TAX INDABA 2017

VAT: Supply of a business as a going concern - New Draft Interpretation Note 57

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WELCOME

Draft VAT Interpretation Note 57

Background

- South African legislation based on the New Zealand practise
- IN 57 deals with taxable going concern sales in terms of section 11(1)(e) with no reference made to the supply of a going concern as envisaged in section 8(25) and section 11(1)(p) of the VAT Act
- The draft expands on the requirements such as voluntary registration, the requirement that the supply must be made to a registered vendor, what constitutes an 'invoice', the section 18A adjustment and the documentary requirements

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The requirements for zero rating

- The seller and purchaser must be registered vendors.
- The supply must consist of an enterprise or part of an enterprise which is capable of separate operation.
- The parties must agree in writing that the supply is that of a going concern.
- The seller and purchaser must, at the conclusion of the agreement for the disposal of the enterprise, agree in writing that this enterprise will be an income-earning activity on the date of transfer of this enterprise.
- The seller must dispose of the assets which are necessary for carrying on the enterprise to the purchaser.
- The parties must agree in writing that the consideration for the supply includes VAT at the zero rate.

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The requirements for zero rating (cont.)

The purchaser must be a 'registered vendor'

- It is required that the supply must be to a registered vendor but the legislation does not stipulate the date on which the purchaser is required to be registered as a vendor
- The Commissioner will determine the effective date of registration as a vendor upon receipt of an application provided the applicant has satisfied the requirements to be registered
- The current IN 57 provides that where Purchaser applied for registration prior to conclusion of agreement this requirement will be met (see time of supply below)

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The requirements for zero rating (cont.)

The parties must agree in writing that the supply is that of a going concern.

- The Milner Street Properties case is referred to and emphasises the point that the parties must clearly state their intention to enter into a going concern transaction
- In terms of this decision the parties are allowed to rectify the agreement to incorporate the requirements for zero rating provided the parties intended a going concern sale
- SAIT has asked SARS to clarify when such rectification would be appropriate
- The parties must agree in writing to dispose of an existing business
- If it subsequently transpires that a going concern sale did not take place the transaction will attract 14% VAT

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The requirements for zero rating (cont.)

Going concern acquired wholly/partly or purposes other than making taxable supplies

- The disposal of financial assets (debtors, cash) where purchaser will be conducting a partially exempt/non-taxable business

- SAIT has asked SARS to specifically deal with the VAT treatment (by the recipient) of creditors, debtors and other financial assets such as loans in terms of section 18A

- SAIT has also asked SARS to deal with residential accommodation on farm and mining land where the accommodation is located on separate land but still comprises less than 5% of the overall use of the land

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Voluntary registration

- A person may apply for voluntary registration, under section 23(3) even though the total value of taxable supplies is less than R1 000 000 if that person amongst others –
  - carries on an enterprise and the value of taxable supplies made has exceeded the minimum threshold of R50 000 in the past 12-month period;
  - supplies commercial accommodation, provided the minimum threshold of R120 000 is met;
  - carries on an enterprise and the value of taxable supplies has not exceeded the R50 000 minimum threshold but can reasonably be expected to exceed that threshold within 12 months from the date of registration (refer ***Regulation no R 447 – 29 May 2015***); or

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Voluntary registration (cont.)

  - intends to carry on an enterprise, from a future date, as a result of purchasing a going concern and the value of the taxable supplies made by the supplier of the going concern has exceeded R50 000 in the past 12-month period.

