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Foreign suppliers of electronic services may unintentionally be contravening tax law

By Jana Krause and Jarryd Hartley

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A foreign electronic services supplier (ES supplier) is required to register for VAT in South Africa within 21 days of the total value of electronic services supplied to persons in the country exceeding the VAT registration threshold of R1m in a consecutive 12-month period. However, there is a misconception that foreign ES suppliers, who supply electronic services to persons in South Africa, do not have to register for VAT if the supplies are made via a South African VAT registered intermediary who accounts for the VAT. This is not supported by law, and the foreign supplier could be in contravention of the Value Added Tax Act, 1991 (VAT Act), which is a penalisable offence under the Tax Administration Act, 2011 (TAA).

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When South Africa first imposed VAT on electronic services in 2014, only a limited scope of services were considered as electronic services. Amendments which became effective in April 2019 saw the scope of services that qualified to be electronic services being widened to include any services (subject to a few exceptions) supplied by means of an electronic agent, electronic communication or the internet for any consideration.

The 2019 VAT amendments also introduced a deeming provision that allowed VAT registered intermediaries to account for the VAT where they were acting on behalf of foreign ES suppliers who were not VAT registered in South Africa. However, neither this deeming provision nor any other provision in the VAT Act absolve the foreign ES supplier from registering for VAT where it meets the VAT registration threshold of R1m in any consecutive 12-month period, even where it only makes supplies to South African persons through an intermediary, and the intermediary is already accounting for the VAT.

Intermediaries

Currently, a VAT registered intermediary may account for the VAT on supplies facilitated by it on behalf of a foreign ES supplier only to the extent the foreign ES supplier is not yet VAT registered in South Africa. As soon as the foreign ES supplier's total value of supplies to South Africa persons exceeds the VAT registration threshold, it is legally obliged to

register with Sars. Once the foreign ES supplier is VAT registered, the intermediary may no longer account for the VAT and must, in line with the requirements of the VAT Act, provide the foreign ES supplier with the necessary statement to enable it to account for the VAT in its own VAT returns within 21 days of the end of the month during which the supplies were made.

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Sars confirmed this position in question 26 of its Frequently Asked Questions - Suppliers of Electronic Services (FAQ document), which states that a foreign ES supplier that exceeds the registration threshold but fails to register as a vendor "may be guilty of an offence and remains liable to register and account for VAT on electronic services in the supplier's VAT return". Regardless, there still appears to be a misconception that the VAT Act provides an exemption from registration for foreign ES suppliers who only make supplies of electronic services through intermediaries.

The reason for this could be that Sars published a draft Binding General Ruling (BGR) around 2015 in which it intended to rule that a foreign ES supplier would not need to register for VAT in South Africa if it only supplied electronic services through a South African VAT registered intermediary's platform, the foreign ES supplier and intermediary had entered into a written agreement confirming that the intermediary would account for VAT on the supply of electronic services supplied via its platform and be liable for the payment of the VAT on those electronic services. The ruling was, however, never issued by Sars and therefore does not have any practical application. It would make sense for the legislation to provide such an exemption since, as it currently stands, it creates an onerous administrative burden not only for foreign ES suppliers, but also for the intermediaries and Sars itself.

Contravention and penalties

A failure to register by the foreign ES supplier leads to an unwitting contravention of the provisions of the VAT Act, which carries possible penalties including a fine or imprisonment of up to two years under the provisions of the TAA. Equally problematic is that the intermediary must provide the foreign ES supplier with a statement of all supplies made via the intermediary during a particular month, to allow the foreign ES supplier to file its own VAT returns and pay the VAT due. This could result in severe cost implications for intermediaries, not to mention the administrative burden placed on them since they are likely supplying electronic services on behalf of many foreign ES suppliers at once.

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Without the relevant information, the foreign ES supplier would not be able to file its returns and pay the relevant VAT. Even if it manages to determine the amount of VAT due to Sars, paying such VAT while it has already been accounted for and paid by the intermediary would lead to double taxation. Similarly, this would also cause an onerous administrative burden for Sars, which would need to investigate this complex web of relationships to ascertain who is liable to pay the VAT.

There could be a valid reason for the requirement that foreign ES suppliers, who only supply electronic services via intermediaries, still register for VAT, but it is likely a backstop approach by the legislature to allow Sars to have recourse to the intermediary, where the foreign ES supplier is not VAT registered. The legislation needs to be reviewed to counter double taxation and/or tax avoidance, and clarify these uncertainties, while also ensuring that there is no prejudice to the fiscus.

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