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SUBMISSION

2018 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill & Amendments to Regulations pertaining to "Electronic services"

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6: VALUE ADDED TAX

Comment	Recommendation
Section 7(3)(a)	The rate of 14% contained in this subsection must be amended to reflect the new rate
Section 8(27)	The rate of 14% contained in this subsection must be amended to reflect the new rate
Section 66	The rate of 14% contained in this subsection must be amended to reflect the new rate

VALUE ADDED TAX ACT:
Sections 7, 8 & 66

	Comment	Recommendation
VALUE ADDED TAX ACT: Sections 1	The proposed definition defines "intermediary" to include a person who facilitates the supply of the electronic services. It is not clear what is required to satisfy such requirement.	A definition for "facilitate" should be included as part of the definition of "intermediary" so that it can be determined, with certainty, when a person is facilitating a supply of electronic services (i.e. whether it is sufficient for the person to provide a platform for providing the services, can the person provide a local client list and details, should the person play an integral part in delivering the services). In New Zealand there are clear intermediary rules that are set out in the legislation and defined in more detail in a guidance note. The guidance note indicates which type of intermediaries would be liable to register and which intermediaries would not be required to register. The role of the intermediary in making the supply appears to be the determinative factor indicating liability to register. Australia also has a guidance document which sets out the kind of intermediaries that will be required to register. Taking into account the constraints and the time to issue documents by SARS, it is proposed that clarity is incorporated directly into the VAT Act as part of the definition of "intermediary".

Comment	Recommendation
	Further consideration should be given as to whether the requirement for the intermediary to "facilitate" the supply in order for the foreign principal gives rise to an increased risk that such foreign entity creates a permanent establishment in SA and policy position.

VALUE ADDED TAX ACT:
Sections 1

Comment	Recommendation
Reference to section 1 in the amended wording should be corrected to section 1(1)	Add (1) to section 1.
If the threshold applies in respect of deemed supplies, does it apply for supplies made per foreign electronic services provider (where intermediary makes supplies on behalf of more than one foreign electronic services provider) or in total. E.g. Intermediary supplies electronic services of R20 000 for 3 separate foreign electronic services providers. While none of the foreign electronic services providers are over the threshold, will the intermediary be required to register.	Clarify whether the threshold applies in respect of supplies made on behalf of all foreign electronic services providers or seperate threshold for each foreign electronic services provider.

VALUE ADDED TAX ACT:
Section 23(1A)

Comment

The VAT registration threshold for intermediaries (as well as foreign electronic service providers) which is aligned with the voluntary registration threshold should be reconsidered.

Given the increasing prevalence of electronic commerce in the global economy, business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar compliance burden.

Due to the low registration threshold, there may be instances where a foreign electronic supplier exceeds the VAT registration threshold by making a single supply, thereby requiring the foreign electronic supplier to register for that single supply, and deregistering subsequently.

VALUE ADDED TAX ACT:
Section 23(1A)

Recommendation

The VAT registration threshold for foreign electronic services providers should be aligned with the compulsory VAT registration threshold in South Africa - being R1 000 000 in a 12 month period and not the voluntary registration threshold of R50 000 in a 12 month period.

The threshold of R50 000 is exceptionally low in global terms (equivalent to approximately USD4 000 / GBP2 900 / EUR3 400) and significantly disadvantages foreign electronic service suppliers compared to local suppliers, and results in additional burdensome administration for foreign electronic service suppliers, specifically the small foreign electronic services suppliers, without any significant gain to the fiscus.

The low threshold encourages non-compliance and consideration would need to be given as to how, practically, SARS/National Treasury could efficiently enforce compliance and, ultimately whether such efforts will give rise to significant additional revenue to the SA fiscus.

The current threshold is contrary to the practice followed internationally in jurisdictions such as Australia, New Zealand, Singapore and the EU, which align the registration threshold for foreign electronic suppliers with the local compulsory registration threshold.

