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# TAX & EXCHANGE CONTROL ALERT

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ISSUE

## VAT RATE INCREASE: WHAT VAT RATE SHOULD BE CHARGED?

The Minister of Finance announced in his Budget Speech of 21 February 2018 that the standard rate of VAT will increase from the current 14% to 15% with effect from 1 April 2018.

# VAT RATE INCREASE: WHAT VAT RATE SHOULD BE CHARGED?

*The effective date of 1 April 2018 for the rate change does not allow much time for vendors to amend their systems and to implement procedures to ensure that VAT is correctly accounted for.*

*Section 67 of the VAT Act deals with the situation where an agreement was entered into before 1 April 2018.*



The Minister of Finance announced in his Budget Speech of 21 February 2018 that the standard rate of VAT will increase from the current 14% to 15% with effect from 1 April 2018.

Unfortunately, the effective date of 1 April 2018 for the rate change does not allow much time for vendors to amend their systems and to implement procedures to ensure that VAT is correctly accounted for from that date. There is also uncertainty as to when supplies still qualify for VAT at 14% and when VAT should be levied at 15%. The VAT Act contains certain specific rules with regard to a VAT rate change and the rate of VAT which should apply to goods or services supplied during the transitional period. These rules are as follows:

#### **Entitlement to alter a contract price in relation to the VAT rate increase**

Section 67 of the VAT Act deals with the situation where an agreement was entered into before 1 April 2018. It entitles the supplier to recover from the recipient, in addition to the amounts payable by the recipient to the vendor as stipulated in the agreement, the additional amount of VAT that becomes payable on supplies on or

after 1 April 2018 as a result of the VAT rate increase, unless the agreement specifically stipulates otherwise. The supplier will nevertheless be required to pay VAT at 15% on such supplies, irrespective of whether or not the supplier actually recovers the additional consideration from the recipient.

#### **Transitional rules**

The transitional rules dealing with a VAT rate increase are contained in s67A, and are dealt with below:

#### **Supplies before 1 April 2018**

Where goods (excluding fixed property supplied by way of a sale) are provided before 1 April 2018, or where services are performed during a period commencing and ending before 1 April 2018, the rate of 14% will apply to these supplies, irrespective of the fact that an invoice for such supply may only be issued after 1 April 2018, and payment is received after that date.

## **Who's Who Legal**

Emil Brincker has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory and Who's Who Legal: Corporate Tax – Controversy for 2017.

Mark Linington has been named a leading lawyer by Who's Who Legal: Corporate Tax – Advisory for 2017.

# VAT RATE INCREASE: WHAT VAT RATE SHOULD BE CHARGED?

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*The onus is on the vendor to prove that the apportionment applied is fair and reasonable in the circumstances.*



Goods are deemed to be provided when they are delivered to the recipient. It is not clear what is meant by 'delivery', but it seems that the concept is wider than just physical delivery, and that it includes 'delivery' in the legal sense. If the goods are supplied under a rental agreement, such goods are deemed to be provided when the recipient takes possession or occupation thereof.

There is, however, no guidance as to when services are deemed to be performed. It seems that services must be carried out or physically performed for the services to be considered to have been performed.

#### **Supplies commencing before and ending on or after 1 April 2018**

The rules with regard to the supply of goods or services commencing before and ending on or after 1 April 2018 are contained in s67A(1)(ii) and cover the following supplies:

- goods that are provided under a rental agreement;
- services which are performed under an agreement or law that provides for periodic payments;
- goods supplied progressively or periodically under an agreement or law that provides for the consideration to be paid in instalments or periodically; and
- goods or services supplied directly in the construction, repair, improvement, erection, manufacture, assembly or alteration of goods under any agreement or law that provides for the consideration to be paid in instalments or periodically.

Where these goods are provided or services are performed during a period that commences before 1 April 2018 and ends thereafter, then the vendor must apportion the value of the supply (ie the VAT exclusive price charged) on a fair and reasonable basis between the supplies made before 1 April 2018, and supplies made on or after that date. VAT is then payable at the rate of 14% on the value attributed to supplies made before 1 April 2018, and is payable at 15% on the value attributed to supplies on or after that date.

