



# Value – Added Tax: Cross-border supplies

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*YOUR KEY TO THE TAX COMMUNITY*

- **Some general VAT principles**
- **Exportation of goods**
- **“Export of services”**
- **E-commerce – supply of “*electronic services*”**
- **Electronic services vs imported services**
- **Importation of goods**

## ▪ Who is liable?

- *Director of Public Prosecutions, Western Cape v Mohammed Shakiel Parker, Case No 103/2014 SCA*

## ▪ Output tax – input tax = VAT liability of “vendor”

## ▪ Recovery of tax from recipient (s 61)

- *“fraudulent action or any misrepresentation by recipient”*
- Vendor has **incorrectly applied a rate of zero percent** or treated such supply as exempt
- SARS may raise an assessment **upon recipient**, with interest and penalty

## Definition of “enterprise” vs place of supply rules

### “Enterprise” (section 1(1))

“In the case of any vendor, any **enterprise or activity** which is carried on **continuously or regularly** by any person **in the Republic or partly in the Republic** and in the course of furtherance of which **goods or services** are **supplied to any other person for a consideration, whether or not for profit**, including any enterprise or activity carried on the form of commercial, financial, industrial, mining, farming, fishing or professional concern or any other concern of a continuing nature or in the form of an association or club”

- Includes, inter alia, supply of “*electronic services*” from outside South Africa

## •Excludes

- any **branch or main business** of an enterprise permanently situated at premises outside the Republic shall be **deemed to be carried on by a person separate from the vendor**, if—
  - the branch or main business can be separately identifiable;
  - independent system of accounting accounting is maintained by the concern in respect of the branch or main business

*Wenco International Mining Systems v CSARS* [2021]  
ZAGPPHC 70

## Value of supply

• **“Consideration”** *“any payment made or to be made...whether in money or otherwise, or any act or forbearance, whether voluntary or not, in respect of, in response to, or for the inducement of, the supply of any goods or services...”*

• **Deemed “consideration”**

**Connected persons** (s 10(4))

- Consideration < open market value
- Connected persons
- If consideration had been = **OMV**, recipient vendor not entitled to full input tax deduction, then **OMV** (s 3)

Deemed consideration where **branch / main business** - lesser of cost or MV (s 10(5))

## Time of supply

- Earlier of an “**invoice**” is issued by the supplier or any payment of consideration is received by the supplier – s 9(1)
- “**Invoice**” – “... A document notifying an obligation to make payment”
- “Invoice” vs “tax invoice”
- “**Tax invoice**” = document containing prescribed information as regards VAT registration of the parties, description/quantity of goods or services, etc.

## Time of supply (cont.)

### Connected persons “ – s 9(2)(a)

- Definition of “*connected person*” – s 1(1) - includes any branch/division/enterprise of a vendor that is separately registered for VAT purposes ITO s 50 and any other **such** enterprise, branch or division of the vendor
- **Goods** = when removed, or made available if not removed
- **Services** = when performed
  - ▶ **unless** ordinary time of supply occurs before then, ordinary time of supply

## Exportation of goods

- Goods “**exported**” from SA – s 11(1)(a)
  - ☐ **Direct** – Interpretation Note 30
  - ☐ **Indirect** – Government Notice R 316, 2 May 20
- Goods are consigned or delivered by a vendor to branch/main business an address outside SA – s 11(1)(i)

## Export of goods (cont.)

### Zero-rating - s 11(1)(a)(i)

“the supplier has supplied the goods (being movable goods) in terms of a **sale** or **instalment credit agreement** and...the supplier has exported the goods in the circumstances contemplated in paragraph (a), (b), (c) or (d) of the definition of exported in section 1..”

- **Direct export (para (a) of the definition of “exported”**

**‘Consigned or delivered by the vendor to the recipient at an address in an export country as evidenced by documentary proof acceptable to (SARS)’**

- **Interpretation Note No 30 (May 2014)**

# Direct export – IN 30 – Direct export (cont.)

## Export time periods

- **General rule** = Within 90 days from the earlier of the time the invoice is issued or the time of payment of the consideration is received by the vendor;
- **Exceptions** – (a) *advance payments* = within 30 days of agreed date of export; (b) *goods supplied progressively or periodically* and subject to repair, improvement, manufacture, assembly or alteration = within 90 days of completion of process.

