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The South African Revenue Service
Per E-mail

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The Commissioner for SARS
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Customs VAT Refunds – Erroneous Declarations Submitted to SARS by Customs Brokers

Purpose

This document contains an overview of the current constraints in respect of applying for Customs VAT refunds in instances whereby Customs Brokers have made submitted an erroneous customs declaration. The purpose of this document is thus to propose two possible solutions to SARS and to provide motivation for one of the two solutions. The content of the document is as follows: **(1)** Problem Overview, **(2)** Information and Discussion Topics, **(3)** Proposal, and **(4)** Conclusion.

PROBLEM OVERVIEW

Customs Brokers process an average of between 50 to 1500 customs declarations per day submitted to various customs offices across the Republic[1] with declarations having multiple lines in most instances, exposing a significant margin for error which nevertheless is still well managed by compliance managers. In the well managed margin of error, there does however exist instances whereby errors to occur whilst every effort is made to avoid such occurrences.

The South African Revenue Service (SARS) customs refund policy requires value-added tax (VAT) vendors – the principal importers of record – to submit VAT input claims on their VAT 201 returns. Where clearing agents make erroneous customs declarations requiring customs refund: only the customs duty may be claimed back from SARS customs in ordinary circumstances by the clearing agents.

We (SAAFF) indicated that often the clearing agent claims the duty back, having received information that the VAT vendor (the principal and importer of record) will claim the VAT erroneously paid to SARS by the clearing agent, on its VAT 201 return. The VAT vendor subsequently reneges on this agreement, leaving the clearing agent out of pocket in respect of VAT that was never due to SARS in the first place, but which is now incorrectly and in SARS's possession, with no way of claiming it back.

A VAT class ruling was issued to SAAFF on 09th December 2021 which stipulated as follows viz.: ***Clearing agents may not request refunds or deduct input tax for their own account where the importers refuse to reimburse the VAT paid by the clearing agents on the importers' behalf.***

[1] https://www.cambridge.org/core/journals/journal-of-african-law/article/abs/trade-facilitation-an-assessment-of-south-african-experiences-visavis-wto-disciplines/57D476DF459E2FF6E23316DDA583B290

INFORMATION AND DISCUSSION TOPICS

VAT is levied on the importation of goods, by any person, into the Republic of South Africa (the Republic) under section 7(1)(*b*). The person liable for the payment of the VAT so levied, is the person that imports the goods as set out in section 7(2).

Under section 54(2A)(*a*) where any goods are imported into the Republic by an agent on behalf of the principal for that importation, the import is deemed to be made by the principal and not the agent. Section 13(2) indicates that the amount of VAT that is payable on importation, is based on the value determined under the Customs and Excise Act No. 91 of 1964 (the Customs and Excise Act). Thus, if there is an error on the value determined under Customs and Excise Act, such an error must first be reported to Customs and establish the procedure to be followed in resolving such an error.

Only a vendor that acquired goods for the purpose of consumption, use or supply in the course of making taxable supplies, may deduct the VAT paid on the importation of the said goods, as "input tax" as defined in section 1(1). The aforementioned deduction under section 16(3) is subject to that vendor having the relevant documentary evidence, set out in section 16(2).

Under section 16(2)(*d*) the importer/principal must be in possession of the BOE together with the receipt of the payment of the tax. However, in the event that the BOE is held by the agent, the agent must retain the records prescribed under section 54(3)(*b*), and the importer/principal must be in possession of the documents prescribed in section 16(2)(dA).

Where the refund requested is an amount erroneously paid in excess of the amount payable in terms of an assessment as envisaged in section 190(1)(*b*) of the Tax Administration Act No.28 of 2011 a vendor may request a refund under section 44(11) of the VAT Act.

The clearing agent merely facilitates the payment of the VAT in question to SARS on behalf of the principal in terms of a contractual agreement for services between the principal and the clearing agent.

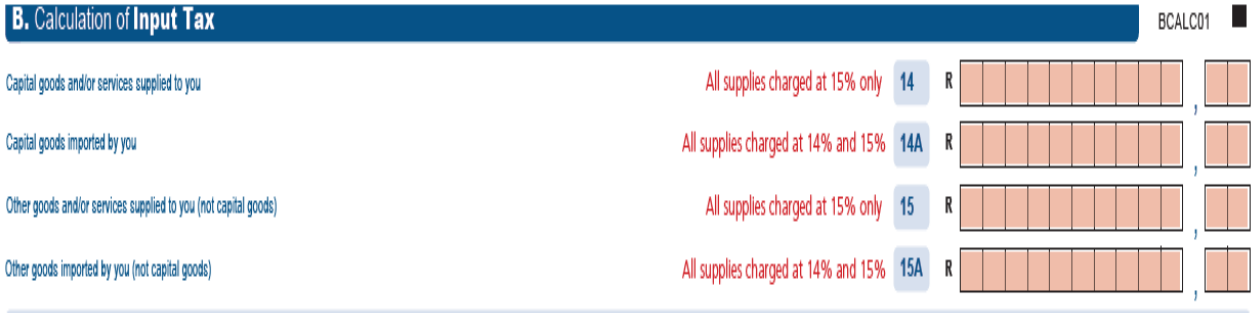
In light of the above, there is no provision in the VAT Act, which allows the clearing agent to deduct the input tax in relation to VAT paid on goods imported into the Republic, and where there is an erroneous payment only the importer may claim such erroneous amount.

