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Standing Committee on Finance

By email:

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28 February 2022

Dear Ms Sepanya; Mr Wicomb, Mr Mangweni

**SUBMISSION ON THE FISCAL FRAMEWORK AND REVENUE PROPOSALS, AS PRESENTED ON
WEDNESDAY, 23 FEBRUARY 2022**

1. OVERVIEW

- 1.1. South Africa remains in a debt trap with gross debt projected at 75.1 per cent of GDP, by 2024/25.
- 1.2. Real GDP growth for 2022, 2023 and 2024 is estimated to be a woeful 2.1%, 1.6% and 1.7% respectively. and our economic future is by no means assured.
- 1.3. South Africa's unemployment rate has reached the highest recorded level due to low economic growth and decades of decline in investment.
- 1.4. President Ramaphosa's 2022 State of the Nation address highlighted –
 - 1.4.1. the risks of social unrest that awaits South Africa, if the economy does not provide the much-needed jobs and economic benefits to the country;
 - 1.4.2. the need for a new consensus, which recognizes that the State must create an environment to enable the private sector to invest and unleash the dynamism and potential of South Africans;

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- 1.4.3. that a strong South African economy is the sustainable solution to the crisis;
- 1.4.4. that Government does not create jobs; business creates jobs;
- 1.4.5. that Government's primary task is to create the conditions that will enable the private sector to grow, access new markets and create new job opportunities.

2. SARS' CONDUCT DURING VAT AUDITS AND WITHHOLDING OF VAT

- 2.1. A submission was respectfully presented to the Standing Committee on Finance, last year on 4 March 2021, expressing grave concerns regarding the practice of SARS in conducting never-ending VAT audits, the unreasonable withholding of VAT refunds and the adverse effect on our economy and job creation.
- 2.2. The abovementioned concerns are shared by the representative bodies –
 - 2.2.1. The South African Institute of Chartered Accountants (**SAICA**);
 - 2.2.2. The South African Institute of Professional Accountants (**SAIPA**); and
 - 2.2.3. The South African Institute of Taxation (**SAIT**)
- 2.3. The 2021 Report of the Standing Committee on Finance, dated 9 March 2021, recorded in paragraph 4.3 that –

“There was a concern that while promotion of exports supports the economy, the lawful Value Added Tax (VAT) zero rating of exports generally cause export companies to fall into a net VAT refund position and their business models build such refunds into their cash flow projections. The issue raised is that taxpayers in the face of a VAT audit are totally powerless unless they litigate, which means (1) taxpayers’ cash flows are significantly compromised and may be driven into insolvency, (2) SARS acts as judge, juror and executioner and (3) there is no law to compel SARS to issue a Revised VAT Assessment within a specified period and dispute resolution cannot commence. All the while, VAT refunds are withheld.”
- 2.4. National Treasury responded in 2021 that *“National Treasury and SARS were open to engaging with the commentator, to explore approaches to further improving the balance of interests of taxpayers and fiscus recommend that NT and SARS should engage the relevant civil society stakeholders to find practical solutions to the issues raised in the public hearings.”*
- 2.5. An initial meeting was held on 28 May 2021 between National Treasury, SAICA, SAIPA, SAIT and the writer to discuss the VAT concerns, but unfortunately no progress was made. Requests for a further meeting with National Treasury and SARS went unheeded.
- 2.6. The promotion of commercial activity especially in the export industry will be imperative in the support of our economy, our currency, job creation and foreign direct investment.
- 2.7. The lawful VAT zero rating of exports generally causes export companies to fall into a net VAT refund position, in terms of the VAT Act and their business models build such refunds into their cash flow projections.

- 2.8. The VAT audit and withholding problem, in fact, is not restricted to the export sector but spread widely across the economy impacting small, medium and large businesses, including those in business rescue. The VAT withholdings of course in particular severely impacts small and medium businesses, to the point of insolvency.
- 2.9. How was it possible that during the "*State Capture*" era of SARS, it was able to unjustifiably withhold some R20-billion of VAT refunds due to taxpayers?
- 2.10. Former and current senior SARS officials, who appeared at the Nugent Commission, investigating the destabilisation of SARS, during the Moyane era, testified that VAT refunds were withheld to manipulate the tax revenue collection numbers. There was a slowdown in VAT repayments due, which cost taxpayers and the economy dearly.
- 2.11. The Tax Ombudsman told the Nugent commission that delayed VAT refunds had been raised in its annual reports tabled in Parliament and there were unnecessary stoppages on taxpayer refunds. The then Honourable Finance Minister Mboweni acknowledged that withholding tax refunds had significantly harmed company cash flows and the economy.
- 2.12. Such recorded unreasonable VAT treatment was and is possible because of SARS' interpretation and application of the VAT Act.
- 2.13. The Ombud's Report during the Moyane era, noted the complaints that SARS auditors keep audits pending while repeatedly requesting information from taxpayers. Apart from delaying the refund, the incidental consequence is that if successive requests for further information are sent out each within 21 days of the other, interest will not start accruing on the refund.
- 2.14. The Ombud's provisional recommendation was that SARS should request all relevant information once, at the outset of an audit/verification. The Ombud also disagreed that while an audit/verification is in progress that refunds for other periods should be withheld.
- 2.15. The VAT audit, which is not subjected to any deadline, is capable of continuing with no finalisation and with no additional assessments been issued. In the result, no objection may be submitted by the taxpayer to enter into a formal dispute process. S.164 of the Tax Administration Act (**TAA**) is of no assistance to the taxpayer, as SARS simply withholds all VAT refunds.
- 2.16. The Commissioner: SARS has constantly assured that part of the SARS strategy is to make matters easier for the compliant taxpayer (clarity, certainty, ease of compliance) and make it very difficult for the non-compliant or tax evaders. What tax practitioners see in practice however, contradicts this assurance as many honest taxpayers are being treated as criminals.
- 2.17. The harsh reality is that taxpayers in the face of a never-ending VAT audit without a deadline for finalisation and the continual withholding of VAT refunds - are rendered totally powerless unless they have the financial resources and capacity to apply for a High Court review of SARS 'actions. Recourse to the courts is extremely costly and time consuming. Taxpayer rights are ignored.
- 2.18. When the audit is eventually finalised, there is furthermore no statutory deadline in which SARS must issue the additional assessment/s, causing further potential delay.

