



EXPLANATORY MEMORANDUM:

REGULATIONS PRESCRIBING ELECTRONIC SERVICES FOR THE PURPOSE OF THE DEFINITION OF “ELECTRONIC SERVICES” IN SECTION 1(1) OF THE VALUE- ADDED TAX ACT, 1991

24 October 2018

EXPLANATORY MEMORANDUM TO THE ELECTRONIC SERVICES REGULATIONS:

I INTRODUCTION

In 1998 the OECD hosted a conference entitled “A Borderless World: Realising the Potential of Electronic Commerce”. This conference was held in Ottawa. The taxation framework that was developed at the conference came to be known as the “Ottawa Taxation Framework”.

Some of the recommendations of the Ottawa Taxation Framework were that in developing domestic laws to deal with electronic commerce, jurisdictions must seek to ensure that VAT should be as neutral and equitable as possible for vendors, the VAT system and laws should be efficient, effective and create certainty and fairness in treatment for all taxpayers. It also proposed that tax rules should be simple and clear to understand.

In 2006 the OECD Committee on Fiscal Affairs (CFA) launched a project to develop a guideline relating to international VAT/GST (the International VAT/GST Guidelines). The intention of the Guidelines was to develop a framework for internationally agreed principles relating to VAT. This initial guideline discussed the principles set out in the Ottawa Taxation Framework. With regard to electronic commerce across borders, this guideline referred to existing taxation frameworks such as “VAT on imported services”/“reverse charge mechanisms”.

In 2012 the CFA created the Global Forum on VAT in order to engage and involve more countries in discussions relating to global VAT issues.

In 2013 the OECD launched an action plan to address tax revenue losses due to Base Erosion and Profit Shifting (BEPS) practices, as requested by the G20 Finance Ministers. On the 19 July 2013 the OECD released a report entitled “Addressing Base Erosion and Profit Shifting” (the BEPS report) in which it pointed out that base erosion and profit shifting not only constituted a serious risk to tax revenues, but also

to the tax sovereignty and tax fairness for both OECD countries and non-member countries.

The OECD proposed 15 action items to address BEPS concerns. Action Plan 1 which deals with the challenges of the digital economy, called for work to be done to address the tax challenges of the digital economy. The OECD's Working Party 9 (which was created due to Action Plan 1) was tasked with developing guidelines relating to International VAT/GST. These guidelines were to focus more specifically on internationally agreed principles relating to the BEPS concerns from a VAT perspective.

In the realm of VAT, the cross border supply of goods posed less of a threat to revenue loss than the cross border supply of services supplied via electronic means. Goods are tangible and would be required to pass through border posts that are generally strictly controlled across jurisdictions. Depending on domestic legislation and value thresholds, these goods could be subject to both Customs Duty and VAT, thereby placing the foreign supplier in a similar tax position as a domestic supplier and thus reducing distortions in trade competitiveness.

The same could not be said of the cross border supplies of services supplied electronically since these are provided via the internet or cloud or through other forms of electronic agents or communication methods. These were largely invisible to tax authorities.

Countries relied on domestic legislation such as those dealing with "imported services" or "reverse charge mechanisms" for the collection of VAT on these supplies of services. The heavy reliance on recipients declaring VAT on imported services in South Africa (as in most jurisdictions) was problematic since it could not be monitored for compliance and collection purposes.

As the digital trade in goods and services grew, so too did the potential for tax avoidance. Often these were done within the ambit of domestic legislation. The BEPS report highlighted the need to introduce domestic legislation to combat the

potential unintended non-taxation and to provide clarity and certainty with regard to taxing the digital economy. The OECD's revised "International VAT/GST Guidelines" provides broad guidelines on the framework for developing domestic legislation in this area. It encompasses internationally agreed upon principles and discusses the various options available to countries.

It was the view that if countries reached agreement on matters such as which country has the taxing rights in the cross border supplies of services, then entities doing business across borders as well as consumers would have certainty on what the VAT implications of the transactions would be and issues relating to double taxation and double non-taxation would be reduced.

The Ottawa Taxation Framework further endorsed the destination principle of VAT which is the one that the South African VAT Act is based on. This in essence means that the place of taxation is generally the place of consumption.

