29 MARCH 2019

TAX & EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

FURTHER AMENDMENTS TO THE VAT ELECTRONIC SERVICES REGULATIONS

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CUSTOMS & EXCISE HIGHLIGHTS

This week's selected highlights in the Customs & Excise environment since our last instalment.

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FURTHER AMENDMENTS TO THE VAT ELECTRONIC SERVICES REGULATIONS

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On 18 March 2019, the revised 'final' regulations were published in the Government Gazette prescribing what constitutes 'electronic services' as contemplated in the VAT Act. The revised regulations will come into effect on 1 April 2019.

Background and entry requirements

South Africa does not have any place of supply rules to aide in the determination of which jurisdiction has taxing rights in respect of supplies made by foreign suppliers to South African customers. South Africa therefore introduced legislation providing a place of supply rule specific to e-commerce transactions for the first time with effect from 1 June 2014, which required foreign suppliers of e-services to register as VAT vendors in South Africa.

Foreign suppliers of e-services are deemed to be carrying on an enterprise in South Africa if at least two of the following requirements are met:

- the recipient of the services is a South African resident;
- the payment for services originates from a South African bank account; or
- the recipient has a business, residential, or postal address in South Africa.

Foreign suppliers of e-services will accordingly be required to register as VAT vendors in South Africa to the extent that they make taxable supplies of electronic services in excess of the VAT registration threshold. With effect from 1 April 2019, the registration threshold for supplies of e-services will be increased from R50,000 in a 12-month period to R1 million in a 12-month period.

Revised regulations

The revised regulations remove the various specific categories of e-services listed in the current regulations and serves to widen the scope of the regulations to apply to *any services supplied by means of an 'electronic agent', 'electronic communication' or the 'internet' for any consideration*. These terms are in turn defined with refence to the Electronic Communications and Transactions Act, No 25 of 2002 (ECTA).

The effect of the amendment is that virtually all services that are supplied by way of electronic means such as, for example, cloud computing, computer software and any online services, are now included as 'electronic services'.

Specifically excluded from the scope of the regulations are supplies of regulated educational services, telecommunication services, and certain supplies between

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FURTHER AMENDMENTS TO THE VAT ELECTRONIC SERVICES REGULATIONS

CONTINUED

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'group companies' as that term is defined. Furthermore, supplies which would ordinarily be exempt from VAT if supplied in South Africa, for example, financial services, will not fall within the scope of the e-services regulations even if supplied by electronic means.

It is interesting to note that the previous draft regulations published during November 2018 provided a detailed definition of what constituted 'telecommunication services' for purposes of the regulations. This definition has however been removed, and the revised regulations now simply define 'telecommunication services' with reference to the ECTA. This is rather peculiar on the basis that the term 'telecommunication services' is not defined in the ECTA. It seems that this may have been an oversight by National Treasury and it is expected that this should be amended in due course.

If one considers the broad definition of e-services, ie 'any services supplied by means of an *'electronic agent', 'electronic communication' or the 'internet'*, it is not clear whether information or advice which is communicated via an e-mail transmitted electronically falls within the ambit of the regulation. "Electronic communication" is defined in the ECTA to mean *'a communication by means of data messages'*, and "data messages" is defined to mean *'data generated, sent, received or stored by electronic means'*. On the face of it, it seems that information or advice communicated via e-mail will therefore fall within the scope of e-services. The Explanatory Memorandum stipulates, however, that one of the policy intentions behind the amendments is to subject to VAT those services that are provided using minimal human intervention. It provides as an example that legal advice prepared outside of South Africa by a non-resident and sent to a recipient in South Africa via e-mail will not be subject to the regulations. Notwithstanding the statement made in the Explanatory Memorandum, it remains that the Explanatory Memorandum does not have any legal status and SARS should preferably clarify and confirm this policy intention by means of a binding general ruling so as to avoid any future disputes in this regard.

Intra-group transactions

A welcome revision of the regulations is the relaxation of the rules relating to intra-group supplies. In terms of the regulations, e-services supplied between group companies are excluded from the scope of the regulations. However, in terms of the initial proposed definition of the term 'group of companies' contained in the previous draft regulations, it was required that the local recipient company

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FURTHER AMENDMENTS TO THE VAT ELECTRONIC SERVICES REGULATIONS

CONTINUED

The reasoning provided by National Treasury in the Explanatory Memorandum is that the exclusion of B2B transactions would create an unfair cash flow advantage for foreign suppliers.

must be the wholly owned subsidiary of the foreign group company for the exclusion to apply. Consequently, if the local company has minority shareholders such as Black Economic Empowerment or employee incentive scheme shareholders, the exclusion would not have applied. This issue was identified and the definition of 'group of companies' was amended and relaxed to require a 70% shareholding in the local recipient company by the foreign holding company. It is important to note that to qualify for the exclusion, the foreign company must supply the e-services to the local recipient company itself.