- 2.19. Only once the additional assessments are issued, may the taxpayer rely on the rules promulgated under section 103 of the TAA, prescribing the procedures to be followed in lodging an objection and appeal against an assessment, and the prescribed deadlines contained therein.
- 2.20. SARS may continually keep requesting additional information for the period/s under audit and continually extend the audit periods, despite the original first audits not been finalised. All the while withholding net VAT refunds.

3. In summary –

- 3.1. According to SARS, despite a recent High Court judgement:
 - 3.1.1. SARS cannot be held to any deadline in which to complete a VAT audit;
 - 3.1.2. an automatic stopper on all VAT refunds applies when an audit commences and is in progress;
 - 3.1.3. SARS may not make part-payments of a refund. The taxpayer must provide security for the whole amount of the refund/s withheld and then only the total refund/s may be paid;
 - 3.1.4. SARS may continually keep requesting additional information for the period/s under audit and continually extend the periods under audit, despite the first audits not been finalised.
- 3.2. A recent Johannesburg High Court judgement held –
 - 3.2.1. The audit process (including withholding of refunds) cannot be indefinite and must be completed in a reasonable time;
 - 3.2.2. An automatic stopper on all VAT refunds is unlawful;
 - 3.2.3. The taxpayer is entitled to a refund for as much as it can provide acceptable security. An all-or-nothing refund practice is unlawful;
 - 3.2.4. SARS may not withhold refunds for periods not under audit; and
 - 3.2.5. SARS may not keep requesting information to delay the finalization of the audit.

4. **TAXPAYERS IN THE FACE OF A NEVER-ENDING VAT AUDIT AND WITHHOLDING OF VAT REFUNDS ARE TOTALLY POWERLESS UNLESS THEY LITIGATE**

- 4.1. Taxpayers' cash flows are significantly compromised and may be driven into insolvency.
- 4.2. SARS acts as judge, juror and executioner.
- 4.3. There is no law to compel SARS to issue a revised VAT Assessment within a specified period and dispute resolution cannot commence. All the while, VAT refunds are withheld.

5. **RECOMMENDATION**

- 5.1. It is recommended that the TAA be amended to provide that SARS :

- 5.1.1. must complete and finalise a VAT audit within 4 months from the date that the taxpayer provides all the relevant material requested by SARS;
- 5.1.2. may not withhold VAT refunds for more than 2 VAT periods under audit. More specifically SARS may not continuously roll out audits into future periods and withhold the VAT refunds due, until the original audit periods have been completed (SARS when initiating an audit for the original VAT periods say - January and February, must first complete the audit and issue assessments for the original audit periods before withholding the VAT refunds for any future periods);
- 5.1.3. may not continue requesting information, which would delay the finalization of the audit;
- 5.1.4. at the outset must agree a deadline with the taxpayer for the audit finalisation. Any extension of the audit must be supported by a full motivation for the extension;
- 5.1.5. allow compliant taxpayers to apply for release of VAT refunds withheld, if they have a proven good compliance record and will suffer irreparable financial harm by the continual non-refunds;
- 5.1.6. may not withhold VAT refunds simply on the basis of pure conjecture and suspicion. There must be a factual basis for the withholding;
- 5.1.7. must not unreasonably and unfairly place the onus on businesses to control criminality in a supply and distribution chain;
- 5.1.8. must refer their findings to the NPA and SAPS for a full criminal investigation, where criminality is alleged. It cannot take it upon itself to be for all practical purposes, judge, juror and executioner - on the charges of criminality;
- 5.1.9. ensure transparent standard non-discriminatory treatment of all taxpayers under audit;
- 5.1.10. issue a revised assessment within 10 business days of finalising an audit;
- 5.1.11. issue full and proper audit progress reports and not a simple report recording simply and unhelpfully "*in execution*". That does not comprise an audit progress report.

Yours faithfully

ERNIE LAI KING
MANAGING DIRECTOR (*Electronically transmitted, therefore unsigned*)