

Ref #629715

Submission File

15 September 2017

South African Revenue Service
Private Bag X923
Pretoria
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BY E-MAIL: policycomments@sars.gov.za

Dear Sir/Madam

COMMENTS ON THE DRAFT VAT QUICK REFERENCE GUIDE TO NON-EXECUTIVE DIRECTORS

1. We herewith present our comments on behalf of the South African Institute of Chartered Accounts (SAICA) Value Added Tax (VAT) Committee, a sub-committee of the SAICA National Tax Committee on the Draft VAT Quick Reference Guide to Non-Executive Directors (NED Guide) released by the South African Revenue Service (SARS).
2. Thank you for affording the South African Institute of Chartered Accountants the opportunity to provide our feedback and inputs on the above matter.

OBSERVATIONS

3. Below are our comments. You are welcome to contact us should you wish to clarify any issue.

Distinction between independent and not dependent NED's

4. The NED Guide states that the Binding General Ruling (BGR) 40 considers an NED to be a director who is not involved in the daily management or operations of a company, but simply attends, provides objective judgment, and votes at board meetings. Thus BGR 40 only applies to NED's who are appointed as such. SARS also makes reference to the King IV report on what constitutes independence.
5. However, it is unclear whether the determination of a director constitutes an NED must be made in accordance with the Reports on Corporate Governance.
6. Submission: Clarification is required on whether a distinction exists between independent and not independent NED's and whether NED's that are not independent are not included in the scope of BGR 41 (issue 2).

Non-resident NED's

7. The NED Guide does not make specific mention of non-resident NED's and thus the enterprise test has to be applied to determine whether a non-resident NED is liable to register for VAT.
8. Where a non-resident NED physically attends director meetings in South Africa on a regular or systematic basis based on the requirements of a contract with a South African company it may potentially be argued that the non-resident conducts an activity or enterprise "regularly or continuously" in South Africa even if the NEDs simply "fly in" for meetings and subsequently again "fly out".
9. Submission: Further guidance is required with regards to non-resident NED's, when the non-resident NED is conducting an enterprise in South Africa and at what point the non-resident NED is required to register for VAT.
10. Further consideration should also be given to instances where there is no registration requirement and when the imported services mechanism will apply. Guidance should be provided for instances where non-resident NED's are required to register in South Africa as VAT vendors and what they must disclose on their VAT return, i.e. only South African income or worldwide income?

Registration

Paragraph 4.1 (Sub-paragraph 1)

11. The NED Guide provides that:

"An NED is required to register as a vendor where the total value of taxable supplies made in any consecutive period of 12 months exceeds R1 million, or where such an amount will be exceeded in a period of 12 months, in terms of a contractual obligation. This is referred to as the compulsory registration threshold."
12. The NED Guide further states that an NED who earned fees for a period of 12 months, before 1 June 2017, exceeding R1 million, will be required to register with effect from 1 June 2017, however, based on the experience, SARS only accepts the NED's appointment contract which evidences fees to be earned. Further, SARS insists that a letter of appointment must clearly state that the director is appointed as an NED and not an executive director. Thus the inconsistencies on the financial information required to support the VAT registration need to be addressed.
13. Submission: Further guidance is required on examples of financial information that will be required in order to support the R 1 million registration threshold.

Paragraph 4.1 (Sub-paragraph 5)

14. In practice confusion is often caused by the enquiry whether a company may charge the company using the services of the NED, for the services of the NED.



15. Sub-paragraph 5 refers to “a person affiliated with that company”. We recommend that it be made clear that only the individual NED may register as a VAT vendor for the NED services.

16. Submission: Consideration should be given to dealing with the circumstances where a company with which the NED is associated issues the tax invoice on behalf of the NED (as its agent), in which case the NED must still be separately registered as a VAT vendor and account for the output tax in the NED’s VAT return.

Paragraph 4.3 (Sub-paragraph 1)

17. The NED Guide provides that:

“NEDs who are liable to register must complete a form VAT101 (Value-Added Tax Registration Application) that must be submitted to SARS no later than 21 business days from the date of liability. The form must be submitted in person at the SARS branch office nearest to the place where the NED’s business is situated. Alternatively, an authorised registered tax practitioner may appear in person on behalf of the NED.”

18. Based on experience, the SARS branches insist that the application process must be done electronically and thus do not accept branch applications.

19. Submission: SARS should streamline the processes to ensure that the branch operations are in line with the guidance provided.

Value of Supply and Consideration

Paragraph 8.2 (Sub-paragraph 3)

20. The issue of reimbursed expenses creates a challenge in practice. Professional service providers often (mostly) supply services on a “time and materials” basis. What would generally be termed “reimbursed expenses” where an employer/employee relationship exists is then converted to a “time and materials” charge. The full charge is then subject to VAT.

21. The comments in the NED Guide assume an agent/principal relationship between the NED and the company. This cannot however be assumed. Unless the NED incurs the costs based on a specific mandate (which generally speaking cannot be an open mandate), it is unlikely that an agent/principal relationship exists.

22. Submission: We recommend that this part of the draft guide be extended to deal with professional “time and materials” basis of invoicing, as well as an indication of what will be required to prove an agent/principal relationship.

SAICA VAT Guide on NEDs

23. SAICA released its VAT Guide on NED services issued to SAICA members to provide guidance with regards to the application of BGR 41, the general principles of VAT that may be applicable and the matters where uncertainty may still prevail where SAICA members should seek additional guidance.



24. We have attached the SAICA VAT Guide on NED services to this submission for ease of reference.

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| 25. <u>Submission:</u> We recommend that SARS considers the SAICA VAT Guide on NED services which deals with the uncertainties and VAT principles applying in respect of BGR41 when SARS finalise its NED Guide. |
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CONCLUSION

26. We would like to thank SARS for the opportunity to provide constructive comments in relation to the Draft NED Guide. SAICA believes that a collaborative approach is best suited in seeking actual solutions to complex problems.

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

Yours sincerely

Christo Theron

SAICA VAT COMMITTEE: CHAIRMAN

Madelein Grobler

SAICA: PROJECT TAX MANAGER

The South African Institute of Chartered Accountants