

## **INTERPRETATION NOTE: NO. 57**

DATE: 31 MARCH 2010

**ACT : VALUE-ADDED TAX ACT, NO. 89 OF 1991 (the VAT Act)**  
**SECTIONS : SECTIONS 8(7), 8(16), 11(1)(e) AND 18A**  
**SUBJECT : SALE OF AN ENTERPRISE OR PART THEREOF AS A GOING CONCERN**

### ***Preamble***

In this Note legislative references to sections are to sections of the VAT Act unless otherwise stated.

### **1. Purpose**

This Note serves to –

- set out the value-added tax (VAT) implications regarding the supply of an enterprise or part thereof as a going concern;<sup>1</sup> and
- withdraw, in terms of section 5(2), VAT Practice Note: No. 14 issued on 20 January 1995.

### **2. Background**

The supply of an enterprise or of a part of an enterprise is a taxable supply which should be subject to VAT at the rate of 14%. However, provision is made in section 11(1)(e) for the supply of an enterprise or part of an enterprise which is capable of separate operation to a registered vendor, to be subject to VAT at the rate of zero per cent. The requirements of section 11(1)(e) are discussed in this Note.

### **3. The law**

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

### **4. Application of the law**

#### **4.1 General**

A vendor making a taxable supply of goods or services in the course or furtherance of its enterprise, is required in terms of section 7(1)(a) to levy VAT at the standard rate on the supply.

The taxable supply of goods by a vendor includes the supply of its enterprise or a part thereof. This supply would be subject to VAT at the standard rate in terms of section 7(1)(a), however, section 11(1)(e) allows this supply to be zero-rated.

---

<sup>1</sup> Any reference in this Note to an “enterprise” disposed of as a going concern includes a reference to any separate part of an enterprise which is disposed of as a going concern.

In order for the supply to qualify as being zero-rated in terms of section 11(1)(e), the following requirements must be met:

- 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 a going concern.
- The seller and purchaser must, at the conclusion of the agreement, agree in writing that the enterprise will be an income-earning activity on the date of transfer thereof.
- The assets necessary for carrying on the enterprise must be disposed of to the purchaser.
- The parties must agree in writing that the consideration for the supply includes VAT at the zero rate.

A more detailed explanation of the aforementioned requirements is set out below.

#### **4.2 The seller must be a vendor**

Only a vendor can make a taxable supply of goods or services and charge VAT in terms of section 7(1). Similarly, only a vendor can make a taxable supply of goods or services at the zero rate in terms of section 11. Accordingly, in order for a person to supply its enterprise as a going concern at the zero rate in terms of section 11(1)(e), the seller must be a registered vendor.

A “vendor” is defined in section 1 to include a person who is registered or required to be registered as a vendor but has not applied for registration. In this regard, a “vendor” being a compulsory registrant, is a person who carries on an enterprise and whose total value of taxable supplies exceeds or will exceed R1 000 000 in any 12-month period. A person will not be obliged to register as a vendor if the total value of its taxable supplies in a 12-month period will exceed the R1 000 000 limit merely as a result of, amongst others, the sale of its business.

#### **4.3 The purchaser must be a registered vendor**

The zero rate cannot apply if the recipient (purchaser) of the supply of an enterprise as a going concern is not a registered vendor. In order to comply with the provisions of section 11(3), the seller must obtain and retain a copy of the purchaser’s Notice of Registration (form VAT 103). The vendor can furthermore verify that the VAT 103 is valid by using the VAT vendor search function, which is available on SARS efilling website [<http://www.sarsefiling.co.za/StaticMain.aspx>].

In the event that the purchaser is not yet registered as a vendor at the time of concluding of the agreement, it is advisable that the agreement provide for the application of the zero rate, subject to the purchaser being a registered vendor with effect from the date the agreement is concluded, and to furnish a copy of the VAT 103 to the seller as soon as it is available. Should this not occur, the seller should ensure that the contract makes provision to increase the consideration payable to cater for the imposition of VAT at the rate of 14%.

#### **4.4 Time of supply**

As the disposal of an enterprise as a going concern is deemed to be a supply of goods, the time of supply is, subject to section 9(2), determined in section 9(1), that is, the earlier of the time an invoice is issued for the supply or any payment of consideration is received by the seller. This time of supply rule applies even when fixed property forms part of the disposal of the enterprise.

