

DRAFT INTERPRETATION NOTE

DATE:

ACT : VALUE-ADDED TAX ACT NO. 89 OF 1991
SECTION : SECTION 1(1), DEFINITION OF “PERSON”, SECTIONS 23 AND 51
SUBJECT : BODIES OF PERSONS

Preamble

In this Note unless the context indicates otherwise –

- “**section**” means section of the VAT Act.
- “**VAT Act**” means the Value-Added Tax Act No. 89 of 1991; and
- any word or expression bears the meaning ascribed to it in the VAT Act.

1. Purpose

This Note explains the bodies of persons that fall within the ambit of section 51(1).

2. Background

A business can be carried on in various legal forms including a company, a sole proprietor and a partnership. A company, for example, has a separate legal personality, exists separately from its members and can therefore register for value-added tax (VAT) in its own right. On the other hand, unincorporated bodies of persons (for example, partnerships, joint ventures or associations) are not regarded as legal persons in terms of common law and the rights acquired and obligations incurred by these entities vest in the members of these entities rather than in the entities themselves. Certain bodies of persons may, however, be established by law and be given separate legal personality in terms of that law (that is, a corporate body of persons, for example, the Government Employees Pension Fund). Although for common law purposes, a body of persons is not regarded as a legal person, for VAT purposes it is included in the definition of a “person” in section 1(1).

3. The law

For ease of reference the relevant sections of the VAT Act are quoted in the **Annexure**.

4. Application of the law

A “person” is defined in section 1(1) to include a body of persons (corporate or unincorporate). A body of persons carrying on an enterprise would be able to register as a vendor under section 23 provided the requirements for registration are met.

Section 51(1) explicitly provides for a body of persons that carries on an enterprise, to carry on such enterprise separate from its members and for the registration of that

body to be separate from the registration of any of its members for any other enterprise carried on by the member.

Partnerships, joint ventures and associations of persons are regarded as falling within the ambit of a “body of persons” as contemplated in section 51 and are described in more detail below:

- A partnership is an arrangement between two or more persons based on an agreement. The parties to that arrangement should have the intention to be partners and the essential elements for a partnership being the partners’ contributions, a profit objective and joint benefit for the partners must be evident from the agreement.
- A joint venture (which is used predominantly in the mining and construction industries) is an arrangement between two or more persons based on an agreement to generally operate a single, limited or defined project. The parties to such an agreement will generally share control of the arrangement and share the product or output of the venture.
- An association of persons is a collection of persons who have joined together and are bound by an agreement in pursuit of a common purpose, for example, an association consisting of racing clubs.¹ It must be evident from the agreement that the parties have the intention to associate and agree on the essential characteristics and objectives of the association.

5. Conclusion

In light of the above, the following falls within the ambit of a body of persons contemplated in section 51(1) provided that such body of persons carries on an enterprise:

- A partnership
- A joint venture
- An association of persons

In the event that two or more parties –

- contend that the arrangement between them does not constitute one of the abovementioned bodies of persons and would not fall within the ambit of section 51(1); or
- are of the view that the arrangement between them does not fall within the aforementioned three categories but the parties want to apply the provisions of section 51(1) to such arrangement,

¹ See *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 23 SATC 380 or 1960 (3) SA 291 (A) in which the court held that an association which consisted of several Witwatersrand racing clubs constituted (as an unincorporated body of persons) a “person” as defined in the Interpretation Act, 1910 and as such was a “person” for purposes of section 5 of the Income Tax Act, 1941.

it is suggested that a written application for a VAT ruling or VAT class ruling be submitted by e-mail to **VATRulings@sars.gov.za** or by facsimile to 086 540 9390 requesting confirmation thereof. The application should consist of a completed VAT301 form and must comply with the provisions of section 79 of the Tax Administration Act, 2011 excluding sections 79(4)(f), (k) and (6).