Comment	Recommendation
	The Davis Tax Committee ('DTC') also stated in its First Interim Report on VAT that the VAT registration threshold applicable to foreign electronic services suppliers should be reconsidered and re-examined. Should the current registration threshold not be changed, we recommend that the registration threshold should be limited to B2C supplies, this is also in accordance with the OECD guidelines. This once more highlights, the need for a distinction between B2B and B2C supplies to be made.

VALUE ADDED TAX ACT:
Section 23(1A)

Comment	Recommendation
Section 54(2B) deems the supply to be made by the intermediary without the parties agreeing to such arrangement. It is very unusual to force this type of arrangement on an agent as there is no opt-out option for the intermediary and automatically places the liability, as well as the risk in respect of any potential non-compliance penalties and interest on the intermediary, regardless of whether the intermediary accepts such liability.	Section 54(2B) should be amended to, similar to section 54(2A)(b), to apply only where the parties have agreed in writing. Accordingly, the intermediary will not automatically become liable where the foreign electronic services provider fails to register as a vendor. As it stands, principals that are not required to register for VAT (i.e. fall under registration threshold) when supplying electronic services through an intermediary would require the intermediary to levy VAT on these supplies. Consideration should be given as to whether the principles contained in section 52 of the VAT Act could be applied in the case of intermediaries.

VALUE ADDED TAX ACT:
Section 54(2B)

Comment	Recommendation
Subsection (ii) is confusing. The requirement that the principal must be a non-resident is restrictive and isn't flexible enough for instances where intermediaries represent both foreign and local suppliers. Instances could arise where intermediaries are required to identify supplies made by foreign suppliers and account for VAT thereon, but not in respect of local suppliers. This will result in significant additional compliance burden on intermediaries.	We recommend that an intermediary may account for VAT in respect of supplies of electronic services made by local entities where it is agreed in writing.

VALUE ADDED TAX ACT:
Section 54(2B)

Comment	Recommendation
It is not clear whether the intermediary is required to provide the foreign electronic services provider with a statement reflecting supplies made on its behalf.	Clarify whether there is any requirement on the intermediary to provide the foreign electronic services provider with a statement similar to that in section 54(3) of the VAT Act.

VALUE ADDED TAX ACT:
Section 54(2B)

CLAUSES

AMENDMENTS TO REGULATIONS: "ELECTRONIC SERVICES"

Comment

It must be appreciated that three major changes in VAT law i.e. a VAT rate increase, broadening of the Electronic Service legislation scope, as well as implementing an intermediary structure for electronic service providers to be implemented within the same year, does not afford an adequate or feasible time frame for business to adequately cater for these changes and align its businesses simultaneously.

Recommendation

We recommend that the amendments with regards to the broadening of the Electronic Service legislation scope (i.e. the Regulation), as well as the implementation of an intermediary structure be considered/implemented at a later stage, perhaps as part of the 2018 Taxation Laws Amendment Bill, rather than the 2018 Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill.

Regulations: Electronic services for purposes of the definition of "electronic services" in section 1 of the VAT Act
(Regulation 2)

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Executive Summary

The proposed amendments, if implemented in their current form effective from 1 October 2018, will have a far-reaching impact on both multinational and foreign vendors who conduct business in South Africa. In Particular, it will require significant business and operational changes to be implemented so that foreign companies can account for VAT in South Africa.

Internationally, in New Zealand the draft law was first published in August 2015 and following a process of consultation only took effect in October 2016. Similarly, the reform to the electronic services laws in Australia was initially announced in a 2015 Bill and the law only took effect in July 2017 after following a process of consultation and review.

The commentary below identifies a number of aspects which certain clients have indicated needs further urgent consideration by National Treasury in order to ensure compliance with the new laws.

Recommendation

Given the significant impact on businesses, in order to achieve a streamlined transition for all stakeholders, (local/foreign vendors, SARS and National Treasury) from the existing laws to the future laws, we propose that:

- an ongoing consultative process between National Treasury, SARS and relevant businesses is initiated as a platform to create meaningful engagement among stakeholders.
- the implementation date be deferred to a later date following the meaningful engagement in order to allow business sufficient time to impliment the required changes.