In this regard, an “invoice” is defined in section 1 as a document notifying of an obligation to make payment. With regard to payment of consideration, any deposit (not being a deposit for a returnable container) received in respect of the purchase price is not regarded as consideration received until such time that the deposit is applied as payment for the supply of goods or services. As a result, the time of supply is not triggered when payment of a deposit is received.

#### **4.5 Date of registration**

A vendor supplying a going concern to a purchaser on or after the commencement date of the purchaser’s enterprise but before the purchaser’s registration as a VAT vendor, must ensure that the purchaser has applied to be registered as a vendor prior to concluding the agreement for the purchase of the enterprise. In the event that the purchaser has not applied for registration before concluding the agreement, the supply cannot be zero-rated and must therefore be subject to VAT at the rate of 14 %.

#### **4.6 Registration numbers**

The seller’s VAT registration number cannot be allocated to the purchaser and the purchaser of the business will receive a new VAT registration number (unless the purchaser is already registered).

#### **4.7 The enterprise must be a going concern**

The term “going concern” is effectively defined in paragraph (i) of the proviso to section 11(1)(e) and consists of various criteria. The criteria for a supply of an enterprise to constitute a going concern as contemplated in section 11(1)(e) are –

- the seller and purchaser must agree in writing that the enterprise will be an income-earning activity;
- the assets which are necessary for carrying on such enterprise are disposed of by the seller to the purchaser; and
- the seller and purchaser must agree in writing that the consideration for the supply of the enterprise is inclusive of tax at the zero rate.

#### **4.8 Supply of an income-earning activity**

The contracting parties must, at the conclusion of the contract, agree in writing that the enterprise will be an income-earning activity on the date the ownership of the enterprise is transferred. This must be stated specifically in the agreement.

The agreement must provide for the sale of an independent income-earning activity together with the necessary infrastructure. The purchaser must be placed in possession of a business which can be operated in that same form, without any further action on the part of the purchaser. The parties must, therefore, agree that the enterprise will remain active and operating until its transfer to new ownership. It is,

however, not necessary that the purchaser indeed intends to carry on the particular activity of the enterprise. The contract must merely create a “capacity to continue”.

The following scenarios provide guidelines as to what will or will not constitute an income-earning activity.

#### **4.8.1 Farming activities**

The mere sale of a farm property constitutes the supply of a capital asset of a business and not the farming enterprise. In order to supply a farming enterprise as a going concern, the seller and the purchaser must agree that the income-earning activities of the farm, its equipment, crops and assets necessary for carrying on the farming activities will be transferred.

#### **4.8.2 Leasing activities**

Leasing activities generally consist of, amongst others, -

- an underlying asset that is the subject of a lease; and
- a contract of lease.

Accordingly, a vendor who conducts a leasing activity in respect of fixed property and who intends to supply such leasing activity must make provision in the contract stating that the other aspects of the leasing activity are disposed of together with such fixed property in order to constitute an income-earning activity. In instances where the agreement does not provide for a property together with the lease agreements to be transferred, only the asset is sold and section 11(1)(e) will not apply.

#### **4.8.3 Fixed property sold to the tenant**

An agreement to sell a fixed property to the sole tenant does not constitute the disposal of a going concern, as the income-earning activity (being the leasing activity) is not sold to the purchaser. The purchaser obtains a capital asset without the capacity to continue the leasing activity.

#### **4.8.4 Sale and lease back**

There is no agreement to sell an income-earning activity where the agreement provides that the seller being the occupier/user of an asset will lease it back from the purchaser.

#### **4.8.5 Business yet to commence or dormant business**

An asset which is merely capable of being operated as a business does not constitute an income-earning activity. There must be an actual or current operation. For this reason, the agreement to dispose of a business yet to commence or a dormant business is not a going concern.

As the parties must agree that the enterprise will on the date of transfer thereof be an income-earning activity, the zero rate can apply where the seller is in terms of the contract obliged to start the business and ensure it is income-earning before transfer thereof. However, in instances where the purchaser takes possession of the enterprise before the date of transfer, and the enterprise is only income-earning after the date of transfer, the zero rate will not apply.