Legal and Policy Division
SOUTH AFRICAN REVENUE SERVICE

Annexure – The law

Section 1 – Definitions

(1).⁰⁰⁰In this Act, unless the context otherwise indicates—

“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;

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;

“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;

Section 23 – Registration of persons making supplies in the course of enterprises

(1) (Every person who, on or after the commencement date, carries on any enterprise and is not registered, becomes liable to be registered—

- (a) at the end of any month where the total value of taxable supplies made by that person in the period of 12 months ending at the end of that month in the course of carrying on all enterprises has exceeded R1 million;
- (b) at the commencement of any month where there are reasonable grounds for believing that the total value of the taxable supplies to be made by that person in the period of 12 months reckoned from the commencement of the said month will exceed the above-mentioned amount:

Provided that the total value of the taxable supplies of the vendor within the period of 12 months referred to in paragraph (a) or the period of 12 months referred to in paragraph (b) shall not be deemed to have exceeded or be likely to exceed the amount contemplated in paragraph (a), where the Commissioner is satisfied that the said total value will exceed or is likely to exceed such amount solely as a consequence of—

- (i) any cessation of, or any substantial and permanent reduction in the size or scale of, any enterprise carried on by that person; or
- (ii) the replacement of any plant or other capital asset used in any enterprise carried on by that person; or
- (iii) abnormal circumstances of a temporary nature.

(2) Every person who is not a resident of the Republic, and who in terms of subsection (1) or section 50A, becomes liable to be registered in accordance with Chapter 3 of the Tax Administration Act, shall be deemed not to have applied for registration, in addition to section 22(4) of the Tax Administration Act, until such person has—

- (a) appointed a representative vendor as contemplated in section 46 in the Republic and furnished the Commissioner with the particulars of such representative vendor;

- (b) opened a banking account with any bank, mutual bank or other similar institution, registered in terms of the Banks Act, 1990 (Act No. 94 of 1990), for the purposes of his or her enterprise carried on in the Republic and furnished the Commissioner with the particulars of such banking account.

(3) Notwithstanding the provisions of subsections (1) and (2), every person who satisfies the Commissioner that, on or after the commencement date—

- (a) that person is a “municipality” as defined in section 1 or is carrying on any enterprise as contemplated in paragraph (b)(ii), (iii) or (v) of the definition of “enterprise” in section 1; or
- (b) that person is carrying on any enterprise other than—
- (i) as contemplated in paragraph (b)(ii) or (iii) of the definition of “enterprise” in section 1; or
 - (ii) as a “municipality” as defined in section 1,
- and the total value of taxable supplies made by that person in the course of carrying on all enterprises in the preceding period of 12 months has exceeded R50 000; or
- (c) that person intends to carry on any enterprise from a specified date, where that enterprise will be supplied to him as a going concern and the total value of taxable supplies made by the supplier of the going concern from carrying on that enterprise or part of the enterprise which will be supplied has exceeded R50 000 in the preceding period of 12 months; or
- (d) that person is continuously and regularly carrying on an activity which, in consequence of the nature of that activity, can reasonably be expected to result in taxable supplies being made for a consideration only after a period of time and where the total value of taxable supplies to be made can reasonably be expected to exceed R50 000 in a period of 12 months,

may apply to the Commissioner for registration.

(4) Where any person has—

- (a) applied for registration in accordance with Chapter 3 of the Tax Administration Act or subsection (2) or (3) and the Commissioner is satisfied that that person is eligible to be registered in terms of this Act, that person shall be a vendor for the purposes of this Act with effect from such date as the Commissioner may determine; or
- (b) not applied for registration in terms of Chapter 3 of the Tax Administration Act and the Commissioner is satisfied that that person is liable to be registered in terms of this Act, that person shall be a vendor for the purposes of this Act with effect from the date on which that person first became liable to be registered in terms of this Act: Provided that the Commissioner may, having regard to the circumstances of the case, determine that person to be a vendor from such later date as the Commissioner may consider equitable:

Provided that where that person is a public entity listed in Schedule 1 or Part A or C of Schedule 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999), which was liable to be registered as a vendor for any supplies made on or before 31 March 2005, but did not register before 1 April 2005, the Commissioner must not register that person in respect of those supplies.