## Documentation

- General – official (customs) and commercial documentation
- Own delivery vs cartage contractor
- Time period to obtain documentation  
General rule (90 days goods are required to be exported from SA) vs exceptions (e.g. written agreement for payment after 90 days but less than 6 months)

## **Indirect export (section 11(1)(a)(i), para (d) of the definition of “exported”)**

*“the supplier has supplied the goods (being movable goods) in terms of a sale or instalment credit agreement and...the goods have been exported by the recipient and the supplier has elected to supply the goods at the zero rate as contemplated in Part 2 of the regulation referred to in paragraph (d) of the definition of exported in section 1..”*

- **Regulation 316 (May 2014)**
- Part One – taxed at standard rate and refund once exported
- Part Two – at election of supplier supply is zero-rated

## Indirect export (para (d) of the definition of “exported”)

- **Regulation 316 (May 2014) – Part Two (zero-rating)**
- Goods are supplied to a “**qualifying purchaser**” – foreign diplomat, **foreign enterprise**; non-resident, tourist, non-resident who acquires goods in SA with sole purpose of selling the goods to another non-resident;
- **Vendor must ensure that goods are delivered to a “designated commercial port”** (harbor, airport and road/rail exit points) from which goods are to be exported by qualifying purchaser;
- Air/ship - Goods supplied to qualifying purchaser or registered vendor and movable goods are situated at a designated commercial port and goods destined for export
- Supplier has to meet certain prescribed responsibilities e.g. obtain and retain documentary evidence of export such as order for goods, proof of payment, etc.
- Road/rail – long list of documentary requirements
- Goods must be exported within 90 days from earlier of invoice or payment of consideration, but if connected persons, general rules apply (s 9(2)(a))

# “Export” of services

- Supplies to non-residents – s 11(2)(l)
  - Zero rated if services are supplied to a person who is **not a resident**, but **not if**:
    - Land/movable property situated in SA, **unless**
      - Exported “*to the said person subsequent to the supply of such services*”
      - Forms part of supply by “*said person*” to a **registered vendor**
    - Services are supplied by the vendor “*to the said person or any other person*” and the said person or such other person is in SA when services are **rendered**

“*Resident*” – “*resident*” as defined in IT Act, but deemed to be a resident if “*carries on in SA any enterprise or other activity and has a fixed or permanent place in SA relating to such enterprise or other activity.*”

## “Export” of services (cont.)

- Foreign branch/main business – s 11(2)(o)
  - Services supplied by a vendor to a branch or main business situated outside SA, but **not** if:
    - Land/movable property situated in SA, **unless**
      - “*Consigned or delivered “to the said person at an address in an export country subsequent to the supply of such services.”*”
      - Part of supply by non-resident
      - Services are supplied by the vendor “*to the said person **or any other person**”* if the said person or such other person is in SA when services **are rendered**

*Wenco International Mining Systems v CSARS* [2021] ZAGPPHC 70.

## ❑ Supplies to non-resident (cont.)

### **XO Africa**

- Local tour operator assembled package tour (transport, accommodation, activities) and "sold" to a foreign tour operator (FTO), who on sold to foreign customers;
- Contract between XO Africa and FTO;
- But evidence that XO Africa in effect contracted to supply services to foreign customers while they were in SA as XO contracted with the local suppliers;
- XO argued that there had to be a direct connection between XO and the FTO customers, whereas local services were rendered directly to FTO or its customers;

**Held:** *"wholly incorrect when it said that the only services XO supplied to the FTOs were the organisational services in assembling the tour package";*

## XO Africa (cont.)

- Rather XO rendered the relevant services to the FTO/customers and as the customers *qua* "other person" were in SA when the services were rendered;
- Concluded after considering the various amendments to the section that: "*the statutory purpose underlying s 11(2)(l) was to ensure that where services were rendered to a foreigner by a person liable to pay VAT, but the services themselves were rendered in South Africa and the benefit of them was enjoyed in the Republic, they would not enjoy the benefit of zero rating. VAT would be payable at the standard rate.*"
- Further that: "*The argument by XO is unsustainable because, if it is followed, it would mean that notwithstanding the fact that the services were consumed in the Republic...XO would have a claim for input VAT in relation thereto, **the fiscus would forgo the 14% output tax levied on the supply of local services by XO.***"

# E-Commerce

## OECD: International VAT/GST Guidelines (2015)

Project embarked upon *"recognising that jurisdictions would benefit from **an internationally agreed standard** that contributes towards **ensuring that VAT systems interact consistently** so that they facilitate rather than distort international trade. These Guidelines were intended to **set the standard for countries when designing and administering their domestic rules.**"*

Adoption of the **destination principal** – tax is imposed in the jurisdiction in which consumption takes place

### Guideline 3.1

**For consumption tax purposes internationally traded services and intangibles should be taxed according to the rules of the jurisdiction of consumption.**

# OECD: International VAT/GST Guidelines (2015)

## Business-to-business (B2B) supplies

Not prescriptive – notes that jurisdiction where consumption takes place should have taxing rights BUT, "*It is recommended that the (business) customer be liable to account for any VAT due to its local tax administration under the **reverse charge mechanism** where that is **consistent with the overall design of the national consumption tax system.***"

## Business-to-consumer (B2C) supplies

Guideline 3.6 recommends a place of taxation rule based on the customer's usual residence

# South Africa

Introduced 1 June 2014.