II BACKGROUND

Prior to 2014, the Value-Added Tax Act, No. 89 of 1991 provided for the inbound supply of electronic services to be taxed by means of the "imported services" provisions. In terms of these provisions, in certain instances, the domestic recipient of these services was to declare VAT on the services received.

On the 28 March 2014, Government published Regulations Prescribing Electronic Services for the purpose of the definition of "Electronic Services" in section 1(1) of the VAT Act in terms of Government Notice No.R221 published in Government Gazette No. 37489 (Regulations) that give effect to the 2013 amendments, which changed the way that certain imported electronic services were taxed. This effectively shifted the onus of the VAT from the domestic recipient to the supplier of electronic services that is situated in an export country. The effective date of the Regulations was 1 June 2014.

Further, in keeping with the OECD Guidelines¹, SARS provided for a streamlined VAT registration and administrative process that significantly reduced the compliance burden on businesses that are required to register in terms of the Regulation.

In line with measures to address base erosion and profit shifting, Government made proposals in the previous Budget Reviews to update these Regulations to include software and other electronic services, to remove some uncertainties and to broaden the scope of electronic services.

III DETAILED EXPLANATION OF REGULATIONS

The main purpose of the Regulations is to prescribe those services that are “electronic services” for the purposes of the definition of “electronic services” in section 1(1) of the Act. However, the current regulations limit the scope of electronic services that are taxable under these regulations. The intention of the proposed amendments to the Regulations is to widen the scope of the Regulations to apply to all “services” as defined in the VAT Act that are provided by means of an electronic agent, electronic communication or the internet for any consideration. In doing so, the policy intention is to reduce the risk of distortions in trade between foreign suppliers and domestic suppliers where VAT is one of the reasons for such distortions.

The policy intention is to subject to VAT those services that are provided using minimal human intervention. Hence, for example, legal advice prepared outside the Republic by a non-resident and sent to a person in the Republic via email, will not be subject to these Regulations. The download of a movie or the provision of the right to use an APPLICATION (APP), for example, may be subject to these Regulations if all other requirements are met.

¹ “International VAT / GST Guidelines”, 2017 and “Mechanisms for the Effective Collection of VAT / GST”, 2017

A. Persons required to register for VAT

The supplier of the electronic services will be required to register for VAT in the Republic if the supplier meets the following:

1. Where electronic services are supplied by a person from a place in an export country (an electronic service supplier); and
2. Such person is conducting an “enterprise” in the Republic, as defined in section 1(1) of the VAT Act; and at least two of the following circumstances are present:
 - a. The recipient of the electronic services is a resident of the Republic;
 - b. Any payment made to the supplier in the export country (for the supply of the electronic services) originates from a bank registered or authorised in South Africa, in terms of the Banks Act 94 of 1990;
 - c. The recipient of those electronic services has a business, residential or postal address in the Republic; and
3. The total value of the taxable supplies made by that person in the Republic has exceeded R1 million within any consecutive 12-month period (section 23 (1A)). This compulsory registration threshold is consistent with the domestic compulsory registration threshold.

The provisions of the VAT Act apply to all supplies of electronic services that are supplied by an electronic service supplier that is required to be registered for VAT in the Republic. Persons who are registered or required to be registered for VAT in the Republic are called “vendors”. This is defined in section 1(1) of the VAT Act.

Supplies that are exempt from VAT in the Republic will not be subject to these Regulations. For example, financial services that could normally be subject to these Regulations will not be subject to these Regulations if they are the type of “financial services” as contemplated in section 2 of the VAT Act and would have been exempt if provided by a person in the Republic.

Where the supplier is not required to register for VAT in terms of these Regulations or is required to register and levy VAT but fails to do so, the recipient of the services in the Republic may still be liable to declare VAT on imported services, where the requirements for such are met.

B. Exclusions

It is proposed that the following services should be excluded from the definition of “electronic services” in the Regulations:

- B1. Educational services provided by a person from an export country which person is regulated by an educational authority in terms of the laws of that export country;
- B2. Telecommunications services; and
- B3. Certain supplies within a group of companies

B2. “Telecommunications services” is defined in the Regulation and excludes the content of telecommunications.

