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Dear Sir and/or Madam

PUBLIC COMMENTS ON THE DISCUSSION PAPER ON THE REVIEW OF THE DIESEL FUEL TAX REFUND SYSTEM

1. We set out below, on behalf of the South African Institute of Chartered Accountants ("SAICA"), our comments and submissions to National Treasury ("NT") and the South African Revenue Service ("SARS") on the discussion paper released by NT and SARS regarding the review of the diesel fuel tax refund system ("the Discussion Paper").
2. Set out below are our comments on the Discussion Paper. We have deliberately tried to keep our submission as concise as possible, which does mean that you might require further clarification. Should you require any further clarification on any of the matters raised please do not hesitate to contact us.
3. We would like to thank NT and SARS for the opportunity to participate in this review in seeking to make the diesel fuel tax refund system more efficient and effective. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex problems such as the current review proposes of the diesel fuel tax refund system and we will continue to communicate and collaborate with NT and SARS.

COMMENTS

The Discussion Paper is conceptual

4. The Discussion Paper scrutinising the diesel fuel tax refund system is welcomed given that many taxpayers question whether the diesel fuel tax refund is worth applying for, given the many challenges the current system impose.

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| <ol style="list-style-type: none">5. <u>Submission:</u> We submit that the Discussion Paper is possibly too conceptual in nature and that it is therefore difficult to discern the practical issues that may arise in future. SAICA will therefore provide constructive feedback once the draft legislation is released, and as and when practical difficulties arise. |
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Stand-alone Diesel Refund Administration System

6. Section 75 of the Customs and Excise Act No 91 of 1964 ("the Customs Act") read with Schedule 6 of the Customs Act permits the refunds of the fuel levy and Road Accident Fund ("RAF") levy imposed and how a taxpayer determines the amount of the eligible purchase.
7. The actual claims and refunds are however administered through the value added tax ("VAT") system by the SARS excise compliance division assisted by the VAT audit section. Taxpayers who qualify as diesel fuel tax refund users therefore have their claims and payments processed through the VAT system, setting off their VAT liability payable to SARS.
8. On the basis that diesel fuel tax refunds fall squarely within the domain of the Customs Act and not that of the Value Added Tax Act No 89 of 1991 ("the VAT Act"), and is merely administered through the VAT system, it should be clear that the Tax Administration Act No 28 of 2011 ("the TAA") and the VAT Act therefore cannot be used to enforce the imposition of additional taxes and/or penalties. In this regard, the VAT system is only used as a "conduit" by SARS to administer the diesel fuel tax refunds and section 2 read with the definition of "tax Acts" in the TAA specifically excludes application thereof to the Customs Act.

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| <ol style="list-style-type: none">9. <u>Submission:</u> The proposal for introducing a stand-alone diesel fuel tax refund administration system is welcomed. We submit, however, that in depth consideration should also be given as to how tax disputes, including additional taxes and/or penalties should be dealt with in the Customs Act, given that the VAT Act and TAA are not the correct tax Acts to apply. It is not clear from the Discussion Paper to what extent SARS and NT have considered the implementation of the proposed stand-alone diesel rebate system in terms of the types of penalties that will be imposed and the remedies available to taxpayers.10. Clarity is also sought on the extent to which the forfeiture provisions will be aligned in the context of diesel fuel tax refunds to ensure that there is not a disproportional burden on taxpayers.11. In this regard, it is imperative that SARS and NT remain mindful of the unconstitutionality of a reverse onus and that forfeiture must only be applied in circumstances where SARS can prove fraud and not as a routine remedy. |
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Administrative enforcement and taxpayer compliance