**Example 1 – Business yet to commence or dormant business***Facts:*

Company A is a registered vendor and has decided, in addition to its current activities, to commence with a property construction activity. Company A acquires fixed property with the intention to develop residential units and sell the individual units to prospective buyers. However, before the construction of the residential units, Company A experiences financial difficulties and sells the property construction activity together with the property and building plans to Property Company B.

*Question:*

Does the supply of Company A's enterprise activity constitute an income-earning activity?

*Result:*

Company A's enterprise activity which is being sold to Property Company B was not an income-earning activity before it was sold and neither will it be an income-earning activity on the date ownership of the property is transferred to Property Company B..

**4.8.6 Sale of share block shares**

A vendor who has applied its share block shares for purposes of making taxable supplies and subsequently supplies such shares to another registered vendor, may zero rate the supply if the parties agree that the enterprise carried on in relation to such share block is disposed of as an income-earning activity by way of the supply of the shares.

**4.9 Disposal of the assets which are necessary for carrying on the enterprise**

The assets which are necessary for carrying on the enterprise must be disposed of by the seller to the purchaser. However, the assets that are not necessary for carrying on the enterprise, need not be disposed of with the enterprise. The seller can, for example, decide to keep certain assets or the purchaser can decide not to purchase certain old stock or book debts.

The term “disposed of” is not defined in the VAT Act. Ordinarily, the dictionary definition of each word within the phrase is used as reference to determine the meaning of the phrase, in which case, the word “disposed” is used as a verb and is defined as:<sup>2</sup>

**verb (used with object)**

1. ...
2. to put in a particular or the proper order or arrangement; adjust by arranging the parts
3. to put in a particular or suitable place: *The lamp was disposed on a table nearby.*
4. to make fit or ready; prepare: *Your words of cheer dispose me for the task*

<sup>2</sup> <http://dictionary.reference.com>

However, the aforementioned definition does not provide sufficient guidance. Therefore, there is a definition for the phrase “dispose of” as a verb phrase which can be used and is defined as:<sup>3</sup>

1. to deal with conclusively; settle
2. to get rid of; discard.
3. to transfer or give away, as by gift or sale
4. to do away with; destroy.

Therefore, the phrase “disposed of” can be interpreted, within the context of section 11(1)(e), to include an outright sale as well as a lease or rental of the assets necessary for the carrying on of the enterprise. It is important to note that while the sale of the enterprise as a going concern can be a zero-rated supply, the lease or rental of the assets necessary for the carrying on of the enterprise will be a standard-rated supply. With regard to a lease or rental of the assets necessary for carrying on the enterprise, the purpose of entering into such lease or rental must be to give effect to, and not merely to purport, the supply of a business which is a going concern and an income-earning activity.

#### **Example 2 – Assets necessary for carrying on the enterprise**

*Facts:*

Company A is a registered vendor and conducts a manufacturing activity. Company A leases a fixed property from Property Company B in which it conducts its manufacturing activity. Company A enters into an agreement with Company C to sell the manufacturing activity, which includes all the assets necessary for carrying on the enterprise. However, in terms of the agreement, Company A will terminate the lease for the fixed property with Property Company B. However, as the fixed property is an integral part of the activity conducted by Company A, in terms of the agreement, it requires Company C to enter into a simultaneous lease with Property Company B. Company C enters into a separate lease agreement with Property Company B for the lease of the fixed property that was previously leased by Company A.

*Question:*

Will the lease of the fixed property together with the sale of the manufacturing activity be regarded as the disposal of the assets which are necessary for carrying on the manufacturing activity?

*Result:*

The agreement of sale of the business read together with the lease agreement will constitute the disposal of assets which are necessary for carrying on the manufacturing activity. In instances where the building was not an integral part of the manufacturing activity of Company A (i.e. the business could still continue trading if relocated to a different venue), the sale agreement comprising only the sale of the business activity together with the assets necessary for carrying on the business, would satisfy the requirements of an income-earning activity.

<sup>3</sup> <http://dictionary.reference.com>

#### **4.9.1 Disposal of shares**

There is no supply of a going concern where ownership of an enterprise changes through the sale of shares in a company. The supply of shares is a financial service contemplated in section 2(1)(d) and is therefore exempt in terms of section 12(a).

