

TAX AND EXCHANGE CONTROL ALERT

SPECIAL EDITION:
VAT AND NON-EXECUTIVE DIRECTORS

IN THIS ISSUE

VAT ON NON-EXECUTIVE DIRECTOR REMUNERATION: MORE QUESTIONS THAN ANSWERS?

The South African Revenue Service (SARS) has ruled in Binding General Ruling (BGR 41), issued on 10 February 2017, that non-executive directors (NEDs) should register and account for VAT on their directors' fees where the fees exceed the VAT registration threshold of R1 million in a 12-month period, as they are not considered to be common law employees but independent contractors. BGR 41 was made effective from 1 June 2017.

FURTHER CLARIFICATION ON THE VAT REGISTRATION OF NON-EXECUTIVE DIRECTORS

On 10 February 2017, SARS published Binding General Ruling 40 (BGR 40), in addition to Binding General Ruling (BGR 41) that was referred to in the article above (Rulings). We initially reported on these Rulings in our [Tax and Exchange Control Alert of 17 February 2017](#).

VAT ON NON-EXECUTIVE DIRECTOR REMUNERATION: MORE QUESTIONS THAN ANSWERS?

BGR 41 clarifies that where NEDs are already registered for VAT but have neither levied nor accounted for VAT on their directors' fees, they must start charging and accounting for VAT on such fees by no later than 1 June 2017.

A NED who receives director's remuneration in excess of the R1 million VAT registration threshold will be required to register and account for VAT with effect from 1 June 2017 in accordance with BGR 41.



The South African Revenue Service (SARS) has ruled in Binding General Ruling (BGR 41), issued on 10 February 2017, that non-executive directors (NEDs) should register and account for VAT on their directors' fees where the fees exceed the VAT registration threshold of R1 million in a 12-month period, as they are not considered to be common law employees but independent contractors. BGR 41 was made effective from 1 June 2017.

On 4 May 2017 SARS issued an updated BGR 41 in which it determined, in terms of s23(4)(b) of the Value Added Tax Act, No 89 of 1991 (VAT Act), the VAT registration liability date of NEDs to be 1 June 2017. BGR 41 further clarifies that where NEDs are already registered for VAT but have neither levied nor accounted for VAT on their directors' fees, they must start charging and accounting for VAT on such fees by no later than 1 June 2017.

The appointment of a director, including a NED, is a statutory appointment in terms of the Companies Act, No 71 of 2008 (Companies Act) and the role, function and duties of directors are prescribed by the Companies Act. The question remains as to whether a NED, in merely performing his or her statutory duties, indeed carries on an "enterprise" as that term is defined in the VAT Act, for which the NED is required to register for VAT. Nevertheless, in view of the SARS ruling, a NED who receives director's remuneration in excess of the R1 million VAT registration threshold will be required to register and account for VAT with effect from 1 June 2017 in accordance with BGR 41 or risk being held liable for the VAT, penalties and interest, until a court may rule otherwise.

In determining the liability date of 1 June 2017, it appears that SARS may not have considered that s66(9) of the Companies Act provides that directors' remuneration may be paid only in accordance with a special resolution approved by the shareholders within the previous two years. A company may, therefore, not increase the directors' remuneration without the prior approval of the shareholders by way of a special resolution. The directors' remuneration paid to NEDs who are required to register for VAT from 1 June 2017, will be considered to be VAT inclusive in terms of s64 of the VAT Act, unless prior shareholders' approval for an appropriate increase is obtained before that date.

Section 67 of the VAT Act provides for a VAT amount to be levied in addition to a fee charged for services where VAT has been imposed for the first time on such services in terms of the VAT Act or the VAT rate has been increased. In SARS's view directors' fees paid to NEDs have always been subject to VAT hence no amendment to the VAT Act is required, but SARS has now merely directed in terms of s23(4)(b) of the VAT Act that NEDs only need to register and account for VAT from 1 June 2017.

VAT ON NON-EXECUTIVE DIRECTOR REMUNERATION: MORE QUESTIONS THAN ANSWERS?

CONTINUED

SARS has ruled that a NED carries on an enterprise in the form of the supply of services. However, the nature of these services is not described.



Accordingly, the VAT on directors' fees paid to NEDs are not imposed for the first time in terms of the VAT Act as contemplated by s67, and a NED will thus not be able to rely on this provision.