- *"The Commissioner will determine the effective date of registration as a vendor upon receipt of an application provided the applicant has satisfied the requirements to be registered voluntarily"*

- *"Due to the risks associated with fraudulent refunds and illegitimate registrations, the Commissioner will not register a purchaser that is not in possession of a signed agreement evidencing the sale of an enterprise disposed of as a going concern"*

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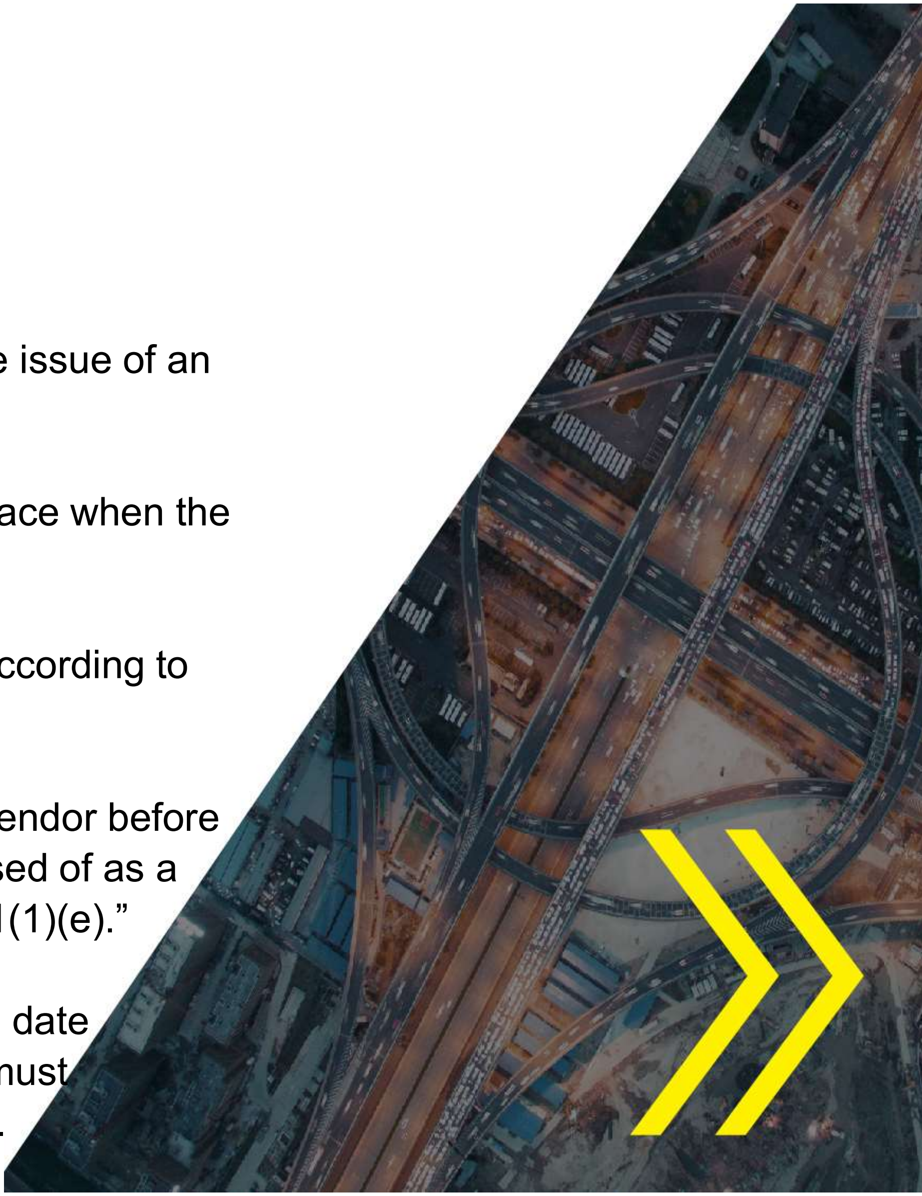
Time of supply

- The general time of supply for goods apply – the earlier of the issue of an invoice or any payment.
- Where the parties are connected persons the supply takes place when the business is made available to the purchaser
- Will the sale agreement constitute or become an “invoice”? According to SARS, yes, however a tax invoice still needs to be issued
- “In this case the purchaser is required to be registered as a vendor before concluding the agreement for the sale of an enterprise disposed of as a going concern in order to meet the requirements of section 11(1)(e).”
- The purchaser must be a registered vendor with effect from a date on/prior to the disposal – In the current IN 57 the Purchaser must have applied for registration prior to conclusion of agreement.