#### **4.10 Agreement in writing between the parties**

The parties must agree in writing that the enterprise is disposed of as a going concern and is a zero-rated supply for VAT purposes. The failure by the parties to agree about this aspect in writing, will result in the zero rate not being applicable, even if the enterprise is indeed transferred as a going concern.

In instances where the contract specifically states that an enterprise (for example, a property leasing enterprise) is disposed of as a going concern at the zero rate and it is subsequently found that the enterprise was not disposed of as a going concern (as, for example, the sale agreement provides for the transfer of a vacant building which cannot constitute an income-earning activity), the zero rate cannot apply. In this instance the seller will be required to charge VAT at the standard rate of 14%. In addition, the seller will also be liable for interest and penalties on the late payment of the VAT relating to the supply of the enterprise.

In such a case there can be no argument between the parties as to whether the purchase price includes VAT or not, or the rate of VAT provided for. As the parties reached agreement on the purchase price based on an incorrect rate of VAT, the purchase price should be adjusted accordingly.

It is therefore advisable for the contract to make provision for VAT to be levied at the rate of 14% in the event that the supply does not qualify to be zero-rated in terms of the provisions of section 11(1)(e).

#### **4.11 Supply of part of an enterprise**

The supply of part of an enterprise which is capable of separate operation is zero-rated where the requirements discussed above are met. The transfer of a “stand-alone” division of a business or of some of the outlets of a business which are operated at more than one geographical location can therefore qualify for zero-rating.

Section 8(15) provides for a supply to be apportioned between zero-rated and standard-rated components where, if separate considerations had been payable, a single supply would be subject to tax partly at the standard rate and partly at the zero rate. Such apportionment requires a sufficient distinction between the parts of the supply to make it reasonable to sever them and apportion accordingly.

A contract for the sale of an enterprise concluded in circumstances where the entire enterprise is not disposed of as a going concern will require an apportionment to be made between the activities which are disposed of as a going concern [section 11(1)(e)] and the portion which is not a going concern [section 7(1)(a)].

#### **4.12 The supply of goods or services used only partly for purposes of a going concern**

##### **4.12.1 General**

The supply of goods or services which were applied partly for taxable and partly for other than taxable purposes is deemed to be made wholly in the course of an

enterprise and is, therefore, fully taxable in terms of section 8(16). The supply of the “portion” of such goods or services that are used partly to make other than taxable supplies (e.g. exempt purposes) is thus also subject to VAT. The vendor making such supply may make a deduction that was previously denied in respect of the “non-taxable” portion of the supply in accordance with section 16(3)(h). However, the purchaser will be required to make an adjustment contemplated in section 18A if the enterprise will be used by the purchaser partly for making taxable supplies.

#### 4.12.2 Goods or services used mainly for purposes of a going concern

Goods or services which were before the supply of the enterprise as a going concern used mainly (that is, more than 50%) for the purposes of such enterprise and partly for other purposes and are supplied as part of the supply of a going concern, are deemed to form part of the going concern [refer to proviso (ii) to section 11(1)(e)].

##### **Example 3 – Goods or services used mainly for purposes of a going concern**

###### *Facts:*

Farmer B, a registered vendor, used his farm for taxable purposes (farming), exempt purposes (provision of accommodation to labourers) and private purposes (the farm house). Farmer B sells the entire farm to Farmer Z. The farming enterprise entails crop farming and to a lesser extent cattle farming. The land on which the farm is situated is used mainly for the enterprise activity (60% of the farm land is used for planting crops and 10% used for grazing land and the balance of 30% is the land on which the labourers accommodation and farmhouse is situated). The parties agree that the crop farming part of the enterprise will be transferred as an income-earning activity at the zero rate.

###### *Question:*

Can the supply of the entire farm, including the portion used for exempt and private purposes constitute a going concern which is zero-rated in terms of section 11(1)(e)?

###### *Result:*

As the farm was used **mainly** for purposes of the going concern, the total purchase price of the farm may be zero-rated, even though the farm was used partly for non-enterprise purposes.