Questions also arise with regard to the VAT position of non-resident NEDs. A person is required to register for VAT if the person carries on an "enterprise", ie an activity on a continuous or regular basis in or partly in South Africa in the course of which goods or services are supplied for a consideration. This means that only activities carried on in South Africa will give rise to VAT registration, and in the absence of any specific place of supply rules in the VAT Act, it is open for interpretation as to where activities in relation to the supply of services are rendered.

SARS has ruled that a NED carries on an enterprise in the form of the supply of services. However, the nature of these services is not described. If the services rendered are considered to be the preparation for and attendance of board meetings, it seems that certain services such as the review of papers in preparation for a board meeting whilst the NED is not present in the country, could be regarded

to be supplied outside South Africa. If the non-resident NED attends a board meeting in a foreign country by way of video conference, a further question arises as to where such services are rendered. The "enterprise" of the NED could therefore be considered to be rendered partly within and partly outside South Africa, and where the director's fees attributable to the services rendered in South Africa are less than R1 million for a 12 month period, the non-resident NED may not be required to register for VAT.

The VAT position of a South African NED serving on a foreign company's board is equally uncertain with regard to the obligation of such NED to register for VAT. If required to register, such directors' remuneration may qualify for the zero rate, but the burden of the VAT registration and submission of VAT returns will remain.

Although BGR 41 does not provide clarity with regard to these aspects, NEDs may apply to SARS for a binding private ruling to clarify their VAT status and obligation to register for VAT where their scenario is not specifically dealt with in BGR 41.

Gerhard Badenhorst

CHAMBERS GLOBAL 2011 - 2017 ranks our Tax and Exchange Control practice in Band 2: Tax.

Emil Brincker ranked by CHAMBERS GLOBAL 2003 - 2017 in Band 1: Tax.

Mark Linington ranked by CHAMBERS GLOBAL 2017 in Band 1: Tax.

Ludwig Smith ranked by CHAMBERS GLOBAL 2017 in Band 3: Tax.

Gerhard Badenhorst ranked by CHAMBERS GLOBAL 2017 in Band 1: Tax.



FURTHER CLARIFICATION ON THE VAT REGISTRATION OF NON-EXECUTIVE DIRECTORS

It has been confirmed that a NED is regarded as an "independent contractor" and any directors fees paid or payable to a NED for services rendered in that capacity are not regarded as remuneration.

Notwithstanding the further guidance provided by SARS in its subsequent media release, published on 17 February 2017, there was still some uncertainty in respect of the position prior to 1 June 2017.



On 10 February 2017, SARS published Binding General Ruling 40 (BGR 40), in addition to Binding General Ruling (BGR 41) that was referred to in the article above (Rulings). We initially reported on these Rulings in our [Tax and Exchange Control Alert of 17 February 2017](#). BGR 40 dealt with the manner in which non-executive directors (NEDs) should account for tax on their earnings as directors from an employees' tax (PAYE) perspective, while BGR 41 dealt with the VAT consequences of NEDs' earnings. While the Rulings provided much needed clarity on various interpretational issues, there were still one or two practical issues, which were not covered. In particular, the Rulings did not provide clear guidance on the manner in which companies and NEDs should have dealt with the taxation of their earnings prior to 1 June 2017. SARS therefore subsequently issued a separate media release on 17 February 2017 setting out further practical guidance.

The 17 February 2017 media release provided, among other things, as follows:

Previously NEDs were subject to employees' tax because the directors' fees received for services rendered were considered remuneration. However, due to amendments made in 2007 to the exclusions to the definition of "remuneration" in the Fourth Schedule to the Income Tax Act, No 58 of 1962, there was uncertainty as to whether the amounts payable to a NED were subject to the deduction of PAYE.

After consultation, review and application of the law it has been confirmed that a NED is regarded as an "independent contractor" and any directors fees paid or payable to a NED for services rendered in that capacity are not regarded as remuneration.

NEDs receiving directors' fees exceeding the compulsory registration threshold are required to register as VAT vendors from 1 June 2017. However, NEDs will not be required to account for VAT in respect of directors' fees received prior to this date, provided such NED was subject to PAYE.

Notwithstanding the further guidance provided by SARS in its subsequent media release, published on 17 February 2017, there was still some uncertainty in respect of the position prior to 1 June 2017, particularly where a NED received directors' fees exceeding the compulsory registration threshold and failed to account for VAT in addition to the fact that the company paying the NED also did not deduct PAYE.