There are no guidelines as to the basis of apportionment which must be used. The onus is on the vendor to prove that the apportionment applied is fair and reasonable in the circumstances.

#### **Supplies made after 1 April 2018**

Generally, where supplies are made on or after 1 April 2018, such supplies will be subject to VAT at 15%. However, to prevent vendors from taking advantage of the lower rate by triggering the time of supply rules in s9 during the period from when the increase in the VAT rate was announced (ie 21 February 2018) but before 1 April 2018, where the actual supplies of the goods or services are only made only after this date, s67A(2) contains certain anti-avoidance rules that override the provisions of s9.

The anti-avoidance rules apply where goods (excluding the sale of residential property) or services are supplied where the time for such supply was triggered in terms of s9 between 21 February 2018 and 31 March 2018, but the goods are only provided 21 days after 1 April 2018 (ie after 22 April 2018) or the services are performed on or after 1 April 2018.

# VAT RATE INCREASE: WHAT VAT RATE SHOULD BE CHARGED?

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*Section 67A(4) of the VAT Act provides for a concession in relation to the sale of residential property.*



Such supplies are deemed to take place on 1 April 2018 and VAT at the rate of 15% will apply. The VAT must then be accounted for in the April 2018 tax period, irrespective of when the goods are provided or the services are performed. Therefore, if the goods are provided within the 21-day period, ie before 22 April 2018, VAT will still be payable at 14%.

The anti-avoidance provisions of s67A(2) will not apply where it is the normal business practice of the vendor to receive payments or to issue invoices before goods are provided or services are performed, for example, a professional body that customarily issues invoices to its members for annual subscriptions.

#### **Sale of residential property**

Section 67A(4) of the VAT Act provides for a concession in relation to the sale of residential property. This section applies to sales of the following types of residential properties:

- the sale of fixed property consisting of any dwelling together with land on which it is erected;
- any real right conferring a right of occupation of a dwelling;

- any sectional title unit where such unit comprises a dwelling;
- any share in a share block company that confers a right to or interest in the use of a dwelling;
- the sale of fixed property consisting of land for the sole or principal purpose of the erection by or for the purchaser of a dwelling as confirmed by the purchaser in writing; or
- the construction by a vendor carrying on a construction enterprise of any new dwelling.

A 'dwelling' is defined to mean, except where it is used in the supply of commercial accommodation, any building, premises, structure, or any other place, or any part thereof, used predominantly as a place of residence or abode of any natural person or which is intended for such use, including fixtures and fittings belonging thereto.

If the price of the sale or construction of such property was determined and stated in a sale agreement which was signed by the parties thereto before 1 April 2018, and the registration of transfer and payment will only take place on or after 1 April 2018, then VAT is payable at the rate of 14%.



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# VAT RATE INCREASE: WHAT VAT RATE SHOULD BE CHARGED?

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*There will, no doubt, be various transactions for which the transitional rules are unclear or where they may cause substantial practical difficulties to comply with.*



## Commercial property

There are no special transitional rules in relation to commercial property. The normal time of supply rule therefore determines the rate of VAT which will be applicable. Consequently, if the date of registration of transfer in the name of the purchaser is effected and payment is made to the seller on or after 1 April 2018, VAT at 15% will be payable by the seller, irrespective of when the sale agreement was concluded.

## Lay-by sales

Where a lay-by agreement is concluded prior to 1 April 2018, VAT at the rate of 14% will be payable on the supply in terms of such an agreement, provided a deposit is paid before 1 April 2018. If such an agreement is cancelled before the supply is made, the supplier must account for VAT on any amount retained at the tax fraction applying the rate of 14%.

Supplies made under any lay-by agreements concluded after 1 April 2018, are subject to VAT at 15%, and any amounts retained under such cancelled agreements will attract VAT at the tax fraction applying the rate of 15%.

There will, no doubt, be various transactions for which the transitional rules are unclear or where they may cause substantial practical difficulties to comply with. Careful consideration and a prudent practical approach for these transactions will be required to avoid any penalties and interest, as SARS is unlikely to have sufficient resources available to provide clarification by way of rulings to vendors before 1 April 2018.

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**Gerhard Badenhorst**



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