seems confusing, as it is not immediately clear as to who the 'vendor' is as referred to in the proposed section.

36 Submission: We therefore recommend that the following amendments to the proposed wording of the section be considered.

"(d) the goods or services or part of the goods or services supplied have been returned to the supplier, including the return [to]—

(i) [a vendor] of a returnable container to a vendor, the vendor in such case being deemed for the purposes of this Act to have made the supply of the container in respect of which the deposit was charged, whether the supply was made by him or any other person; or

(ii) to [a vendor, where] the recipient of a supply of an enterprise as a going concern, contemplated in section 11(1)(e) of this Act, [was made to that vendor,] the [vendor] recipient in such case being deemed for purposes of this Act to have made the supply of the goods or services [to the recipient], whether the supply was made by him or any other vendor; or".

Documentation required for sales in execution

37 Paragraph (b) of the Clause refers to "document reflecting the information referred to in paragraph (a)". Paragraph (a) in its current proposed form does not refer or make provision for a document reflecting any information. In its proposed form it merely prescribes which documents must be obtained and retained.

38 Submission: We recommend that the proposed wording of the section be amended to create the desired link between the sub-sections.

Amendment of section 41 of the VAT Act

39 Section 41A of the Value-Added Tax Act, 1991, was repealed by section 271 of the Tax Administration Act, 2011. The proposed amendment removes the reference to the repealed section 41A.

40 Submission: We have no comments on this amendment.

VAT Act-Limited time to claim erroneously paid VAT refund

Amendment of section 44 of the VAT Act

41 The Explanatory Memorandum indicates that the policy position for VAT, being a self-assessment tax, is that the erroneous overpayment prescribes if the vendor does not claim the overpayment within a period of 5 years from the date it was paid to SARS.

42 The Explanatory Memorandum also sets out that section 190(4) of the TAA does not require such a claim, it merely deals with the situation if a claim is made. The proposed amendment aims to ensure that the prescription rule prior to the introduction of the TAA will apply and that claims will not be considered valid if the enterprise's banking details for the payment of the refund have not been provided.

43 Section 44(11) of the VAT Act inserted with the following proposed wording:

> *"(11)(a) A refund of the amount erroneously paid as contemplated in section 190(1)(b) of the Tax Administration Act may only be made by the Commissioner where the claim for the refund of such erroneous payment is received by the Commissioner within five years after the date the erroneous payment was made.*
>
> *(b) A claim for a refund under paragraph (a) shall be deemed not to have been received where the vendor has not furnished the Commissioner in writing with the particulars of the enterprise's banking account as contemplated in subsection (3)(d) prior to or together with the claim.".*

44 The proposed amendment is welcomed as it clarifies the time period within which any refund of VAT erroneously overpaid may be claimed. Although the proposed section 44(11)(b) refers to subsection 44(3)(d), it is not fully aligned to that subsection.

45 Submission: We recommend that the following amendment to the proposed wording of the section be considered:

"(11)(a) A refund of the amount erroneously paid as contemplated in section 190(1)(b) of the Tax Administration Act may only be made by the Commissioner where the claim for the refund of such erroneous payment is received by the Commissioner within five years after the date the erroneous payment was made.

(b) A claim for a refund under paragraph (a) shall be deemed not to have been received where the vendor has not furnished the Commissioner in writing with the particulars of the enterprise's banking account or account with a similar institution as contemplated in subsection (3)(d) prior to or together with the claim."

47 In addition to the above proposed amendment to section 44, we wish to advise that it is not clear as to what is meant by the reference to "account with a similar institution" in section 44(3)(d) of the VAT Act in the first instance. In view of the fact that only South African banking accounts are accepted for purposes of VAT registration, and that the South African banks are some of the best regulated financial institutions in the world, we recommend that refunds only be paid into banking accounts with registered banks, and that the reference to 'account with a similar institution' be deleted.

48 Alternatively, the term 'account with a similar institution' should be clarified.

VAT Act-Set-off and recovery of VAT in case of divisions or branches

Amendment of section 50 of VAT Act

49 The Explanatory Memorandum to the TALAB2018 sets out that:

The Value-Added Tax Act allows a vendor that carries on enterprises in branches or divisions, to separately register such branches or divisions for VAT. Further, the Act regards such branches or divisions as separate vendors, albeit that the branches or divisions are carried on by one and the same legal entity. The proposed amendment aims to simplify SARS' set-off and recovery provisions and to provide legal certainty that set-off and recovery provisions will apply across such separately registered branches and divisions. The main business and the branch operate as the same legal entity and any legal action can only be taken against the legal entity.

50 Per the Budget speech delivered earlier this year, the following was set out as a VAT administrative adjustment:

"Separate treatment of branches or divisions of a juristic person for VAT debt-collection purposes: The VAT legislation allows a vendor to register branches or divisions of a juristic person separately. Furthermore, the legislation regards such

*branches or divisions as separate enterprises, even though they are operated by a single person. An amendment is proposed to provide legal certainty that the provisions for collecting **VAT debt** will apply across all branches and divisions."* (our emphasis).

51 The reason behind the proposed amendment is clear. However, it is submitted that the administrative burden coupled with this proposed amendment has not been taken into account. The practical implications of this provision should also be taken into account.

