

**SAICA SUMMARY**  
**AGENDA: 2020 DRAFT TLAB & TALAB WORKSHOP**  
**THURSDAY, 10 SEPTEMBER 2020, 9:00-16:00**  
**DAY 3: VAT, DRAFT TALAB, DRAFT RATES BILL**  
**ONLINE MICROSOFT TEAMS MEETING**

**A. 2020 DRAFT TLAB – VAT**

***Please note: Formal responses by NT will be done in NT's response document***

1. Changing the VAT treatment of transactions under the Corporate Reorganisation rules
  - 1.1. Amendment of wording in the EM to reflect the words used in section 45 of the Income Tax Act
    - *S8(25) and s11(1)(e): Supply between group of companies & meets going concern requirements, may elect to use s11(1)(e).*
    - *Commentators concerns:*
    - *Wording of EM is not in line with the law - NT noted*
    - *Certain assets would not meet the requirements of s42/45 – “to the extent” is a problem*
    - *Difficulty in the way the law is written – suggest that proviso should be a standalone provision at the end after the current (ii)*
    - *NT noted concerns & suggestions made*
  - 1.2. Proposed wording in the draft bill creates confusion and is not consistent with the draft EM
    - *NT noted concerns & will adjust accordingly*
2. Reviewing the section 72 decision with regard to the VAT treatment of telecommunications services
  - 2.1. Proposed wording in the draft bill is unclear as to what services are being zero-rated
    - *Ruling allowed zero-rating between resident and non-resident communication suppliers in terms of International Agreements (Dubai)*
    - *Concern:*
    - *Does this apply to all services or only specific services? (such as roaming) – seems as zero-rating on entity level is provided rather than addressing telecommunication services*
    - *Definition is quite broad*
    - *NT: concerns noted*
  - 2.2. Proposed amendment should make provision for future International Telecommunications Regulations
    - *NT specifically did not cater for this & would prefer to deal with this on a case-by-case basis*
3. Reviewing the section 72 decision with regard to the VAT treatment of cross border leases of foreign owned ships, aircraft and other equipment for use in RSA
  - 3.1. Input Tax deduction
    - *Relevant sections: Definition of enterprise & s23(2)*
    - *Scenario: Lessor is foreign based entity, no presence or supplies in SA & leases out asset in SA; Lessee based in SA – Ruling: lessor not required to register for VAT (with conditions attached)*
    - *Proposed change to legislation: Keep lessors out of the definition of ‘enterprise’ (deals with status of lessor). Intention that s72 ruling conditions continue.*
    - *Concern: Results in VAT cost for the lessee.*
    - *NT: Not meant to affect lessees*

### 3.2. Delivery outside SA

- *Commentator concern: Unclear why reference to “delivery outside of SA” – this does not determine who is liable for VAT on importation*
- *NT: If lessor does clearing & importing = conducting enterprise & would fall foul of exception*
- *NT: Amendment meant to maintain status quo ito ruling*

### 3.3. Lessor disposes of the goods while they are in SA or cedes the lease agreement

- *Above concern raised by commentators*
- *NT noted*

### 3.4. Extended leases

- *Lessee is required to account for additional VAT*
- *NT: SARS website contains relevant document in this regard: “SARS external customs valuation policy”. This makes reference to customs valuation & extended leases & how this should be dealt with.*
- *Change in lessee or extending lease will not create problems with VAT on importation.*
- *SARS wants to collect on the value of the lease throughout its period (extended period or cession of lease).*
- *SARS Customs division is monitoring this area & has a robust system of ensuring that these agreements are on their systems.*

### 3.5. Proposed amendment contrary to the spirit of the Act re: taxing final domestic consumption

- *Commentator view:*
- *Foreign lessors are carrying on an enterprise in SA.*
- *Amendment is not limited to aircraft & ships only - it seems to extend to all goods & might incentivise inappropriate behaviour.*
- *Amendment should also be contrasted to NT’s position on ‘electronic services’ – the aim there is to include as many foreign supplies into the VAT net as possible.*
- *NT: Rulings dealt with foreign owned ships & aircrafts only – are there any other assets that are leased from foreign suppliers?*
- *Commentators responses:*
- *Rail is another type of asset & NT should consider possible other industries that could be affected.*
- *Change should not be to definition of ‘enterprise’ - rather include in a different part of the legislation (same as is done for the electronic services – want targeted approach rather than a broader approach).*
- *SARS: principal of taxing consumption has not been lost – Act allows this in other ways,*
- *NT: requests commentators to please provide further examples.*
- *NT will engage further with stakeholders on this.*