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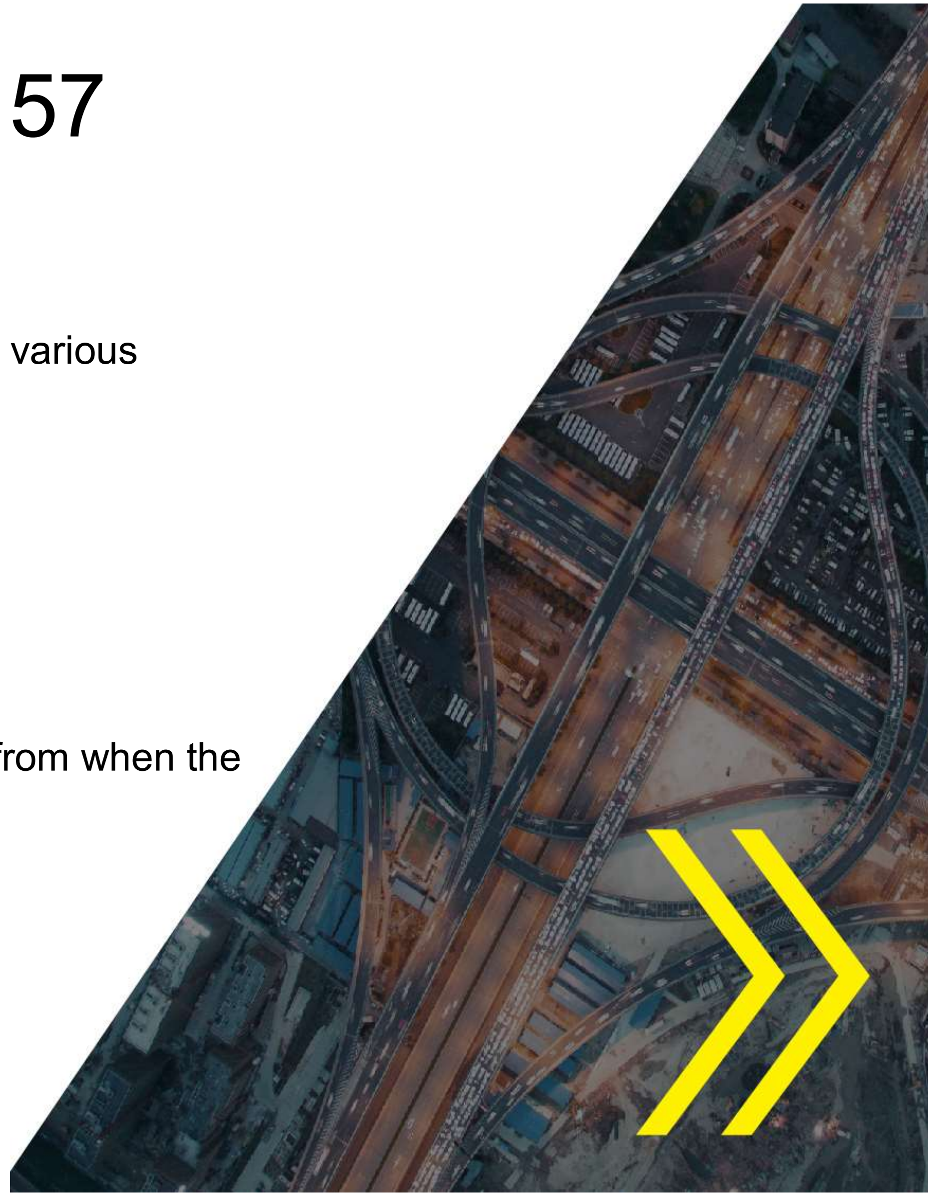
Documentary proof

- Signed agreement between the parties dealing with the various requirements
- Recipient’s notice of registration
- Tax Invoice

The above documentary proof must be obtained within 90 days from when the supply was deemed to be made

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