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TAX ALERT

24 January 2014

TOLL FEES AND VAT INVOICES: VENDORS MUST GET THE NECESSARY DOCUMENTATION TO SUBSTANTIATE VAT INPUT CLAIMS

SARS's VAT 404 Guide states: "One of the underlying principles of the South African VAT system is that it is an invoice-based tax. This means that vendors are generally required to account for VAT on the basis of invoices being issued or received." Furthermore: "The most important document in such a system is the tax invoice. Without a proper tax invoice you cannot deduct input tax on purchases for your enterprise, and if you have clients who are vendors … they cannot claim back the VAT …"

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In brief, the following are the requirements of the Value-Added Tax Act, No 89 of 1991 (VAT Act) with regard to a supplier's obligation to issue a tax invoice:

- The general rule is that a supplier making a taxable supply 'must' within 21 days of the date of supply issue a tax invoice (s20(1)) which contains certain particulars (referred to as a 'full tax invoice' - s20(4)); or
- Where the consideration for the supply is less than R5 000 an 'abridged tax invoice' (s20(5)) can be issued and where the total consideration is for less than R50 the supplier is not required to provide a tax invoice, but then, in terms of s20(6), "… the supplier shall provide the recipient with a document that is acceptable to the Commissioner" (eg a till slip).

'Services' under the VAT Act include the 'making available of any facility' (s1). That would include a toll road operator (operator) providing a toll road facility to a road user (user).

Presumably, the supply of the toll road 'service' occurs each time the user passes under a gantry. Such service would be in respect of the particular stretch of toll road covered by the gantry in question. In reality, while traveling on a toll road, numerous individual gantry-by-gantry supplies, each with a value of less than R50, are continuously being made to the user.

On the above-mentioned basis the applicable provision would be s20(6). The operator would thus not be obliged to issue a full (s20(4)) or abridged tax invoice (s20(5)). However, it has to furnish ('shall provide') the user with, at least, "a document that is acceptable to the Commissioner" (hereinafter referred to as the acceptable documentation) to enable the user to claim the applicable VAT inputs in terms of s16(3).

The Guide states: "Tax invoices for supplies made … and the general maintenance of proper accounting records and documents are all very important aspects of how the whole VAT system operates. These documents form an audit trail which SARS uses to verify that the vendor has complied with the law. A tax invoice … also serves as the documentary evidence of any VAT deducted by the vendor as input tax. A tax invoice is only valid if it contains certain details and is issued by the supplier within 21 days of making a taxable supply, regardless of whether the recipient has requested this or not."

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It is clear that a user would need at least some basic documentation from the operator to calculate the VAT input claim. It is the operator's responsibility under the VAT Act to supply the user, within 21 days, with the acceptable documentation under s20(6) even if the user has not demanded same from the operator. The operator's obligation stems from the applicable VAT Act provisions and hence it is irrelevant whether:

- The user is a registered, unregistered or an alternate toll road user; or
- The operator has been paid, or not, for the toll road supplies made.

The issuing of the tax invoice or acceptable documentation must happen 'within 21 days of that supply'. It does not refer to 'business day' as defined in s1 of the VAT Act. Calculation of the 21 day period is accordingly determined under s4 of the Interpretation Act, No 33 of 1957. It is reckoned exclusive of the first (when passing under the gantry) and inclusive of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusive of the first day and exclusive also of every such Sunday or public holiday.

The VAT Act does provide for an exception: Should the Commissioner be satisfied that there are or will be sufficient records available to establish the particulars of any supply or category of supplies, and that it would be impractical to require that a full tax invoice be issued, then he may direct (subject to any conditions imposed) that a tax invoice is not required to be issued (s20(7)(b)). Where such a direction has not been obtained from the Commissioner, the operator's obligation to issue a tax invoice or acceptable documentation would be as set out above.

It is understood that registered toll road users have access to printable electronically generated invoices to substantiate their VAT input claims.

In the case of unregistered and alternate users the VAT Act nevertheless obliges the operator to issue to those users either a tax invoice (s20(1)), alternatively the acceptable documentation (s20(6)) within the 21 day period. Same could then be used for VAT 201 purposes.

The status of the user (registered, unregistered or alternate), and the fact that the operator has not received payment for its toll road supplies, has no bearing and does not somehow suspend the operator's obligations under the VAT Act to issue a tax invoice, alternatively the acceptable documentation.

A recent, as yet unreported, Tax Court case (*Case No VAT 872*, decided 2 December 2013), dealt with the input-claiming vendor's obligation to procure a tax invoice. The case dealt with barter transactions where no tax invoices were issued. Yekiso J, held:

- The obligation to procure a tax invoice for purposes of claiming VAT inputs rests on the recipient vendor.
- The fact that the vendor requested invoices from the supplier (who failed to provide same), did not leave the recipient vendor without a remedy. It could either have created a document deemed to be a tax invoice (under s20(2)), or it could have sought a court order compelling the supplier to issue the necessary invoices.
- It was the recipient vendor's responsibility to obtain tax invoices. SARS should not be ordered by the court to force the supplier to issue same.
- Because the recipient vendor lacked tax invoices SARS was correct in denying it the VAT inputs.

The judgment indicates that a recipient vendor must do more than to merely request tax invoices from its supplier. A court order to compel the supplier might even be called for. Yekiso J also made it clear that it is not SARS's duty to somehow strong-arm the supplier to force it to comply with its VAT Act obligations as far as tax invoices are concerned. To obtain the necessary tax invoices for VAT input purposes is basically the recipient vendor's problem.