B3. Currently, the VAT Act does not make any distinction between B2B and B2C domestic supplies. Introducing this concept for non-resident suppliers would create an unfair cash-flow advantage for the non-resident suppliers which domestic suppliers would not be in a position to benefit from.

However, in order to limit the administrative burden, electronic services supplied between companies in the same group may be excluded from these Regulations. Electronic services that are supplied by a non-resident company to a resident company that forms part of the same group of companies will be excluded from these regulations provided that the services are supplied exclusively for the purposes of consumption by the resident company. The term “group of companies” is defined in the Regulations.

An example of these supplies would be where an IT non-resident company supplies IT solutions of its own to a company in the Republic, where both such companies are members of the same group of companies. Where, for example, such non-resident company procures the IT services from a third party and then on-supplies them to a company within the Republic (where both such companies are members of the same group of companies), such services will not qualify for the exclusion. These would typically be global contracts entered into with third party suppliers for the benefit of all the companies within the group.

The policy rationale for excluding these supplies between companies within the same group of companies is to prevent the situation where a non-resident company within the group meets the requirements for compulsory registration in terms of these regulations purely on the basis of supplies that it makes to a resident company within the same group of companies, which supplies of electronic services are utilised or consumed within the same group of companies.

The policy rationale for excluding global contracts is that this approach is an anti-avoidance measure.

C. Intermediaries and Platforms

Currently, the VAT Act and Regulations do not provide for “intermediaries” and “platforms” to be the principal supplier of the electronic services. In order to broaden the scope, further amendments are proposed in the VAT Act and Regulations to specifically deal with “intermediaries” and “platforms”.

It is proposed that where suppliers provide electronic services using the electronic platform of another “person”, as defined, such “person” (referred to as an “intermediary”) will be deemed to be the supplier for VAT purposes where that person facilitates the supply of the electronic services and is responsible for, amongst other things, the issuing of the invoice and the collection of the payment. The requirement of being “responsible for” would be met even if these functions are

outsourced, provided that the intermediary has a responsibility to ensure that the invoice is issued and / or the payment is made to the underlying supplier.

This would exclude those intermediaries that are only facilitating payment (i.e. pure payment platforms only).

The definition of “services” in section 1(1) of the VAT Act encompasses “anything done or to be done, including the granting, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods....”.

Hence, where a person provides the use of its platform and meets the requirements discussed in “A” above, such person will be required to register for VAT in the Republic.

D. Compliance

Recipients of electronic services that are registered for VAT in the Republic may claim the VAT charged as input tax credits, based on whether the expenses incurred are wholly or partially for the making of taxable supplies.

Where the supplier of the electronic services is not required to register for VAT in the Republic as a result of not meeting the requirements for VAT registration discussed above, the recipient of those services may be required to declare VAT on imported services in terms of the definition of “imported services” in section 1(1), the provisions of section 7(1)(c) and section 14 of the VAT Act.

Currently, neither the VAT Act nor the Regulations make any distinction between business-to-business supplies and business-to-consumer supplies. This is intentional. This distinction does not exist for domestic suppliers and in the interest of fairness and equity, the distinction will not be introduced for purposes of these Regulations.

Electronic Service Suppliers may register for VAT in the Republic using the simplified registration procedures as provided for in the SARS (South African Revenue Services) VAT Registration Guide for Foreign Suppliers of Electronic Services².

Vendors may find further guidance on matters relating to registrations, tax periods, time and value of supply, tax invoices, VAT returns, etc. in the SARS VAT 404 – Guide for Vendors³. This is a comprehensive guide on the application of the VAT Act.

For ease of reference, we have quoted the relevant sections of the VAT Act as “Annexure A” hereto.

IV EFFECTIVE DATE

The proposed amendments to the Regulations will come into effect on 1 April 2019.