The Rationale

This includes, amongst other things, an imperative for the legislation to distinguish between supplies of electronic services made to vendors (i.e. business-to-business ('B2B') supplies), and non-vendors (i.e. business-to-consumer ('B2C') supplies).

Regulations: Electronic services for purposes of the definition of "electronic services"in section 1 of the VAT Act
(Regulation 2)

The Rationale

Should National Treasury and SARS agree to create the platform for meaningful dialogue with interested stakeholder/stakeholder representatives, this will provide the assurances business needs now in order to prepare and comply with the new laws.

It is our submission that business does not seek in anyway to comprise or create undue risks for the fiscus, by making this request. In this regard, a consultative process will enable all stakeholders with a better understanding of the risks and impact as well provide an adequate timeline.

	Comment	Recommendation
	The proposed amended definition of 'electronic services' broadens the scope such that all supplies made by means of an electronic agent, electronic communication or the internet are included.	Broadening the definition of electronic services by means of only defining the two exclusionary categories (namely education and telecommunication services) is problematic. We would recommend the proposed regulation provides certainty on the services that are in scope. Given all the different types of electronic services which fall within the new definition there is uncertainty for all suppliers of electronic services, which services are in fact in scope and potentially liable to register under the proposed law.
Regulations: Electronic services for purposes of the definition of "electronic services"in section 1 of the VAT Act (Regulation 2)	The broadening of the definition of 'electronic services' without the inclusion of a specific exclusion for B2B supplies results in an increased administrative burden and cost for foreign suppliers supplying services electronically to SA group entities which acquire such services for purposes of making taxable supplies, without any corresponding increase in revenue to the fiscus.	If the intention is to maintain the broad definition of electronic services, a distinction should be included in the VAT Act such that only supplies made to non-vendors (i.e. B2C supplies) are subject to SA VAT, thereby giving rise to a requirement for the foreign electronic services provider to register and account for VAT. Where supplies are made to vendors which are not entitled to deduct full input tax (i.e. partially exempt entities) as opposed to consumers, the imported services mechanism would apply to ensure that SA VAT is collected in respect of such transactions. Unlike in a B2C context, the imported services mechanism in the case of VAT registered recipients, can more readily be enforced by SARS to ensure compliance.

Recommendation (cont)

According to the DTC, the treatment of electronic services should be aligned with international treatment, and should especially be harmonised with OECD principles. The DTC advocates for a broad based definition which includes all supplies, and the OECD recommends that a distinction is made between B2B and B2C supplies such that only B2C supplies are subject to tax.

Although merely a recommendation, the OECD advises that differentiating between B2B and B2C supplies may facilitate the application of collection mechanisms that are better geared towards the various types of transactions, which will allow businesses to operate more efficiently, helping to ensure a level playing field and to mitigate distortion of competition, while helping to safeguard VAT revenues for tax authorities. It is necessary here to note here that National Treasury has, in the preamble to the Explanatory Memorandum, expressed the need to recognise and streamline legislation and policy in accordance with the OECD principles.

We agree with the approach that a distinction should be made between B2B and B2C supplies. We note that this is also the approach followed in other foreign jurisdictions, including the EU, Australia and New Zealand.

In line with international best practice, a distinction should be included in the VAT Act such that only supplies made to non-vendors are subject to SA VAT, thereby giving rise to a requirement for the foreign electronic services provider to register and account for VAT in respect of B2C supplies.

Regulations: Electronic services for purposes of the definition of "electronic services" in section 1 of the VAT Act
(Regulation 2)

Recommendation (cont)

Reducing the scope to only include B2C supplies will also alleviate the burden on SARS to enforce compliance in respect of foreign electronic service provider having to register and account for VAT.

Another important factor to consider for implementing the B2B and B2C distinction is to reduce the risk of fraud and protect the fiscus where a foreign electronic services supplies levies VAT on the supply of electronic services, but fails to account for the VAT to SARS, but the South African business customer deducts the VAT in respect of the supply. Accordingly, the fiscus is out of pocket in this instance.