It is suggested that vendors in all instances timeously obtain from the operator the necessary documentation to substantiate their VAT input claims in respect of toll road usage, or risk facing VAT input add-backs should SARS conduct a VAT audit.

Johan van der Walt

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BARTER TRANSACTIONS AND TAX INVOICES

The fundamental governing principle of value-added tax (VAT) is that it is levied on the supply of goods and services by a vendor, and that the vendor can claim input tax in respect of goods and services received. It can be difficult enough dealing with the administrative aspects of VAT and determining the correct VAT treatment of transactions – imagine the additional frustration created when the South African Revenue Service (SARS) assesses a vendor for VAT on supplies made, but then denies the vendor the right to claim input VAT as a result of a failure to comply with certain substantive and procedural requirements imposed under the Value-Added Tax Act, No 89 of 1991 (VAT Act).

In a recent Tax Court judgment (as yet unreported, *case no VAT 872*) the facts were that a vendor provided services to certain sponsors (also VAT vendors) and in return the sponsors gave money and services to the taxpayer. Essentially, the parties engaged in barter transactions. The vendor had failed to account for output tax in respect of the supplies made to the sponsors. Also, despite numerous requests by the vendor, the sponsors failed to issue tax invoices to the vendor for the supplies that the sponsors had made to the vendor.

SARS assessed the vendor in respect of output tax on the supplies made to the sponsors, but denied the vendor an input tax claim in respect of the supplies that the sponsors made to the vendor on the grounds that no output tax was actually charged by the sponsors and the vendor was not in possession of tax invoices. The vendor conceded that it was liable to account for the output tax, but insisted that it should be allowed to claim input tax against such output. The vendor also insisted that SARS should force the sponsors to provide it with tax invoices for this purpose.

Yekiso J, in giving judgment:

- Considered the submission by SARS that the sponsors, rightly or wrongly, did not charge VAT, and accordingly there was no 'input tax' (as defined) that could be claimed.
- Noted that the vendor did not submit that it was charged any VAT by the sponsors or that it paid input tax to the sponsors.
- Held that the reason the vendor cannot deduct input tax is because it did not have the required tax invoices.
- Held that, in circumstances such as the present where a tax invoice cannot be obtained, the vendor should have created a document deemed to be a tax invoice in terms of s20(2) of the VAT Act, or it should have obtained a court order compelling the sponsors to provide it with tax invoices;
- Held that the vendor could not ask for an order compelling SARS to force the sponsors to provide tax invoices because the vendor itself did not comply with the VAT Act in that it failed to account for output tax.
- Held that the vendor could not make use of s20(7)(b) of the VAT Act, which provides that the Commissioner of SARS may exercise a discretion to not require a tax invoice where sufficient records are available to establish the particulars of any supply or category of supplies, because there was a "contentious mix of supplies and the category of supplies received is uncertain".

The court confirmed SARS's assessment and dismissed the vendor's submissions.

Considering the facts, the question should be asked: what was the mischief? The value of the supplies made by each party to the other, and therefore the consideration and output VAT in respect of each supply, was equivalent. The input tax claim of each party would have equalled its output tax liability. For all intents and purposes, it should have been a VAT neutral transaction.

Section 64(1) of the VAT Act which deals with prices charged by the vendor provides that "any price charged by any vendor … shall be deemed to include any tax payable in terms of section 7(1)(a) in respect of such supply, whether or not the vendor has included tax in such price". Both parties were registered VAT vendors, and accordingly both parties were deemed to have charged VAT. It must follow that they are both also deemed to have paid VAT. The fact that the transaction was a barter transaction and not a money transaction should not make any difference.

Where a vendor sells something for R114 and no reference is made to VAT being charged, the R114 is deemed to include VAT. In my view this is no different from a barter transaction. In other words, it is irrelevant whether the *quid pro quo* is given in cash or in kind. The definition of consideration in the VAT Act provides that consideration includes any payment whether in money or otherwise and may also take the form of any act or 'forbearance' (that is, failure to act). When the consideration is in kind, the open market value of the goods or service received as consideration will be taken into account. For example, where a company sponsors an event by supplying sport equipment in exchange for advertising, the consideration for the advertising services would be the market value of the sport equipment.

In other words, whether a person receives money or goods and services makes no difference as the vendor is still deemed to have charged VAT. In terms of the judgment, the judge was correct in that the taxpayer did not have a tax invoice, but this does not detract from the fact that, on an overall application of the policy underlying the VAT Act, the taxpayer should be in a tax neutral position and there was no loss to the fiscus.

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The judgment is correct to the extent that without the tax invoice the taxpayer was not entitled to the input tax deduction. However, the suggestion in the judgment that the vendor could have made use of s20(2) of the VAT Act (recipient generated invoices) as a remedy is, with respect, incorrect. The vendor would not have been able to meet the prescribed requirements in circumstances where both SARS and the sponsors were not being cooperative. The requirements include prior approval by the Commissioner of SARS as well as an agreement with the sponsors that they would not issue tax invoices.

It is interesting to note that in considering s27(b) of the VAT Act,the judgment failed to consider the section in its entirety and made reference to only the “category of supplies” and not the fact that the VAT Act refers to (the particulars of any supply or category of supplies…). When one considers s27 of the VAT Act it seems clear that the reference to 'categories' is to standard rated supplies, zero-rated and exempt supplies, as opposed to any other category or type of goods or services supplied. On the facts, all the supplies were taxable supplies. Even if it was not clear whether the supplies were that of goods or services or any other category, it would have made no difference in this particular case.

The reasoning of this judgment has put the proverbial (judicial) cat amongst the (VAT) pigeons. It is understood that the matter is to go on appeal and we keenly await the outcome.

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