SARS thus issued the updated BGR 41 referred to in the article above and issued a media release on 5 May 2017 in this regard. As per the SARS media release, the updated BGR 41 clarifies that:

- A NED who is liable to register for VAT but has not done so yet, must register and account for VAT with effect from 1 June 2017 unless an earlier date of liability is chosen.
- A NED who was actually registered for VAT before 1 June 2017 for other activities, but did not charge VAT on the director's fees must charge VAT with effect from 1 June 2017 unless that person chooses to account for VAT on those fees from an earlier date.

FURTHER CLARIFICATION ON THE VAT REGISTRATION OF NON-EXECUTIVE DIRECTORS

CONTINUED

Any NED that carries on an enterprise in the Republic of South Africa and has exceeded the R1 million compulsory VAT registration threshold that has not registered for VAT as at the date of BGR 41 must apply for registration by no later than 1 June 2017.



The media release further importantly confirms that the above is applicable regardless of whether the fees earned by the NED were subject to PAYE or not. Therefore, whether the fees were subject to PAYE prior to 1 June 2017 does not affect the VAT liability as the obligation to charge VAT only arises from 1 June 2017 henceforth, notwithstanding that persons may choose to charge VAT of their own volition should they wish to do so.

In addition, the revised BGR 41 provides that any NED that carries on an enterprise in the Republic of South Africa and has exceeded the R1 million compulsory VAT registration threshold that has not registered for VAT as at the date of BGR 41 must apply for registration by no later than 1 June 2017. The revised Ruling 41 therefore provides guidance in respect of the provisions set out in s23(4)(b) of the Value-Added Tax Act, No 89 of 1991 (VAT Act) which states as follows:

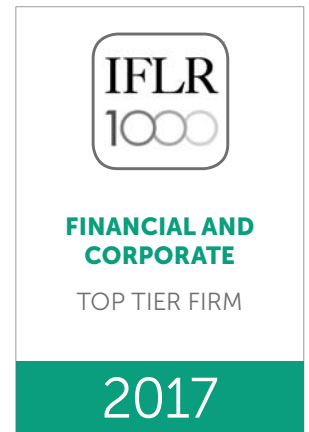
Where any person has not applied for registration in terms of Chapter 3 of the Tax Administration Act and the Commissioner is satisfied that

that person is liable to be registered in terms of this Act, that person shall be a vendor for the purposes of this Act with effect from the date on which that person first became liable to be registered in terms of this Act: Provided that the Commissioner may, having regard to the circumstances of the case, determine that person to be a vendor from such later date as the Commissioner may consider equitable.

Therefore, notwithstanding the fact that a NED may be considered a vendor for purposes of the VAT Act with effect from the date on which that person first became liable to be registered (ie a date prior to 1 June 2017), the effective date of such registration (liability date) as determined by the Commissioner of SARS under s23(4)(b) of the VAT Act, must be no later than 1 June 2017.

The further publications, media releases and revised BGR 41 issued by SARS hopefully provide more clarity.

Jerome Brink



OUR TEAM

For more information about our Tax and Exchange Control practice and services, please contact:



Emil Brincker
National Practice Head
Director
T +27 (0)11 562 1063
E emil.brincker@cdhlegal.com



Mark Linington
Private Equity Sector Head
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com



Lisa Brunton
Senior Associate
T +27 (0)21 481 6390
E lisa.brunton@cdhlegal.com



Gerhard Badenhorst
Director
T +27 (0)11 562 1870
E gerhard.badenhorst@cdhlegal.com



Heinrich Louw
Senior Associate
T +27 (0)11 562 1187
E heinrich.louw@cdhlegal.com



Petr Erasmus
Director
T +27 (0)11 562 1450
E petr.erasmus@cdhlegal.com



Louis Botha
Associate
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com



Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com



Jerome Brink
Associate
T +27 (0)11 562 1484
E jerome.brink@cdhlegal.com



Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@cdhlegal.com



Gigi Nyanin
Associate
T +27 (0)11 562 1120
E gigi.nyanin@cdhlegal.com



Mareli Treurnicht
Director
T +27 (0)11 562 1103
E mareli.treurnicht@cdhlegal.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2017 1661/MAY

