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Dear Ms Mason and Dr Smulders

SAICA SUBMISSION: REQUEST FOR CONSOLIDATED GUIDANCE ON ASPECTS OF THE CARBON TAX ACT

Your letter “Ref #: 765880” dated 23 September 2020 has reference.

The South African Institute of Chartered Accountants (SAICA) Carbon Tax Sub-Committee requested guidance from the National Treasury (NT), Department of Environment, Forestry and Fisheries (DEFF) and South African Revenue Service (SARS) on specific aspects of the carbon tax legislation and administrative processes.

This response accordingly incorporates guidance by NT, DEFF and SARS.

1. Definition of “operational control”

The National Greenhouse Gas Emission Reporting Regulations (DEFF Regulations) under the National Environmental Management: Air Quality Act, 2004, require the principle of “operational control” to be applied in accordance with the principle of “data provider”, which is defined as any natural or juristic person conducting any activity listed in Annexure 1 to these Regulations. This means that both the principles of “operational control” and “data provider” must

be applicable, in that the data provider must also have operational control over the activities conducted.

Section 3 of the Carbon Tax Act, 2019, determines that a carbon taxpayer is a person who is subject to carbon tax as a taxpayer for the purposes of this Act and liable to pay an amount of carbon tax calculated as contemplated in section 6 in respect of a tax period as specified in section 16, if that person conducts an activity in the Republic resulting in greenhouse gas emissions that either meets or exceeds the threshold determined by matching the activity listed in the column “Activity/ Sector” in Schedule 2 with the number in the corresponding line of the column “Threshold” of that table.

The carbon tax rules to the Customs and Excise Act, 1964, mirror the registration requirements of the DEFF Regulations and require the carbon taxpayer who has operational control over emissions facilities to obtain a consolidated licence in respect of the combination of those emissions facilities. A taxpayer should therefore first determine over which emissions facilities it has operational control and then obtain a licence for those emissions facilities as its customs and excise manufacturing warehouse before it accounts for carbon tax in respect thereof.

Contractual arrangements that cause a third party to have operational control over any activity listed in Annexure 1 of the DEFF Regulations mean that the third-party entity is the responsible data provider and carbon taxpayer.

For example, in instances where a company is contracted to provide energy for the primary activity of its client by operating a boiler on the site of that client, operational control resides with the energy provider as boiler operator. In terms of the DEFF Regulations, the energy provider is responsible to register with and report to DEFF. In terms of section 3 of the Carbon Tax Act, 2019, the energy provider conducts a fuel combustion activity (heat and steam generation) and is subject to carbon tax. In terms of the carbon tax rules to the Customs and Excise Act, 1964, the energy provider is similarly required to license with and account for carbon tax purposes to SARS.

The Carbon Tax Act, 2019, and carbon tax rules to the Customs and Excise Act, 1964, do not define the term “operational control”, as this concept is defined in the DEFF Regulations, which inform the mutual design of the carbon tax. SAICA’s contention that the term “operational control” needs to be defined in the Carbon Tax Act, 2019, is therefore not supported.

2. Alignment of SARS and DEFF registration

The carbon tax rules to the Customs and Excise Act, 1964, require the carbon taxpayer who has operational control over an emissions facility to obtain a licence in respect of that emissions facility. Either the holding company, or its subsidiary company, that has operational control over the emissions facility should apply to license that emissions facility. Where the holding company has operational control, that holding company would be the licensee upon successful completion of the licensing process. Where the subsidiary company has operational control, it would be the licensee.

The company that applies for carbon tax licensing must list its DEFF registration details on the DA185.4B2 application form. This includes that company’s data provider name and data provider ID, as well as the facility names and facility IDs for each of the emissions facilities over which it has operational control and in respect of which it is applying for a licence. As the DEFF registration is also based on operational control of emissions facilities, there would be no misalignment in respect of such an applicant’s registration details with DEFF that should be so declared to SARS.

The obligation for companies to register in terms of the DEFF Regulations arose in 2017 and companies that are only registering now are non-compliant. All registration submittals on the SAGERS system are reviewed within the legislated timeframe of 30 days. Once approved, the registration acceptance letter with all registration details is downloadable on the SAGERS.

Applications for carbon tax licensing with SARS would not be delayed if the applicant has not yet received its data provider ID and facility ID numbers from DEFF. However, the applicant should amend its carbon tax licence application

by submitting an updated DA185.4B2 form with this outstanding DEFF registration information as soon as it becomes available.