Business-to-Business (B2B) transactions

At the time of introducing the e-services regulations for the first time in June 2014, National Treasury stated that the regulations do not impose a new tax, but merely shifts the tax liability from the local recipient of the e-services to the foreign supplier thereof, so as to address concerns about non-compliance with the reverse charge mechanism, and to level the playing field between local and foreign suppliers of e-services.

The regulations were accordingly first introduced to address concerns about non-compliance by recipients of imported services. The concept of 'imported services' specifically excludes services acquired for purposes of making taxable supplies. By including B2B transactions, the regulations create a disparity between supplies of e-services and supplies of any other services by foreign suppliers. The supplies of any other services are only taxed as imported services if they are acquired for purposes other than making taxable supplies. The reasoning provided by National Treasury in the Explanatory Memorandum is that the exclusion of B2B transactions would create an unfair cash flow advantage for foreign suppliers. This reasoning however does not seem to have any basis because services rendered by foreign suppliers to businesses using the services for taxable supplies are not subject to VAT under the imported services provisions in the first place.

The inclusion of B2B transactions in the scope of the e-services regulations therefore deviates from the initial intention expressed by National Treasury at the time of introducing the regulations during June 2014. The inclusion of B2B transactions brings foreign suppliers who supply electronic services to local business for purposes of making taxable supplies into the South African VAT net.

It is questionable as to what benefit would accrue to the fiscus on B2B transactions if the net impact on the fiscus is nil, as any VAT charged by the supplier will be deductible as input tax by the recipient, coupled with the increased administration for both the South African Revenue Service (SARS) and the foreign supplier who will now need to register as a vendor and submit monthly VAT returns to SARS.

The inclusion of B2B transactions is also contrary to the recommendations of the Davis Tax Committee (DTC). The DTC recommended that the treatment of e-services should be aligned with international treatment and especially harmonised with OECD

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FURTHER AMENDMENTS TO THE VAT ELECTRONIC SERVICES REGULATIONS

CONTINUED

A foreign supplier of e-services who makes taxable supplies in excess of R1 million in a 12-month period will be liable to register as a South African VAT vendor with effect from 1 April 2019.

principles. The Organisation for Economic Co-operation and Development (OECD) in its *International VAT/GST Guidelines (2017)*, recommends that a distinction be drawn between B2B and B2C (Business-to-Consumer) transactions. The OECD recommends that a customer should be liable to account for any tax due under the reverse charge mechanism where that is consistent with the overall design of the national VAT system. The OECD goes on to state that the application of the reverse charge mechanism in this instance has a number of advantages, including, *inter alia*, reducing the administrative costs for the tax authority because the supplier will not be required to comply with tax obligations in the customer's jurisdiction, for example, VAT identification, audits and the costs associated with administering language barriers. Notwithstanding the DTC's and the OECD's recommendation that B2B transactions be excluded so as to ensure global harmonisation of the VAT principles, it seems that National Treasury has chosen to disregard these recommendations.

Intermediaries

Intermediaries who facilitate the supply of e-services or who provide their platforms to foreign suppliers for rendering the e-services to South African customers, and who are responsible for invoicing and collecting payment for the e-services, are also required to register for VAT in South Africa. Accordingly, where a foreign supplier supplies e-services via an intermediary, the intermediary will be deemed to be the supplier of the services where such intermediary facilitates the supply of the e-services and is responsible for the issuing of the invoice and collection of the payment.

The VAT Act provides for suppliers of electronic services to apply to SARS, to account for VAT on the payments basis as opposed to the invoice basis. However, this dispensation has not been extended to intermediaries who facilitate the supply of e-services.

Registration as a vendor

A foreign supplier of e-services who makes taxable supplies in excess of R1 million in a 12-month period will be liable to register as a South African VAT vendor with effect from 1 April 2019.

A simplified VAT registration process has been introduced for foreign e-services suppliers. The VAT 101 Application form may be downloaded from the SARS website. The application must be completed in English and emailed together with the requisite supporting documents to SARS. It is important to note that foreign suppliers of e-services will not be required to have a South African banking account for purposes of registering as a vendor.

Detailed guidance regarding the registration process as well as guidance on completing a VAT201 return is provided for in the SARS *VAT Registration Guide for Foreign Suppliers of Electronic Services* available on the SARS website.

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FURTHER AMENDMENTS TO THE VAT ELECTRONIC SERVICES REGULATIONS

CONTINUED

A person who is liable to register and fails to do so is guilty of an offence and is liable to a fine or imprisonment for a period not exceeding two years.