² www.sars.gov.za

³ www.sars.gov.za

Extracts from the VAT Act

“**consideration**”, in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for gain: Provided that a deposit (other than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless the supplier applies the deposit as consideration for the supply or such deposit is forfeited;

“**electronic services**” means those electronic services prescribed by the Minister by regulation in terms of this Act;

“**enterprise**” means—

- (a) 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 or 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 in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club;
- (b) Without limiting the applicability of paragraph (a) in respect of any activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern—

- (i) the making of supplies by any public authority of goods or services which the Minister, having regard to the circumstances of the case, is satisfied are of the same kind or are similar to taxable supplies of goods or services which are or might be made by any person other than such public authority in the course or furtherance of any enterprise, if the Commissioner, in pursuance of a decision of the Minister under this subparagraph, has notified such public authority that its supplies of such goods or services are to be treated as supplies made in the course or furtherance of an enterprise;
- (ii) the activities of any welfare organization as respects activities referred to in the definition of “welfare organization” in this section;
- (iii) the activities of any share block company (other than the services in respect of which section 12 (f) applies) where such company has applied for registration as a vendor under the provisions of section 23(3) and has been registered as such;
- (v) the activities of a foreign donor funded project;
- (vi) the supply of electronic services by a person from a place in an export country, where at least two of the following circumstances are present:
 - (aa) The recipient of those electronic services is a resident of the Republic;
 - (bb) any payment to that person in respect of such electronic services originates from a bank registered or authorised in terms of the Banks Act, 1990 (Act No. 94 of 1990);
 - (cc) the recipient of those electronic services has a business address, residential address or postal address in the Republic;

(vii) the activities of an intermediary:

Provided that—

- (i) anything done in connection with the commencement or termination of any such enterprise or activity shall be deemed to be done in the course or furtherance of that enterprise or activity;
- (ii) 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—
 - (aa) the branch or main business can be separately identified; and
 - (bb) an independent system of accounting is maintained by the concern in respect of the branch or main business;
- (iii) (aa) the rendering of services by an employee to his employer in the course of his employment or the rendering of services by the holder of any office in performing the duties of his office, shall not be deemed to be the carrying on of an enterprise to the extent that any amount constituting remuneration as contemplated in the definition of “remuneration” in paragraph 1 of the Fourth Schedule to the Income Tax Act is paid or is payable to such employee or office holder, as the case may be;
 - (bb) subparagraph (aa) of this paragraph shall not apply in relation to any employment or office accepted by any person in carrying on any enterprise carried on by him independently of the employer or concern by whom the amount of remuneration is paid or payable;
- (iv) any activity carried on by a natural person essentially as a private or recreational pursuit or hobby or any activity carried on by a person other than a natural person which would, if it were carried on by a natural

person, be carried on essentially as a private or recreational pursuit or hobby shall not be deemed to be the carrying on of an enterprise;

- (v) any activity shall to the extent to which it involves the making of exempt supplies not be deemed to be the carrying on of an enterprise;
- (vi) the activity of underwriting insurance business by Underwriting Members of Lloyd's of London, to the extent that contracts of insurance are concluded in the Republic, shall be deemed to be the carrying on of an enterprise;
- (vii) ---
- (viii) the making of supplies by a constitutional institution listed in Schedule 1 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), shall be deemed not to be the carrying on of an enterprise;
- (ix) where a person carries on or intends carrying on an enterprise or activity supplying commercial accommodation as contemplated in paragraph (a) of the definition of "commercial accommodation" in section 1, and the total value of taxable supplies made by that person in respect of that enterprise or activity in the preceding period of 12 months or which it can reasonably be expected that that person will make in a period of 12 months, as the case may be, will not exceed, R120 000 shall be deemed not to be the carrying on of that enterprise;
- (x) where the Minister is satisfied that an activity of the municipal entity as defined in section 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), is of a regulatory nature and if the Commissioner, in pursuance of a decision of the Minister, has notified that "municipal entity" of that decision, the supply of goods or services in respect of that activity by the municipal entity shall be deemed not to be the carrying on of an enterprise;

- (xi) the supply of services by a mutual association licensed in terms of section 30 of the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993), to carry on the business of insurance of employers against their liabilities to employees in terms of that Act in respect of which that mutual association pays compensation that is no greater than compensation that would have been paid in similar circumstances in terms of that Act shall be deemed not to be the carrying on of an enterprise;
- (xii) any activity carried on by a trust contemplated in the definition of “sukuk” in section 24JA (1) of the Income Tax Act shall be deemed not to be the carrying on of an enterprise;