- **No B2B/B2C distinction, but mostly achieved by virtue of description of the categories of electronic services**
- Specified (categories) “**electronic services**” – treated as carrying on “*enterprise*” in SA
- Proxy: 2 of 3 present - (a) resident of SA; (b) payment originated from SA bank, or (c) business address, residential address or postal address in SA
- Registration threshold – R50 000 pa

## Davis Tax Committee

- Distinction should be drawn between B2B and B2C
- Threshold too low
- If use categories, then need to issue comprehensive guidance notes and should be updated regularly

Major amendments introduced 1 April 2019

**No categories of electronic services, rather -**

***"any services supplied by means of an electronic agent, electronic communication or the internet"*** where 2 of 3 proxies present (para (vi) of the proviso to the definition of "*enterprise*")

but excluding:

- "*educational services supplied from a place outside SA and regulated by an educational authority*";
- "*telecommunication services*";
- supplies by foreign company to a resident company and both companies part of **same group of companies**

**“Electronic agent”, “electronic communication” and internet**” all defined by reference to the Electronic Communications and Transactions Act

- **“Electronic agent”** – *“a computer program or an electronic or other automated means used independently to initiate an action or respond to data messages or performances in whole or in part in an **automated transaction**”*
- **“Electronic communication”** – *“a communication by means of data messages”*
- **“ Internet”** – *“the interconnected system of networks that connects computers around the world using the TCP/IP and includes future versions thereof”*

**“Group of companies”** – 70% common ownership

Branches/main business ????

## Electronic Services: Issues

- "*Electronic services*" vs "*imported services*"
- Electronic services vs ordinary services

SARS: "*Electronic services are ...services, the supply of which –*

- *is dependent on information technology;*
- *is **automated**;*
- ***involves minimal human intervention.***"

SARS: "*Certain supplies that are not electronic services **by their nature**, but where the **output and conveyance of the services is merely communicated by electronic means...***"

## Group of Companies exclusion

Applies only in respect of "**companies**"

- What of local branches of foreign companies?
  - Any main business or branch of an enterprise permanently situated at premises outside South Africa is deemed to be carried on by a **person** separate from the vendor, if the main business/branch can be separately identified and has an independent system of accounting (para. (ii) of the proviso to the definition of "*enterprise*" in section 1(1))
  - Supplies of electronic services made by foreign Company A to SA Branch of Company A. Does the group of companies exclusion apply?
  - Supplies of electronic services made by foreign Company A to SA Branch of foreign Company B. Does the group of companies exclusion apply?

## ***“Imported services”***

- "Imported services" subject to VAT (section 7(1)(c) of VAT Act)
- ***"Imported services" = "supply of services made by a supplier who is a resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies".***
- **"Recipient"** required to account for VAT within 30 days to SARS, or if vendor, in VAT return;
  - deemed to take place at the time earlier of the date on which an invoice is issued by the supplier or the recipient or the time any payment is made by the recipient;
  - Value = value of the consideration for the supply;
  - Not payable if –
    - subject to SA VAT;
    - ***a supply, which if made in SA would be charged with tax at the rate of zero percent (section 11) or would be exempt (section 12);***

# CIR v De Beers [2012] ZASCA

- Independent Committee of Directors (ICD) established to consider offer from Consortium to restructure De Beers – essentially a share and cash deal;
- ICD appointed foreign and local advisors
- Issue was whether De Beers could claim input tax (local services) and whether company had services an imported service (foreign services)
- **De Beers:** (a) Foreign services consumed outside SA, but only 2 of 5 meetings of ICD took place outside SA, and (b) services rendered in respect of taxable supplies made by De Beers, "*necessary attached to and accordingly a concomitant of (De Beers') mining or commercial enterprise as a public company*"..
- **SARS:** acquisition of services was to provide advice in relation to the take-over – as was required under the Companies Act and JSE Listing Requirements.
- **SCA** (para 27 *et seq*) Re (b) clear distinction between overhead costs and special duties imposed on the company by law – "*duty imposed on a public com[any that is the target of a take-over is too far removed from the advancement of the VAT enterprise to justify characterizing services acquired in the discharge of that duty as services acquired for purposes of making taxable supplies, especially in the circumstances of this case.*" RE (a) s 311 scheme of arrangement was approved and implemented in SA, "*the fact that some meetings were held with (foreign supplier) outside of the country can hardly be used to justify the conclusion that the services were not consumed in South Africa.*"

# IMPORTATION OF GOODS (sections 7(1)(b) and 13)

- VAT payable "*on the importation into the Republic by any person...*" (section 7(1)(b))
- "**importation**" – when goods enter the Republic or are cleared for home use before entering the Republic
- Deemed imported on the date goods deemed to be imported under the Customs & Excise Act
- Value = value for C & E purposes, plus any duty plus 10%
- **Agency - section 54**
  - - importation by principal, but **deemed importation by agent** if –
    - Foreign principal
    - Agent is registered vendor
    - Goods imported by foreign principal for supply to person in Republic
    - Agent retains specified documentary proof of importation
    - Agent and foreign principal in writing that principal will not reimburse agent for VAT
  - Agent than deemed to make a taxable supply of the imported goods (section 8(20))

**THANK YOU**