52 To illustrate:

One legal entity has 2 separate operating divisions with each division constituting a business on its own, i.e. separate management, different locations etc. Each of the businesses within these 2 divisions are registered for VAT as separate enterprises. The same would apply in relation to PAYE, i.e. there are various PAYE registration numbers for each separate employer.

i. In the event that SARS offsets a refund due to business number 67 within division A, from an amount due by business 2 in division B, it is unclear how this will be brought to the relevant vendors' attention. Will SARS inform each vendor of the other vendor's identity since businesses will have to recover such amounts internally from each other?

ii. Assuming this might happen multiple times – the administrative burden to keep track of any liability between the respective VAT vendors is significant.

iii. What happens if business 2 in division B subsequently pays the overdue VAT without having known about the offset in the first instance? Will SARS refund the amount to business number 67 of division A automatically?

iv. Each of the separately registered VAT vendors may be a stand-alone business with its own bank account and own enterprise that may differ significantly from the other enterprise and these businesses will most probably not even have contact with each other. One vendor may sell generators will the other vendor may be a motor dealer. They may be registered under different e-filing profiles. It will be extremely difficult and unfair for one vendor who is owed a refund to try and determine against which other vendor its refund was set-off, while another vendor's debt is settled by this vendor's refund. Furthermore, a vendor is entitled to be paid interest if its refund is not paid by SARS within 21 business days. It would be unfair for the compliant vendor, waiting for its refund, to not be receiving any interest due from SARS because its refund had been set-off against a non-compliant vendor's debt over which the compliant vendor has no control.

v. In addition, thereto, SARS has applied set-off not only in relation to VAT, but have set-off a PAYE liability of one business within division A with a VAT liability from a business within division B.

1.3.7 Large taxpayers who previously had assistance from the SARS Large Business Centre by dealing with a single contact person, are not afforded this assistance anymore. To deal with various SARS personnel from different SARS centres are complicating the implementation of this proposed legislation even more.

vi. It is submitted that the single taxpayer registration status on e-filing assists in this regard, i.e. no tax clearance certificate would be obtainable from either division within the legal entity with any tax debt outstanding (VAT, PAYE) since both divisions from part of one legal entity. Businesses cannot operate without a tax clearance certificate and this is a compelling incentive to ensure all tax affairs are in order.

vii. It is further submitted that the proposed amendment is not aligned with the spirit of this section 50 of the VAT Act that deems a separate enterprise to be carried on by a person separate from the main vendor.

53 Submission: It is proposed that this amendment be withdrawn.

54 As an alternative, we recommend that the alternative proposal regarding the wording of the new proposed section 50(7) be included as the wording of the alternative proposal is more precise and therefore the preferred option.

VAT Act- set-off of tax debts

New section 50(7) – Amendment to section 51(3) of the VAT Act

55 The concept of a joint venture is not defined in the VAT Act. It is also not recognised in law as having a legal persona. It is often only identifiable based on the contractual arrangement among contracting parties. In practice it can take may shapes and forms and varies from very formal arrangements to informal collaborative arrangements.

56 Submission: Due to the critical impact that this proposed amendment might have on the parties involved in joint ventures and similar contractual arrangements, we recommend that a definition be inserted in the VAT Act as to the nature of a joint venture. Alternatively, the proposed amendment must be reconsidered.

ANNEXURE C CARRY FORWARDS-

Definitions of 'inbound insurance policy' and 'outbound insurance policy' Amendments to section 1(1)

57 The definitions of 'inbound insurance policy' and 'outbound insurance policy' in section 1(1) of the VAT Act refer to "South Africa" whereas the defined term is the "Republic".

58 Submission: We submit that the words "South Africa" in these definitions be replaced by the word "Republic".

Section 16(3) of the VAT Act

59 Section 16(3) currently provides as follows:

> *(3) Subject to the provisions of subsection (2) of this section and the provisions of sections 15 and 17, the amount of tax payable in respect of a tax period shall be calculated by deducting from the sum of the amounts of output tax of the vendor which are attributable to that period, as determined under subsection (4), and the amounts (if any) received by the vendor during that period by way of refunds of tax charged under section 7 (1) (b) and (c) and 7 (3) (a), the following amounts, namely—*

60 The second part of section 16(3) seems to imply that refunds of VAT charged under section 7(1)(b) and (c) and section 7(3)(a) are payable by the vendor together with output tax payable as determined by section 16(4). However, such refunds are not payable to SARS, as they will then result in duplications. It is also not the practice of SARS Customs to pay refunds of VAT paid under section 7(1)(b) to vendors, as the vendor would generally have deducted the amount paid as input tax. The deductions should further not be made from any amounts refunded under section 7(1)(c). The refund of an amount of VAT paid under section 7(1)(c) will only be made if the amount has been overpaid. It does therefore not make any logical sense that the deductions provided for in section 16(3) should reduce such amount refunded.

61 Submission: We recommend that the following amendment to section 16(3) be considered:

(3) Subject to the provisions of subsection (2) of this section and the provisions of sections 15 and 17, the amount of tax payable in respect of a tax period shall be calculated by deducting from the sum of the amounts of output tax of the vendor which are attributable to that period, as determined under subsection (4), ***[and the amounts (if any) received by the vendor during that period by way of refunds of tax charged under section 7 (1) (b) and (c) and 7 (3) (a),]*** *the following amounts, namely—*