“export country” means any country other than the Republic and includes any place which is not situated in the Republic: Provided that the President may by notice in the *Gazette* determine that a specific country or territory shall from a date and to the extent indicated in the notice, be deemed not to be an export country;

“goods” means corporeal movable things, fixed property, any real right in any such thing or fixed property, and electricity, but excluding—

- (a) money;
- (b) any right under a mortgage bond or pledge of any such thing or fixed property;
and
- (c) any stamp, form or card which has a money value and has been sold or issued by the State for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collector’s piece or investment article;

“imported services” means a supply of services that is made by a supplier who is 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;

“intermediary” means a person who facilitates the supply of electronic services supplied by the electronic services supplier and who is responsible for issuing the invoices and collecting payment for the supply;

“invoice” means a document notifying an obligation to make payment;

“person” includes any public authority, any municipality, any company, any body of persons (corporate or unincorporate), the estate of any deceased or insolvent person, any trust fund and any foreign donor funded project;

“recipient”, in relation to any supply of goods or services, means the person to whom the supply is made;

“Republic”, in the geographical sense, means the territory of the Republic of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5 and 8 of the Maritime Zones Act, 1994 (Act No. 15 of 1994);

“sale” means an agreement of purchase and sale and includes any transaction or act whereby or in consequence of which ownership of goods passes or is to pass from one person to another;

“services” means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of “goods”;

“South African Revenue Service” means the South African Revenue Service established by section 2 of the South African Revenue Service Act, 1997;

“supplier”, in relation to any supply of goods or services, means the person supplying the goods or services;

“supply” includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of **“supply”** shall be construed accordingly;

“taxable supply” means any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a), including tax chargeable at the rate of zero per cent under section 11;

“tax invoice” means a document provided as required by section 20;

“VAT” means value-added tax; •

“VAT Act” means the Value-Added Tax Act No. 89 of 1991;

“vendor” means any person who is or is required to be registered under this Act: Provided that where the Commissioner has under section 23 or 50A determined the date from which a person is a vendor that person shall be deemed to be a vendor from that date;

Imposition of value-added tax.

7. (1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax—

(a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(b) on the importation of any goods into the Republic by any person on or after the commencement date; and

(c) on the supply of any imported services by any person on or after the commencement date,

calculated at the rate of 15 per cent on the value of the supply concerned or the importation, as the case may be.

(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid by the vendor referred to in that paragraph, the tax payable in terms of paragraph (b) of that subsection shall be paid by the person referred to in that paragraph and the tax payable in terms of paragraph (c) of that subsection shall be paid by the recipient of the imported services.

(3)(a) Where any goods manufactured in the Republic, being of a class or kind subject to excise duty or environmental levy under Part 2 or 3 of Schedule No. 1 to the Customs and Excise Act, have been supplied at a price which does not include such excise duty or environmental levy and tax has become payable in respect of the supply in terms of subsection (1) (a), value-added tax shall be levied and paid at the rate specified in section 7(1) for the benefit of the National Revenue Fund on an amount equal to the amount of such excise duty or environmental levy which, subject to any rebate of such excise duty or environmental levy under the said Act, is paid.

(b) The tax payable in terms of paragraph (a) shall be paid by the person liable in terms of the Customs and Excise Act for the payment of the said excise duty or environmental levy.

(c) - - -

(d) Subject to this Act, the provisions of the Customs and Excise Act relating to the clearance of goods subject to excise duty or environmental levy and the payment of that excise duty or environmental levy shall *mutatis mutandis* have effect as if enacted in this Act.

(4) If the Minister makes an announcement in the national annual budget contemplated in section 27(1) of the Public Finance Management, 1999 (Act No. 1 of 1999), that the VAT rate specified in this section is to be altered, that alteration will be effective from a date determined by the Minister in that announcement, and continues to apply for a period of 12 months from that date subject to Parliament passing legislation giving effect to that announcement within that period of 12 months.