### 3.6. Requirement for lessee to be a vendor

- *Amendment considers status of lessor rather than the activity of lessor – lessor does not need to register for VAT, lessee would be required to import & pay VAT on importation, whether lessee is a vendor or not.*
- *Commentator concerns: problem is that the goods are not ‘acquired’ as defined in the ‘input tax’ definition and this is to the detriment of the lessee. Another amendment to the legislation is possibly required to deal with input tax for the lessee.*

- *NT: Refer to valuation rules, C&E Act & SARS Policy document that is specific to rentals as change was just to enact ruling & should not have affected the lessee.*
- *NT: Concern iro the input tax for the lessee - Please submit as an Annexure C item.*

### 3.7. Importance of lessor not being a registered vendor

- *Concern: Lessor may be a registered vendor for other activities and should not be disqualified from the proposed changes because of this.*
- *NT: Please provide examples*

### 3.8. Proposed wording of the draft bill is very broad in scope compared to the EM

- *Already discussed – see above*

### 3.9. Transitional Provisions

- *Commentator concern: Current agreements may not cater for these changes.*
- *NT: Could consider if addendums to the agreements would be an option.*

### 3.10. Proposed word “solely” creates problems with regard to service or maintenance plans

- *Commentator concern: Further services may be linked to these assets such as support services/maintenance plans & then these assets would not qualify for this relief. Suggest include “to the extent of” rather than “solely”.*
- *NT: These agreements should not qualify as the lessor is not just leasing out asset in SA. Doing leasing plus other services which are continuous & regular results in the lessor conducting an enterprise.*
- *Consideration will be giving to these different activities & “to the extent to”.*

## 4. Reviewing the section 72 decision with regard to the VAT treatment of the management of superannuation schemes

### 4.1. “Management of superannuation schemes” should be defined

- *S10(22A) – ineffective for vendors (can’t determine costs related to this income)*
- *BGR34 – ruling issued on how to determine the cost.*
- *NT: Although fee/commission is part of charge and not on invoice, vendor is aware of the amount*
- *Regarding the scope of the management services, it’s not the services being changed, it’s the valuation that is being amended (previously used BGR)*
- *NT: Clarity on types of activities on management of the superannuation schemes is noted – SARS will consider issuing an Interpretation Note.*

### 4.2. The effect of the proposed deletion on the wording of the contracts

- *Commentator concern: Management of the scheme is taxable even if the charge forms part of the long-term policy.*
- *NT: Asked for more details. Commentator will provide more info directly to NT.*

### 4.3. Other issues not on agenda:

- *BASA has concerns regarding emergency COVID funding – where can these be addressed?*
- *NT: Mandate for this meeting is only draft TLAB issues. COVID issues cannot be discussed here as consideration of these was done during the Disaster Relief Bills.*

## B. 2020 DRAFT TALAB

### 1. Proposed amendment to **section 18A** of the Income Tax Act

#### 1.1 Tax deductible donations in respect of PBOs providing funding to Government Departments.

- Commentators concerns:
- *Comments relating to funding entities were received – but not part of the TALAB so no further comments made on this by SARS.*
- *Government department should be able to issue s18A certificates without Commissioner's approval as timing may be a concern.*
- SARS:
- *Timing of the approval should not be an issue as approvals are currently being issued within days.*
- *Commissioner approval necessary to ensure that funds are appropriately accounted for. Findings of AG report is of relevance here. It is important to ensure that government department's systems are in place before funds flow.*
- Commentator: *What is the policy rationale for these changes?*
- SARS: *This is a consistency change.*

### 1. Proposed amendments to **paragraph 30 of Fourth Schedule** to Income Tax Act, section 58 of Value-Added Tax Act and section 234 of the Tax Administration Act