Should SAICA be aware of instances where these carbon tax licensing procedures were perhaps not consistently applied by SARS, it should please forward the details of those taxpayer licence applications and the offices where these discrepancies may have occurred to the dedicated carbon tax enquiries mailbox at “carbontax@sars.gov.za” for investigation by SARS.

3. Turnaround time for licensing with SARS

SARS has prioritised its carbon tax licensing processes and re-allocated its available resources to expedite the turnaround time for the consideration of licence applications. In terms of the carbon tax rules to the Customs and Excise Act, 1964, every licence application that is approved will be issued with effect from the date the carbon tax liability of that taxpayer arose in terms of the Carbon Tax Act, 2019. Although carbon tax licences will therefore be issued and backdated to the relevant effective date for each taxpayer, the licensing processes may be delayed where companies submitted their applications or their required supporting documents late.

Although licensing commenced on 2 January 2020, SARS received the majority of 273 applications in September 2020 and further applications during October 2020. Despite dedicated SARS resources, late licence applications that are not processed in time for taxpayers to submit their accounts and payments by the due date of 29 October 2020 may result in interest and penalties. The Commissioner has discretionary power to reduce or waive interest and penalties on good cause shown by a taxpayer. Should the taxpayer demonstrate that its licence application was timely and that the delay was likely on the part of SARS, this could be a mitigating factor.

The DA 185.4B2 licence application form requires the person who applies on behalf of a company to declare the details of the meeting of the board of directors where the resolution was passed whereby that person was so authorised. If the Financial Director / Chief Financial Officer / Public Officer / Head of Tax or similar representative is authorised to sign all company

documents, the details of the meeting of the board of directors where the resolution was passed whereby that person was so authorised should be provided. This is not unreasonable considering that electronic signatures from a virtual meeting of the board of directors would be accepted.

4. Annual licence renewals

The requirement in Schedule No.8 to the Custom and Excise Act, 1964, for annual licence renewals is standard for all customs and excise manufacturing warehouses for environmental levy goods. These provisions will in future be aligned with the new customs legislation to “three years subject to conditions or such lesser period as the Commissioner may impose in each case”. However, this harmonisation will form part of the rewrite of the excise legislation and a deviation at this stage for carbon tax alone cannot be considered due to the precedent that this would create.

The delayed implementation of the carbon tax to October 2020 has resulted in the unforeseen situation that all carbon tax licences will lapse within two months. As this would cause an undue compliance burden to taxpayers and administrative burden to SARS, options could be explored to postpone the first licence renewal until 31 December 2021. However, the validity period and requirement for renewal of licences are prescribed in the primary legislation and such a postponement may therefore require legal amendments that would be subject to Ministerial approval.

5. Timing of allowances and refunds

In terms of the Carbon Tax Act, 2019, the Offset Allowance Regulations thereunder, and the carbon tax rules to the Customs and Excise Act, 1964, taxpayers are permitted to claim the:

- Offset allowance if the taxpayer has the required offset retirement certificate from DMRE to prove eligibility for that allowance; and
- Carbon budget allowance if the taxpayer has the required letter of confirmation from DEFF to prove eligibility for that allowance.

(a) Offset allowance

Companies must apply for offset retirement certificates on the COAS system of DMRE. Each application must include the supporting documents of the Extended Letter of Approval for qualifying projects and the cancellation letter or certificate for credits to be transferred to the COAS for conversion to carbon offsets for purposes of the carbon tax.

The offset allowance is percentage based and capped per IPCC code activity as determined in Schedule 2 to the Carbon Tax Act, 2019. Seeing as taxpayers would already have declared their GHG emissions for the 2019 tax period to DEFF, eligible taxpayers should know the exact amount of offsets required to claim a full or partial offset allowance.

All applications received to date have been captured on the COAS and 17 projects have been approved for taxpayers to retire offsets. This allows sufficient time for taxpayers who applied timeously to claim the offset allowance.

(b) Carbon budget allowance

The voluntary carbon budget phase of DEFF is from 2016 to 2020. A company that receives a carbon budget could qualify to claim the annual carbon budget allowance for the full carbon budgeting period depending on when the budget was issued. Further communication on the voluntary carbon budget phase will be provided by the DEFF and NT in the coming weeks.