From the information available, a clearing agent that uses its deferment facility to make payment of VAT and duties on behalf of its clients is ultimately responsible for any outstanding payments on the account after the goods are imported.

FIRST PROPOSAL:

Customs Brokers fulfil an import role in facilitating the collection of Customs Duties and Taxes on behalf of SARS and thus solicit the implementation of one of two solutions that would assist with regard to facilitating the refund of Customs VAT erroneously declared and subsequently paid to SARS.

Our first proposed solution is to amend the VAT 201 return to provide separately for refunds relating to imported goods erroneously declared.



Appended above is a snip of Section B. of the VAT 201 return form which we is reflective of the fields in the SARS e-filing VAT return application. As we see above, this deals with "input tax" deductions, there is no field, nor otherwise any section on the VAT 201 return form, dealing with "refunds of VAT overpaid on erroneous import customs declarations". This is notwithstanding the fact that section 16(3) of the VAT Act, and section 190 of the TAA, clearly distinguish between VAT refunds and VAT input tax. This provides clear and valid grounds for our request to amend the VAT 201 return to distinguish between VAT input claims, on the one hand, and VAT refunds, on the other.

SECOND PROPOSAL:

Alternatively, our proposal is to request an amendment of SC-DT-C-13 viz.: External Policy Refunds and Drawbacks would allow for a refund of Customs VAT erroneously declared and subsequently paid by the Customs Broker to be claimed back, specifically 2.2.7 b) with the proposed addition of v) after iv) to read "The clearing agent is entitled to apply for a VAT refund in the instance where an erroneous customs declaration, processed by the Customs Broker, reflecting incorrect Customs VAT amount has been paid to SARS"

2.2.7 Value-added tax (VAT) levied on the importation of goods into South Africa

a) SARS Customs levies VAT at the applicable rate on the importation of goods into South Africa in terms of Section 7(1)(b) of the Value-Added Tax Act No. 89 of 1991.

b) SARS Customs **only** has the mandate to authorise a refund of the VAT after it has been paid, by means of a CR 1 (General Application for Refund) in the following instances:

i) The **importer is a non- registered VAT vendor**; or
ii) **Duplicate clearance –** i.e. more than one (1) import declaration has been processed in respect of the importation of the same goods; or
iii) **The clearing agent has invoiced and processed the import documentation in the incorrect importer's name** (not include a clearing agent who has invoiced and processed the import documentation incorrectly in the name of the correct importer); or
iv) **Substitution –** i.e. the goods have been cleared under the incorrect CPC resulting in the original import declaration being substituted by a new import declaration reflecting the correct CPC **and** VAT is paid a second time.

INTERNATIONAL BENCHMARKING

a) The general rules on VAT refund as per Directive 2008/9/EC that stipulate the legislative provisions for member countries of the EU permit VAT refunds to be processed by clearing agents for and behalf of importers on record provided that the clearing agent processed the import or instances whereby the clearing agent did not process the import declaration that a POA has been issued authorizing the clearing agent to do so[1].

b) To be able to deduct or reclaim the VAT paid upon import, you will need to have the original import documents specifying the amount of VAT. If a customs agent is handling the import, you will not receive the original import document yourself. In that case, the invoice issued by the customs agent will state the VAT amount you paid upon import. You may deduct or reclaim this amount. A clearing agent is authorized to apply for a refund on Import VAT whereby the declaration was processed for and on behalf of an importer[2].

1.) European commission directive on VAT refunds
2.) The Dutch VAT Act 1968 and Taxes on Imported goods Netherlands

CONCLUSION

More often than we would like to see, the clearing agent claims the duty back, having received information from the VAT vendor, that the VAT vendor will claim the VAT erroneously paid to SARS by the clearing agent, from SARS on its VAT 201 return. The VAT vendor subsequently reneges on this agreement, whether formal or informal, or disagrees to cooperate at all, leaving the clearing agent out of pocket in respect of VAT that was never due to SARS in the first place, but which is now incorrectly and unlawfully in SARS's possession, with no way of claiming it back.

We therefore submit our two proposed solutions that will enable a clearing agent to claim the Import Customs VAT for their own account where the vendors refuse to pay the agents the VAT paid by the agents on their behalf to SARS, or insists on being credited, following payment by the vendors to their agents.

We would sincerely appreciate a response as to why either one of our proposals is not accepted with the accompanying reasoning provided therewith.

We confirm that our submission is to the best of our knowledge, true and complete and complies with the legislative provisions described in the preceding paragraphs and remain at your disposal for further engagement as may so be required.

Best Regards

Devlyn Naidoo
Executive: SARS & OGA
SAAFF