#### 2.1 Removal of requirement of "wilfulness" from certain statutory offences.

- Context: *Term "willfully & without just cause" found in 3 provisions of tax legislation only.*
- *When included in Act, EM was silent & courts had to interpret meaning. Interpreted to mean level of negligence.*
- *When TAA was written, this was changed and term "willfully & without just cause" inserted.*
- *Meant to be: "or" instead of "and"*
- *SARS not trying to introduce strict liability – in SA context, no need to show intent/negligence, just that improper event occurred, accused needs to then respond to that.*
- International precedence provided by SARS:
  - Australia - offence of absolute liability (stronger than strict liability);
  - *First offence = fine, third offence = jail term.*
  - *Draws distinction in law rather than leaving it up to judiciary*
  - Canada – offence of strict liability; regulatory offence has been upheld
  - New Zealand (s143) - absolute liability; fines imposed & 143A = commits offence & knowingly = higher fines; 143B (evasion) = stricter penalties & potentially a jail term
  - USA: *willfully required; civil penalty for failure to render returns etc. are significantly higher than in SA.*
- Commentator responses: *Comparative jurisdictions mentioned are parliamentary democracies not constitutional democracies like SA. (Noted: Canada it's a constitutional monarchy).*
- *"Willfulness" – need to show intent & this is a subjective test. SCA has indicated that there is an overlap with negligence.*
- Commentators concern: *Offences are not all the same – proposed change will criminalize all offences with the same brush.*
- Commentators suggestion:
- *Mover from "willfully" to "knowingly"*
- *Could replace "negligent" in place of "just cause"*
- *Categorize all offences to ensure that punishment fits the crime as relying on courts for all of these is problematic.*
- SARS: *Invites alternatives to the proposed wording such as:*
  - *retaining "without just cause"*
  - *replacing it with "negligently"*
  - *could have nothing in opening words & leave up to Courts to decide*
  - *"Willfully OR without just cause" or "Willfully OR negligently"*
- Commentators concern: *SA has constitutional court case law on this and why is the constitutional court standard not accepted by SARS.*

- SARS response: International comparatives draws between criminal and regulatory offences & SA courts have looked at it but not considered it fully. SARS legislation for the 3 provisions is at a higher level than most & needs to be addressed.
- Commentators concern: SARS decides who is criminally convicted or not in respect of the same offence (same crime can be treated in 3 different ways) – this should not be at the decision of SARS.
- Commentators suggestion:
- Law needs to be provided consistently for the same offence.
- Tiering needs to be explicit
- Criminal offences should be reserved for most egregious crimes and SARS should be compelled to report these
- SARS response: Unless there is evidence to prove SARS is abusing this, it is allowed as it is impossible to charge everyone.
- SARS will look into categorizing the offences (by levels of offence [which we have to some extent in the Act] and in respect of tax evasion offences).
- Complex area & requires further discussion.

## 2. Proposed amendments to sections 91, 93 and 95 of the Tax Administration Act

### 3.1 Allowing SARS to raise an estimated assessment where the taxpayer fails to respond to more than one request for relevant information and suspending right to objection and appeal until relevant information is provided.

- Reason for amendment & process:
- Taxpayers who are due refunds but they are not required to submit a return because < threshold - this now allows SARS to issue an assessment (auto assessments).
- SARS has 1000s of taxpayer not responding to SARS requests;
- If SARS requests for info are sent & no response received – SARS can make an estimated estimate – current power to do this exists but the change implies the taxpayer can't object or appeal in these circumstances.
- If these cases go into dispute resolution process – delays in this process will become longer.
- Taxpayer has 40 business days to give SARS info & if SARS does not react to this information, a taxpayer can object.
- SARS has power to extend this period to when an assessment expires.
- Commentator concern:
- How will the following situations be dealt with so that these situations are not pushed into the dispute process:
  - 1) Difference of opinion in respect of info provided (eg. taxpayer provided what the taxpayer thought was a sufficient response to SARS but SARS disagrees that it is sufficient);
  - 2) Information is impossible to provide by taxpayer; and
  - 3) What is delivery – did you actually receive what was supposed to be sent to you as a taxpayer?
- Commentators request: Clarity in legislation or policy document on what adequate information is & how to deal with these situations.
- Suggested solution: For item 2) could introduce similar requirements contained in other legislation such as when info is held offshore or by someone else.
- Questions posed:
- Where is a definitive ruling of info not required? – Possible solution: Create an exception for this.
- What do you do in the interim? – Possible solution: Link it to the extension of prescription
- Commentator point: Section 102(2) requires SARS to prove that assessment is reasonable. Taxpayer must not be precluded from objecting this. But SARS says they can't do this as not all info is available.
- Commentator concern: Tax type transfer – doesn't always allow access to taxpayer profile. SARS/NT are requested to consider this when looking at timelines & how this affects taxpayers' access to react & provide info to SARS. There might be an effective date issue here possibly.