(5) Notwithstanding anything in this Act to the contrary, where any enterprise is carried on by any association not for gain in branches or divisions, or separate enterprises are carried on by that association, that association may apply in writing to the Commissioner for any such branch, division or separate enterprise to be deemed to be a separate person for the purposes of this section, and if every such branch, division or separate enterprise maintains an independent system of accounting and can be separately identified by reference to the nature of the activities carried on or the location of that branch, division or separate enterprise, every such branch, division or separate enterprise shall be deemed to be a separate person, and not a part of the association, and, where any such branch, division or separate enterprise is deemed to be a separate person under this subsection, any enterprise carried on by that branch or division or any separate enterprise carried on by the association shall, to that extent, be deemed not to be carried on by the association concerned.

(6) The provisions of this Act relating to the determination of the value of any supply of goods or services, whether such supply is made before or on or after the commencement date, shall apply for the purposes of this section, but no regard shall be had to any tax charged in respect of any such supply: Provided that any supply of services contemplated in section 11(2)(n) shall for the purposes of this section be deemed not to be a taxable supply.

(7) Where the Commissioner is satisfied that any person who has applied for registration in terms of subsection (3) is not eligible to be registered in terms of this Act or should not be registered by reason of the fact that such person—

- (a) has no fixed place of abode or business; or
- (b) does not keep proper accounting records relating to any enterprise carried on by him; or
- (c) has not opened a banking account with any bank, mutual bank or other similar institution for the purposes of any enterprise carried on by him; or
- (d) has previously been registered as a vendor in respect of any enterprise, whether in terms of this Act or in terms of the Sales Tax Act, 1978 (Act No. 103 of 1978), but failed to perform his duties under either of the said Acts in relation to such enterprise,

the Commissioner may refuse to register the said person as a vendor in terms of this Act and shall give written notice to that person of such refusal.

Section 51 – Bodies of persons, corporate or unincorporated (other than companies)

(1) Subject to the provisions of section 46, where any body of persons, whether corporate or unincorporate (other than a company), carries on or is to carry on any enterprise—

- (a) such body shall be deemed to carry on such enterprise as a person separate from the members of such body;
- (b) registration of that body as a vendor shall be effected separately from any registration of any of its members in respect of any other enterprise;
- (c) liability for tax in respect of supplies by the body shall be determined and calculated in respect of the enterprise carried on by it as an enterprise carried on independently of any enterprise carried on by any of its members, and any refund relating to the body's enterprise which is payable in terms of section 44 shall be made to that body; and
- (d) the duties and obligations imposed by this Act on any vendor or other person shall, as respects the enterprise carried on by that body, be performed by it separately from the duties and obligations imposed on any of its members.

(2) Where any such body is a partnership or other unincorporated body and is dissolved in consequence of the retirement or withdrawal of one or more (but not all) of its members or the admission of a new member and a new partnership or unincorporated body comes into being consisting of the remaining members of the dissolved partnership or body, as the case may be, or such remaining members and one or more new members and the new partnership or body continues to carry on the enterprise of the dissolved partnership or body as a going concern, the dissolved partnership or body and the new partnership or body, as the case may be, shall (unless the Commissioner, having regard to the circumstances of the case, otherwise directs) for the purposes of this Act be deemed to be one and the same partnership or body, as the case may be.

(3) Subject to the provisions of section 46, every member of a partnership shall be liable jointly and severally with other members of the partnership for performing the duties of the partnership in terms of this Act and paying the tax imposed by this Act on the partnership in respect of supplies made by the partnership while such member was a member of the partnership: Provided that this subsection shall not apply to any such member of a partnership who in relation to that partnership is a partner en commandite or a special partner as defined in the Special Partnerships' Limited Liability Act, 1861 (Act No. 24 of 1861), of the Cape of Good Hope or in Law No. 1 of 1865 of Natal, who has not held himself out as an ordinary or general partner of the partnership concerned.