Regulations: Electronic services for purposes of the definition of "electronic services"in section 1 of the VAT Act
(Regulation 2)

Comment	Recommendation
Excluding inter-group transactions from requirement to register as foreign electronic services provider The proposed definition of 'electronic services', will include a significant number of B2B supplies, especially in a multi-national group context, which results in an increase in the group's admin burden, with no additional gain to the fiscus as the position will be neutral since the vendors would be entitled to deduct input tax.	Should the proposed distinction between B2B and B2C supplies not be adopted, we recommend that a specific exclusion to register and account for SA VAT is included in the VAT Act for supplies made between connected persons. This would alleviate the requirement for foreign entities supplying intra-group services electronically (i.e. software licences, administration, management, eLearning, etc.) from the requirement to register and account for SA VAT, thereby reducing the administrative cost and burden on both SARS and the foreign entity. The local entity will account for the VAT by way of the reverse charge (where applicable) thereby ensuring there is no loss to the fiscus.

Excluding inter-group transactions

Comment

Rules to determine and verify recipient information

Should National Treasury agree with our submissions that a distinction should be drawn between B2B and B2C supplies, it is imperative that National Treasury/SARS insert a definition of consumer into the legislation.

Recommendation

The likelihood to manipulate information provided to suppliers in particularly a B2C context is rife. The examples in Australia and New Zealand are useful and must be followed, as sufficient policy guidance has been provided in those jurisdictions in order to assist suppliers to determine the veracity of and test the information submitted by recipients of these supplies.

New Zealand even introduced stringent monetary penalties for knowledge offences to recipients who willfully provide false and misleading information (such as using VPN's) in an attempt to evade VAT for electronic services acquired.

In view of this, it is our submission that enforcement mechanisms of this kind require serious consideration and adoption in a South African context to ensure enforcement and minimise losses to the fiscus. An example of how to achieve this can be found in Australia, see http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5613_ems_80fe4701-d459-4971-9100-126d942757f1%22

Rules to determine and verify recipient information

9: MATTERS NOT ADDRESSED IN THE BILL OR REGULATION

Comment

The VAT Act currently prescribes that foreign suppliers of electronic services must issue tax invoices as prescribed by section 20 of the VAT Act.

Where the definition of 'electronic services' is broadened such that all supplies made by means of an electronic agent, electronic communication or the internet will fall within scope, many supplies made to registered vendors (i.e. B2B supplies) will become subject to SA VAT.

This will require foreign suppliers of electronic services to issue compliant tax invoices in order for recipient vendors to deduct the VAT charged. The requirement to issue tax invoices which are compliant with the requirements of the SA VAT Act, including the requirement to convert foreign amounts to ZAR in line with SARS' requirements, is onerous for foreign suppliers and will likely result in recipients not being in possession of valid tax invoices to deduct input tax.

Recommendation

The documentary requirement, if any, should follow international best practice.

Comment

While the law does not specifically provide that electronic services providers **must** account on the payments basis accounting method, we note that this is the accounting method applied/imposed by SARS on electronic services providers in practice. This is, in our view not feasible, particularly in respect of B2B supplies.

Recommendation

It is proposed that foreign ESS suppliers be allowed to apply to account for VAT on the payments basis should they elect to do so, failing which the invoice basis of accounting will apply.

Prescribed Payment accounting basis

Comment

Frequent review of legislation and policy guidance

Finally, it is our submission that it is incumbent on National Treasury and SARS to be committed to ensure that both the legislation and policy guidance documents remain aligned with technological developments.

This can only be achieved if the legislative and policy rules are revised in accordance with such technological advances and in line with contemporary international trends.

Recommendation

We therefore propose the revision of the legislation and policy guidance documents must be adequate and provided on a timely basis that will ensure not only compliance in respect of the suppliers but also provide greater certainty.

Frequent review of legislation and policy guidance