12. The Discussion Paper states that SARS will only allow diesel fuel tax refunds for claims that are substantiated by information that has been uploaded on the beneficiary's current registration profile on SARS' database. Such information will include details of the person managing the business, the specialist who has sufficient knowledge to ensure compliance and annually conclude new SARS agreements. It is expected of beneficiaries to update and maintain their diesel fuel tax refund registration profiles electronically to validate their claims.
 13. The Discussion Paper notes that the focus will remain on adequate and accurate logbook keeping of all diesel received, dispensed and applied in qualifying primary production activities. The Discussion Paper requires two logbooks, i.e. one to reflect the storage facility's diesel and another to detail the usage of the dispensed diesel by diesel-powered equipment and vehicles.
 14. Furthermore it is proposed that SARS will require the beneficiary to keep detailed records of maintenance, service and repairs of such diesel-powered equipment and vehicles to prevent ghost claims. The Discussion Paper notes that diesel refunds will be disallowed if the storage facilities and diesel-powered equipment or vehicles are not formally on record with SARS.
 15. Section 195 of the Constitution stipulates that SARS (an organ of the State) must, *inter alia*, at all times act impartially, fairly, equitably and without bias. In addition, section 7 of the Constitution requires SARS to respect, protect, promote and fulfil the rights in the Bill of Rights of the Constitution, including the right to just administrative action as envisaged in section 33 of the Constitution, read with the Promotion of Administrative Justice Act, 2000 ("PAJA").
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| 16. <u>Submission:</u> We submit that the above noted obligations and requirements in the Discussion Paper seem to impose a significantly onerous and additional administrative burden on the already encumbered taxpayers. The enactment of such onerous administrative burdens on taxpayers must be considered in the context of the Constitutional values and the provisions of PAJA which require the observation of procedural fairness and not an overly burdensome obligation on taxpayers. |
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17. The main criticism against the current diesel fuel tax refund system is the onerous administrative and compliance burden on taxpayers and their tax practitioners to qualify for the diesel fuel tax refund. Members have stressed that the cost of compliance does not match the tax benefit being received, resulting in taxpayers increasingly considering to abandon the diesel fuel tax refund, which will be to the detriment of these taxpayers.
 18. *BP Southern Africa (Pty) Ltd v Secretary for Customs and Excise and Another (1985) 1 All SA 398 (A)* dealt with the interpretation of the Customs Act and its regulation. Van Heerden JA held that "... I have little doubt that it could not have been the intention to grant a rebate subject to compliance with each and every provision of the Act and the regulations ..." The *BP* case supports a practical purposive approach to regulate the requirements of the diesel fuel tax refund regime, rather than a technical "tick box" outlook.
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| 19. <u>Submission:</u> It is submitted that the proposed administrative obligations and requirements on taxpayers per the Discussion Paper appears to be even more onerous than the existing system. We consider that the proposed additional administrative obligations and |
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requirements may be in contradiction to the policy of introducing the diesel fuel refund tax relief, namely to protect international competitiveness of local industries and to reduce the road-related burden of the RAF levy for certain non-road users.

20. The proposed obligations and requirements to keep detailed logbooks and records of maintenance, service and repairs of diesel-powered equipment and vehicles are considered to be overly ambitious and too theoretical, not sufficiently taking into account the practical challenges. Many employees operating such equipment and vehicles may be illiterate, which would lead to practical difficulties to keep the required level of detailed logbooks. Furthermore the equipment and vehicles hours-meter and speedometer-meter readers may also not be in working condition which means that the data may not be reliable. Consideration should also be given thereto that a large number of these equipment and vehicles are maintained and repaired by the taxpayers themselves, which leads to practical challenges to provide SARS with substantive maintenance and repair records on a per vehicle and equipment basis.

21. Submission: We submit that the obligations and requirements to keep detailed logbooks and records of maintenance, service and repairs of diesel-powered equipment and vehicles will lead to many practical difficulties and that a disproportionately high administrative burden will be encountered by taxpayers, who are already under pressure in a struggling and pressured economic environment. Similarly the dispensing storage facilities logbook will also result in practical difficulties and lead to an onerous administrative burden..
22. The proposed formula-based methodology would therefore be welcomed, not just for small and emerging primary producers, but also for all other users. Alternatively, it is proposed that the requirement must not be to record detailed logbooks, maintenance, service and repairs or storage facilities, but rather allow taxpayers to record all activities or occurrences which is non-qualifying to the diesel fuel tax refund regime.

Annexure 1: Indicative List

23. Annexure 1 to the Discussion Paper provides for an indicative list of the type and nature of qualifying activities by sector for the diesel fuel tax refund. The list should be interpreted fairly wide to ensure that it covers all aspects currently allowed for each sector.

24. Submission: The following activities should be clarified in the list to ensure that all aspects of primary farming are addressed: Activity (DD), i.e. caring for animals, should include veterinary activities; Activity (GG), i.e. herding and rounding up of livestock, should include transporting livestock on the farm as well as from one farm to another; Activity (JJ), i.e. planting and tending of fruit trees, should include vineyards. Furthermore an activity of “storage and spreading of fertilizer” should be added to the list.

25. Reference is made to “quarrying” for the mining on land sector, however no reference is made to the “hauling” stage from the quarry site. The exclusion of the “hauling” activity, while including the “drilling” activity, may also lead to further practical issues given that diesel storage and bowsers are all shared in practice.

26. Submission: It is submitted that the reference in activity (ss), i.e. quarrying, should be extended to include hauling as well as all other activities necessary to generate the muck pile.

CONCLUSION

27. SAICA again reiterates that a collaborative approach in addressing complex problems which have to balance fair procedures with increased fraudulent activity (i.e. protecting the fiscus) is best suited in seeking amicable solutions.
28. Though we cannot condone any practice that undermines the fiscal legal framework or any practices that seek to frustrate it, which needs to be addressed, NT and SARS should during this process be commended for its initiative in refining the diesel fuel tax refund processes and systems in challenging circumstances and its willingness to engage with stakeholders to address challenges.

Should you wish to clarify any of the above matters please do not hesitate to contact us.

Yours sincerely

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The South African Institute of Chartered Accountants