SARS has also issued a detailed document titled 'Frequently Asked Questions: Supplies of Electronic Services' (FAQs) in which it provides answers to various questions regarding the e-services regulations. SARS has stated that the FAQs will be updated periodically to address questions regarding the revised regulations and as such it is not envisaged that VAT rulings in relation to the revised regulations will be issued. A dedicated mailbox (VATElectronic@sars.gov.za) has been set up to field any questions not already answered in the FAQs. The FAQ document is available on the SARS website.

Effective date/Implications

The regulations come into effect on 1 April 2019. The revised regulations have only been gazetted in their final form on 18 March 2019 providing foreign suppliers of e-services who now fall within the ambit of the revised regulations and who have not registered as yet, with just two weeks to register for VAT in South Africa and to update their systems so as to comply with their obligation to account for VAT on e-services supplied in South Africa with effect from 1 April 2019.

A person who is liable to register and fails to do so is guilty of an offence and is liable to a fine or imprisonment for a period not exceeding two years. Furthermore, a person may also be subject to further penalties for failure to register, as well as penalties and interest on output tax not accounted for from the time such person first became liable to register. Foreign suppliers of e-services should therefore carefully consider their VAT registration obligations in South Africa and should ensure that they comply with the revised regulations and VAT legislation.

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CUSTOMS & EXCISE HIGHLIGHTS

Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.

Herewith below selected highlights in the Customs & Excise environment since our last instalment:

1. Appointment of new SARS Commissioner (certain sections quoted from the SARS website):

   President Cyril Ramaphosa has appointed Mr. Edward Kieswetter as the Commissioner for SARS with effect from 1 May 2019 for a term of five years. The decision was informed by the recommendation to the President from the Minister of Finance that the recommended candidate of the independent selection panel be appointed.

2. Rewrite of Excise legislation (certain sections quoted from the SARS website):

   2.1 Following the recent announcement in Budget 2019, SARS has compiled an excise rewrite discussion document to further the process of redrafting the excise legislative framework.

   2.2 The discussion document outlines the internationally recognised aspects of an excise administration against which any excise review must be measured. The introduction and current practice of the duty-at-source (DAS) system of excise administration provides the context to the review of the excise legislation. Certain apparent shortcomings in the current legislation regarding DAS licensing, accounting, assessment and acquittal of excise duties have been identified for possible amendment. A comparison of various countries is also provided to demonstrate international examples of reform options. Finally, a summary conclusion reflects the proposals that SARS supports.

   2.3 The discussion document aims to elicit constructive inputs and comments from all affected industries that manufacture, use, import and export excisable goods, as well as from broader excise stakeholders. Upon completion of the public comment period and once comments have been processed, SARS intends to approach representative industry bodies and applicable government departments for further engagements on those particular reform proposals that require additional inputs and refinement.

   2.4 Comments can be submitted to C&E_LegislativeComments@sars.gov.za or to SARS, Private Bag X923, Pretoria, 0001, for attention Ms Samantha Authar, by 31 May 2019.

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CUSTOMS & EXCISE HIGHLIGHTS

CONTINUED

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3. Amendments to Rules to the Customs & Excise Act, No 91 of 1964 (Act) (certain sections quoted from the SARS website):

    3.1 Draft amendments to the Rules under s8 of the Act. The purpose of the amendment to the Rules is to provide for the reporting of goods transported by road, that are part-shipped.

4. Amendments to Schedules to the Act:

    4.1 Schedule 2:

        4.1.1 In terms of s57A of the Act a provisional payment in relation to anti-dumping duty was imposed on 22 March 2019 up to and including 22 September 2019 on clear float glass, classifiable in tariff subheadings 7005.29.17, 7005.29.23, 7005.29.25 and 7005.29.35, imported from Saudi Arabia and the United Arab Emirates.

5. The Department of Trade and Industry has issued the following notices (certain sections quoted from the notice):

    5.1 Draft amendment to the compulsory specification for canned meat products in relation to the National Regulator for Compulsory Specifications Act, No 5 of 2008 (dated 8 March 2019):

        5.1.1 The notice, *inter alia*, requires a permit and/or approval by the Department of Agriculture, Forestry and Fisheries (DAFF), and also an application for approval to the National Regulator for Compulsory Specifications (NRCS) for canned meat products to be imported and exported.

        5.1.2 Comments may be submitted to the Chief Executive officer, NRCS, Private Bag X25, Brooklyn, within 2 months from the date of the notice.

    5.2 Correction notices (dated 8 March 2019) to the compulsory specifications for pneumatic tyres for:

        5.2.1 Passenger cars and their trailers; and

        5.2.2 Commercial vehicles and their trailers.

6. The DAFF has issued a notice dated 8 March 2019 providing for amendments to the fees payable in respect of anything done, or which is required to be done, under the Liquor Products Act, No 60 of 1989.

7. Please advise if additional information is required.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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