Collection of value-added tax on imported services, determination of value thereof and exemptions from tax.

14. (1) Where tax is payable in terms of section 7 (1) (c) in respect of the supply of imported services the recipient shall within 30 days of the date referred to in subsection (2)—

- (a) furnish the Commissioner with a return; and[
- (b) calculate the tax payable on the value of the imported services at the rate of tax in force on the date of supply of the imported services and pay such tax to the Commissioner:

Provided that where the recipient is a vendor, that vendor must calculate the tax payable on the value of the imported services at the rate of tax in force on the date of supply of the imported services and must furnish the Commissioner with a return reflecting the information required for the purposes of the calculation of the tax in terms of section 14 and pay such tax to the Commissioner in accordance with section 28.

(2) For the purposes of this Act, a supply of imported services shall be deemed to take place at the time an invoice is issued by the supplier or recipient in respect of that supply or the time any payment is made by the recipient in respect of that supply, whichever time is the earlier.

(3) For the purposes of this Act, the value to be placed on the supply of imported services shall, save as otherwise provided in this section, be the value of the consideration for the supply, as determined in terms of section 10(3) or the open market value of the supply, whichever is the greater.

(4) Where a person carries on activities outside the Republic which do not form part of the activities of any enterprise carried on by him and in the course of such first-mentioned activities services are rendered for the purposes of such enterprise which, if rendered by anybody other than the said person, would be imported services, such services shall for the purposes of section 7(1)(c) be deemed to be imported services supplied and received by that person in respect of such enterprise.

(5) The tax chargeable in terms of section 7(1)(c) shall not be payable in respect of—

- (a) a supply which is chargeable with tax in terms of section 7(1)(a) at the rate provided in section 7;
- (b) a supply which, if made in the Republic, would be charged with tax at the rate of zero per cent applicable in terms of section 11 or would be exempt from tax in terms of section 12;
- (c) a supply of an educational service by an educational institution established in an export country which is regulated by an educational authority in that export country; or
- (d) a supply by a person of services as contemplated in terms of proviso (iii)(aa) to the definition of “enterprise” in section 1;
- (e) a supply of services of which the value in respect of that supply does not exceed R100 per invoice.

Registration of persons making supplies in the course of enterprises.

23. (1A) Every person who carries on any enterprise as contemplated in paragraph (b)(vi) or (vii) of the definition of “enterprise” in section 1 and is not registered becomes liable to be registered at the end of any month where the total value of taxable supplies made by that person has exceeded R1 million in any consecutive 12-month period.

Agents and auctioneers.

54. (1) For the purposes of this Act, where an agent makes a supply of goods or services for and on behalf of any other person who is the principal of that agent, that supply shall be deemed to be made by that principal and not by that agent: Provided that, where that supply is a taxable supply and that agent is a vendor, the agent may, notwithstanding anything to the contrary in this Act, issue a tax invoice or a credit note or a debit note in relation to such supply as if the agent had made a taxable supply, and to the extent that that tax invoice or credit note or debit note relates to that supply, the principal shall not also issue a tax invoice or a credit note or a debit note, as the case may be: Provided further that where an agent issues a tax invoice on behalf of a principal, such tax invoice must be issued within 21 days of the date of that supply by that agent.

(2) For the purposes of this Act, where any vendor makes a taxable supply of goods or services to an agent who is acting on behalf of another person who is the principal for the purposes of that supply, that supply shall be deemed to be made to that principal and not to such agent: Provided that such agent may nevertheless request that he be provided with a tax invoice and the vendor may issue a tax invoice or a credit note or debit note as if the supply were made to such agent.

(2A)(a) For the purposes of this Act, where any goods are imported into the Republic by an agent who is acting on behalf of another person who is the principal for the purposes of that importation, that importation shall be deemed to be made by that principal and not by such agent: Provided that a bill of entry or other document

prescribed in terms of the Customs and Excise Act in relation to that importation may nevertheless be held by such agent.