### 3.2 Extending estimated assessments to cases where a tax return or tax payment are not due.

- *Refer to discussion above*

### 3. Proposed amendment to **section 187** of Tax Administration Act

#### 4.1 Timing of interest calculation for erroneous payments.

- *Situation arises where taxpayer uses incorrect payment reference number & SARS needs to determine where to allocate the payment.*
- *Interest accrues on an over payment by taxpayer & SARS should refund the amount.*
- *Consequences for taxpayer if amount incorrectly allocated = interest & penalties are raised on unpaid amount because of the incorrect allocation.*
- *The amendment aims to create a window period for SARS to see where this payment should be allocated so that no interest & penalties are raised.*
- Commentator concern:
- *Taxpayers are required to administer their accounts whereas this should be SARS' responsibility. SARS account maintenance has been raised as a concern in OTO's report (including the concern that amounts are unallocated for various reasons including because of errors made by SARS).*
- *If taxpayer transposes payment reference number & payment goes on someone else's account – they get the refund not the taxpayer making the payment. Amendment will catch both scenarios.*
- *Timelines – SARS gets 60 business days to sort this out = 3 months. This seems too long to clear an account.*
- SARS: *Noted comments made*

### 4. Proposed amendment to **section 190** of Tax Administration Act

#### 5.1 Potential withholding of refund until criminal investigation is finalised.

- *The TAA currently provides that SARS may not authorize a refund until such time that a verification, inspection or audit of the refund is finalized. It is proposed that this provision be extended to also include "criminal investigations".*
- Commentator concerns:
- *Verification process is of concern as they don't have timelines or reasons for information requests (delayed payment of refunds = systemic matter of concern).*
- *TP must be notified of investigation (due process must be followed).*
- *Taxpayers need to know why a refund is withheld & although it is acknowledged that this is challenging in a criminal investigation it should be recognized that this is also challenging for taxpayers.*
- *Criminal investigation into entire an industry - could this result in the possibility that a refund is withheld from all of the taxpayers in industry? It would seem so from some commentators.*
- *Taxpayers should be able to object & withholding should be limited to a specific refund not to all the other refunds due to the taxpayer. For example, taxpayers get verification requests each month & then also a request for relevant material for the same periods, then all refunds after that are blocked (SARS has audited each period & raised assessments for these). This affects the sustainability of certain taxpayers that struggle to survive without refunds.*
- *No reasons are currently provided for why refunds are not being released & SARS also keeps extending timelines*
- *Only recourse for taxpayer in these circumstances is to go to Court.*
- SARS comment:
- *Law relates to a particular refund of a particular taxpayer, so this should not be a concern, however, syndicates are of concern to SARS and may result in refunds not being paid to all vendors in the syndicate.*
- *Systemic risk may arise from an audit on one period & this may result in refunds arising from other periods being withheld.*
- *SARS will see if a recourse mechanism for taxpayers is possible (objection & appeal process may not assist taxpayers due to timelines).*

- *Please send through examples of refunds withheld after monthly audits through to RCBs for escalation to SARS.*

## **C. 2020 DRAFT RATES BILL**

### 1. Increase in excise duty on tobacco

- *Commentator concern: Due to the illicit tobacco trade & effects of lockdown a request for reduced (no) increases is made. Ban has resulted in loss of many farmers & whole supply chain is affected.*
- *Enforcement & excise rates need to work hand in hand to prevent further rise in illegal sales.*
- *Introduce an “other” category*
- *Vapor category – cost vs effort of collection needs further consideration*
- *NT:*
- *Will work with SARS to counter illicit tobacco*
- *NT general policy = rates increased in line with inflation or higher (40% of PPP)*
- *Current rate increases are in line with inflation, lower than increases in previous years to acknowledge the 40% limit*
- *Other concerns noted*