DEFF processes carbon budget submissions within the prescribed period of six weeks, provided companies submit all the required data. This includes adherence to the DEFF Regulations and clear assumptions and justification for projected emissions. Submissions that lack sufficient information and require corrections may lead to delays of several months while DEFF awaits adequate responses from such companies. DEFF is currently piloting a carbon budget allocation methodology for use from 2020 to 2023.

The confirmation letter that proves the eligibility of a taxpayer for the carbon budget allowance is only issued once the carbon budget is accepted by DEFF. However, it is important to note that companies were supposed to have filed their carbon budget submissions with DEFF in 2015. This would have allowed sufficient time for taxpayers who commenced the process timeously to claim the carbon budget allowance from the 2019 tax period onwards.

(c) Carbon tax refunds

SARS would have no legal basis to permit taxpayers to claim allowances or to submit their accounts and payments late while they are awaiting the required supporting documents from DEFF or DMRE.

The DA180 carbon tax account includes a declaration by the taxpayer that all the information supplied is true and correct and complies with the provisions of the Customs and Excise Act, 1964. Taxpayers therefore need to submit their carbon tax accounts and payments by 29 October 2020 based on the required supporting documents in their possession. Should a taxpayer subsequently obtain the supporting documents that prove its eligibility for these allowances during the 2019 tax period, it may submit a revised account at that time. If these allowances on the subsequent revised account are approved, the overpayment on the original account is not refunded, but set off against the account of the following tax period.

6. Renewable energy premium

The policy intent of allowing electricity generators (not only Eskom) to qualify for the renewable energy premium is to level the playing field for price neutrality, as long as the company meets the following requirements:

- Licensed with the National Energy Regulator of South Africa (NERSA); and
- Supplying electricity to the national grid with a purchasing power agreement (PPA) with Eskom.

These requirements are not explicitly outlined in the Carbon Tax Act, 2019, but implicit since only licensed electricity producers can have PPAs with Eskom.

However, only electricity producers who actually pay the renewable energy premium are allowed the deduction and that would be those producers who supply electricity to the grid through Eskom and have PPAs.

Self-generation cannot qualify for the renewable energy premium, as the company does not pay the renewable energy premium on its own consumption and there is therefore no basis for them to deduct the premium. Only electricity purchased from the national grid that incurs the renewable energy premium cost and which is passed on to the consumer is eligible for the deduction equal to the amount of the renewable energy premium paid.

Taking into account the NERSA licensing requirements applicable to electricity generation, especially renewable energy, NT will explore whether the licensing requirements could be further clarified in either the Carbon Tax Act, 2019, or the Renewable Energy Premium Notice.

7. Compliance costs of nil accounts

It is a standard obligation of the Customs and Excise Act, 1964, for all excise duty, fuel levy, environmental levy and health promotion levy taxpayers to license with SARS and to account for their duty liability, irrespective of whether this might ordinarily result in the submission of nil accounts with zero duty liability. The prevalence of nil accounts is not unusual and is particularly common for those duties that have tax thresholds like the sugary beverages levy. The overwhelming majority of these taxpayers are required to submit monthly accounts, so the possibility of an annual nil account for carbon taxpayers should not be extraordinarily burdensome.

8. Deferral of accounts and payments

As part of government's COVID-19 relief measures, the due date for the submission of the carbon tax accounts and payments for the first tax period of 2019 were deferred from 30 July 2020 to 29 October 2020. Further relief is not under consideration, as the COVID-19 lockdown restrictions have been relaxed to allow for the recovery of the economy.

The request for SARS to consider the postponement of carbon tax payments on a case-by-case basis can unfortunately not be considered. Similar to taxpayers, SARS is bound by the provisions of the Carbon Tax Act, 2019, and Customs and Excise Act, 1964. SARS would therefore have no legal basis to permit taxpayers to submit their carbon tax accounts and payments after the due date of 29 October 2020 and such late submissions may also attract interest and penalties.

The Commissioner has discretionary power to reduce or waive interest and penalties on good cause shown by a taxpayer. Taxpayers who can demonstrate that the late submission of their carbon tax accounts and payments were not the result of their own negligence are therefore welcome to petition the Commissioner and to motivate their mitigating circumstances for consideration by SARS.

We trust this response is of assistance.

Kind regards

Executive: Legislative Research and Development
Date: 23 October 2020

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