(b) Notwithstanding the provisions of paragraph (a), where any goods are imported into the Republic by an agent who is acting on behalf of another person who is the principal for the purposes of that importation, and—

- (i) the agent is a registered vendor; and
- (ii) the principal is not a resident of the Republic and is not a registered vendor; and
- (iii) the goods are imported by the principal for the purposes of a supply made or to be made by him to a person in the Republic; and
- (iv) the agent obtains and retains documentary proof, as is acceptable to the Commissioner, that—
 - (aa) he paid the tax on importation on behalf of that principal; and
 - (bb) such agent and that principal agree in writing that the said tax has not and will not be reimbursed to such agent by that principal,

that importation shall for the purposes of this Act be deemed to be made by such agent and not by that principal.

(2B) For the purposes of this Act, where electronic services are supplied by an intermediary, who is acting on behalf of another person who is the principal for the purposes of that supply, and—

- (i) the intermediary is a vendor;
- (ii) the principal is not a resident of the Republic and is not a registered vendor; and

(iii) the electronic services are supplied or to be supplied by the principal to a person in the Republic,

that supply shall be deemed to be made by such intermediary and not by that principal.”.

(3) Where—

(a) a tax invoice or a credit note or debit note in relation to a supply has been issued—

(i) by an agent as contemplated in subsection (1); or

(ii) to an agent as contemplated in subsection (2); or

(b) a bill of entry or other document prescribed in terms of the Customs and Excise Act in relation to the importation of goods is held by an agent as contemplated in subsection (2A),

the agent shall maintain sufficient records to enable the name, address and VAT registration number of the principal to be ascertained, and in respect of all—

(i) supplies made on or after 1 January 2000 by or to the agent on behalf of the principal, the agent shall notify the principal in writing by means of a statement within 21 days of the end of the calendar month during which the supply was made or received of the particulars contemplated in paragraphs (e), (f) and (g) of section 20(4) in relation to such supplies; or

(ii) goods imported by the agent on behalf of the principal, the agent shall notify the principal in writing by means of a statement within 21 days of the end of the calendar month during which the goods were imported of the full and proper description of the goods, the quantity or volume of the goods, the value of the goods imported and the amount of tax paid on

importation of the goods, together with the receipt number of the payment of such tax.

(4) For the purposes of subsection (5), the expression “**auctioneer**” means a vendor carrying on an enterprise which comprises or includes the supply by him by auction, of goods as an auctioneer or agent for or on behalf of another person (hereinafter in this section referred to as a principal) and includes an agent, fresh produce agent and livestock agent as defined in section 1 of the Agricultural Produce Agents Act, 1992 (Act No. 12 of 1992).

(5) Notwithstanding anything in the preceding provisions of this section, where the principal and the auctioneer agree to have a supply by auction of any goods, other than a taxable supply, treated as if that supply were made by the auctioneer and not by the principal, the supply shall be charged with tax as if it were made by the auctioneer in the course or furtherance of the auctioneer’s enterprise and the auctioneer may—

- (a) recover the amount of tax charged on that supply from that principal as a debt together with the costs of recovery in any court of competent jurisdiction; or
- (b) retain or deduct such amount and costs out of any money in the auctioneer’s hands belonging or payable to the principal:

Provided that the auctioneer or agent shall maintain the records contemplated in section 20(8) as if the principal made a supply of second-hand goods to him, not being a taxable supply.

(6) Notwithstanding anything in subsection (2), where any vendor makes a taxable supply (other than a supply that is charged with tax at the rate of zero per cent under section 11) of goods or services to an agent who is a vendor and is acting for or on behalf of another person who is the principal for the purposes of that supply, and—

- (a) the principal is not a resident of the Republic and is not a vendor; and

- (b) (i) the supply is directly in connection with either the exportation, or the arranging of the exportation, of goods from the Republic to any country or place outside the Republic, or the importation, or the arranging of the importation, of goods to the Republic from any country or place outside the Republic, including, in either case, the transportation of those goods within the Republic as part of such exportation or importation, as the case may be; or

- (ii) the supply is of services which comprise the handling, pilotage, salvage or towage of any foreign-going ship or foreign-going aircraft while present in the Republic or is of services provided in connection with the operation or management of any foreign-going ship or foreign-going aircraft,

this Act shall, where such agent and such principal agree, apply as if the supply were made to that agent and not to the principal.