



Africa Tax Alert Expert's Corner

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Fees paid to non-executive directors (South Africa)

In terms of Binding General Ruling No. 41 issued by SARS, which came into effect on 1 June 2017, non-executive directors should register and account for VAT on their fees if these exceed the VAT registration threshold.

This ruling raises many interesting practical implications that should be considered by companies and non-executive directors who are impacted by the ruling, two of which we consider below:

- Non-executive directors are typically paid quarterly or semi-annually, which may result in tax invoices being issued by affected non-executive directors on or after 1 June 2017 for services rendered both before and after the non-executive director has registered for VAT.

How should VAT be charged by the non-executive director in such an event, that is to say should VAT only be levied for services rendered on or after 1 June 2017 or should the entire fee be subject to VAT?

This question is particularly relevant as an argument could be made to say that the time of supply is usually determined as the date on which any payment is received or an "invoice" is issued. However, a counter argument could be made to say that part of the services would have been rendered at a time that the non-executive director was not a vendor and that VAT should therefore not be charged for such services.

- Fees paid to non-executive directors are usually approved at the company's annual general meeting as such remuneration must be approved by special resolution of shareholders.

It is to be expected that there will be cases where the current annual fee payable to a non-executive director was approved by shareholders prior to the SARS ruling being issued. In this event, the parties may not have been aware that VAT should have been levied on the fee charged by the director at the time that the remuneration was approved by shareholders.

This issue is of particular importance where the company concerned is not able to claim back all VAT that it incurs as, in this case, an additional cost will arise for the company in respect of any VAT charged by a non-executive director. It could be argued that section 64 of the VAT Act, which deems a price charged by a vendor to include VAT, may apply in these cases and that the remuneration approved by the shareholders would consequently be inclusive of VAT. However, a counter argument can be made to say that section 64 of the VAT Act should not apply as the non-executive was not registered as a VAT vendor at the time that his/her remuneration was approved by the shareholders.

Some companies may, however, wish to increase the fees payable to non-executive directors by all or part of the VAT which is payable by the non-executive director. In such cases, consideration should be given to whether prior shareholder approval (by way of special resolution) should be obtained before paying such additional amounts. Although this may be cumbersome for companies with a large shareholder base, it is advisable as the Companies Act contemplates prior shareholder approval for the payment of remuneration to directors.

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