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The South African Revenue Service

Lehae La SARS

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PRETORIA

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BY EMAIL: policycomments@sars.gov.za

RE: DRAFT BINDING GENERAL RULING RELATING TO ELECTRONIC SERVICES SUPPLIED BY INTERMEDIARIES (VAT)

Provided below are SAIT's comments in respect of the draft binding general ruling relating to the application of VAT when foreign persons supply electronic services into South African via South African intermediaries. We support the draft ruling as a mechanism for easing the administrative burden on foreign persons that supply cross-border electronic services into South Africa. The main point of this submission is to seek further clarification.

1. Background

The draft ruling essentially allows South African intermediaries to assume responsibility for VAT in lieu of foreign supplies in the case of imported e-services. The foreign e-commerce provider is excused from VAT registration and any VAT withholding with the South African intermediary assuming both the VAT reporting and liability instead. The draft ruling is based on the SARS discretionary power of section 72. The examples below are our understanding of the basic application of the draft ruling.

Example 1 (basic imported services). Foreign Company 1 supplies R10 million of cross-border electronic services to South Africans. Under this circumstance, Foreign Company 1 must register for VAT within South Africa. Foreign Company 1 must pay VAT output if the services are supplied to non-VAT customers. However, no VAT is required to the extent the imported services solely involve business parties (i.e. are business-to-business).

Example 2 (use of an intermediary). Foreign Company 2 supplies R10 million of cross-border electronic services to South African intermediary that has its own electronic platform, which in turn provide supplies to multiple South Africans. Under the draft ruling, Foreign Company 2 can rely on South African intermediary for VAT reporting and liability in respect of cross-border e-services. The provision of e-services to South African intermediary has no VAT implications. The provision of those same services by South African Intermediary to other South Africans triggers a VAT supply.

2. *Clarification of relationships*

The legal relationship between the foreign person and the South African intermediary is unclear. Is the relationship one of independent parties with the foreign person making an outright sale to the intermediary or is the intermediary merely an agent acting on the foreign person's behalf? The terms "via" an intermediary platform and "to facilitate" the supply of electronic services seems to suggest an agency relationship. If so, what is the impact of the agency rules (if any). Alternatively, is either an intermediary or an agency relationship permissible?

3. *Solely?*

The draft ruling seems to suggest that a foreign person can utilise only one South African intermediary. If so, this limitation presumably exists due to anti-avoidance concerns out of fear that a single electronic service provider could divide-services into smaller groupings so as to fall below the R50 000 threshold. If so, we would alternatively suggest that multiple intermediaries be freely allowed without a threshold to prevent avoidance. Foreign persons may have different forms of electronic services or different sets of clientele requiring different intermediary platforms.

On the other side of the coin, we presume that a South African intermediary can provide local registration on behalf of several foreign e-commerce providers. Multiple e-commerce registrations with a single intermediary do not represent a risk of foreign persons dividing electronic commerce service into amounts that artificially falling below the R50 000 threshold. The aggregation of multiple foreign-service providers into a single South Africa intermediary channel presumably would make enforcement easier.

4. *Connected persons*

It is not entirely clear whether the draft ruling will apply to connected persons. We would request connected person relationships be allowed. Foreign groups can provide a variety of e-commerce services to a local South African group subsidiary. In these situations, the use of a South African intermediary to eliminate foreign registration would be highly beneficial in terms of simplified compliance. We assume that this practice would be acceptable as long as the intermediary has an electronic platform of its own. A VAT in/out charge would apply when the South African intermediary passes the foreign e-services on the South African group subsidiary.

It should be noted that the use of a local intermediary platform to mitigate tax risks associated with simple foreign-parent situations should also not be overlooked. Concerns continue to exist that local registration by a foreign e-commerce provider creates potential income tax risk in terms of the permanent establishment test. The need to reduce this risk is more acute given the changing landscape of the permanent establishment concept set into motion by the OECD base erosion profit shifting action plans.

5. *Closing Thoughts*

At the end of the day, the section 72 ruling effectively creates a simple trade-off. On the one hand, the foreign e-commerce provider can effectively eliminate the need for direct registration requirement. On the other, a South African intermediary must assume reporting and the cash-flow burden of the in/out business-to-business service charge (which would not otherwise exist in the case of business-to-business imported services).

If true, we suggest an even further simplification (perhaps a subject of another section 72 ruling or legislation). If a foreign parent company provides e-services to a South African subsidiary, we suggest no intermediary should be required at all. The foreign parent company should be relieved of local registration if the South African subsidiary simply agrees to fully account for these services via a reverse-charge mechanism like goods. This mechanism may operate as a better enforcement mechanism for perceived concerns in cross-border business-to-business ecommerce than the

unwieldy forced foreign registration procedure and has the same practical effect of requiring South African intermediary platforms as outlined above.

We again thank you for the opportunity to comment on this matter and welcome the attempt to ease the burden imported e-services.

Yours sincerely

Keith Engel

Chief Executive