The supplying vendor (Farmer B) is therefore entitled to a deduction envisaged in section 16(3)(h) on the portion of input tax previously denied (i.e. the portion that was used other than for purposes of making taxable supplies).

However, the purchasing vendor (Farmer Z) is required to make an adjustment in terms of section 18A (the application of section 18A is discussed in detail below).

#### 4.12.3 Goods or services not used mainly for purposes of a going concern

Goods or services used partly for purposes of an enterprise, but not mainly for such purposes, when supplied, is in terms of section 8(16) deemed to be made wholly in the course or furtherance of the enterprise. As such goods or services are not used mainly for purposes of an enterprise, the supply cannot be a going concern as contemplated in section 11(1)(e) and will be subject to VAT at the standard rate. In instances where the vendor can sufficiently distinguish between the parts of the supply to make it reasonable to sever them and apportion accordingly, the portion of



the selling price which relates to the going concern may be zero-rated. The remainder of the portion which is not a going concern must be charged with VAT at the standard rate [section 8(15)].

In instances where the apportionment contemplated above cannot be made, the supply of the enterprise will be subject to VAT at the standard rate.

#### **Example 4 – Goods or services used mainly for purposes of a going concern**

##### *Facts:*

B, a registered vendor used his land for taxable purposes (farming), exempt purposes (provision of dwellings to private individuals) and private purposes (the personal residential house). B sells the land together with the farming enterprise to Farmer Z. The farming enterprise entails egg production. However, B's business was largely attributable to making exempt supplies and for private purposes (i.e. the land area space used constituted 60%). The parties agree that the egg production enterprise will be transferred as an income-earning activity at the zero rate.

The sale agreement stipulated the following values of the supply:

	R
Land	1 000 000
Buildings	1 500 000
Egg production assets	1 500 000
<b>Total</b>	<b>4 000 000</b>

##### *Question:*

Can the supply of the entire farm, including the portion used for exempt and private purposes constitute a going concern which is zero-rated in terms of section 11(1)(e)?

##### *Result:*

As the land was not used mainly for purposes of the going concern, the total selling price may not be zero-rated.

However, the consideration which is attributable to the egg production assets (i.e. the farming activity) may be zero-rated in terms of section 11(1)(e). However, all the requirements of section 11(1)(e) must be complied with in order for the zero rate to apply. In view of this, the consideration of R1 500 000 attributable to the farming activity may be zero-rated.

With regard to the land and buildings, the entire consideration attributable thereto will be subject to VAT at the standard rate. Therefore, B must levy VAT of R350 000 on the value of R2 500 000 [(R1 000 000 + R1 500 000) X 14%].

The supplying vendor (B) is therefore entitled to a deduction envisaged in section 16(3)(h) on the portion of input tax previously denied (i.e. the portion that was used other than for purposes of making taxable supplies).

The purchasing vendor (Farmer Z) is entitled to deduct input tax on the acquisition of the land and buildings to the extent that the land and buildings are used in the course of the farming activity.

In view of this, the consideration for the supply by B will be R4 350 000, which is made up as follows:

	R
Farming activity – zero-rated	1 500 000
Land & buildings – standard-rated	2 500 000
VAT @ 14%	350 000
<b>Total</b>	<b>4 350 000</b>

As the land and buildings are subject to VAT, the sale will not be subject to transfer duty.

#### 4.13 Going concern acquired wholly or partly for purposes other than making taxable supplies

##### 4.13.1 Section 18A

A principle of VAT is that a vendor is only entitled to deduct input tax to the extent that goods or services acquired are to be used, consumed or supplied by the vendor in the course of making taxable supplies. A vendor acquiring an enterprise as a going concern at the zero rate is effectively allowed a deduction of input tax in full as the assumption is that the acquisition is to be used, consumed or supplied wholly in the course of making taxable supplies. However, if the acquisition of an enterprise as a going concern at the zero rate is partly used, consumed or supplied in the course or furtherance of making taxable supplies, the vendor is effectively obtaining an undue input tax deduction.

Section 18A therefore creates a consistent VAT treatment on the aforementioned transaction in that the purchasing vendor is, subsequent to the acquisition of the enterprise as a going concern, required to account for output tax on the portion of the purchase price of a zero-rated supply. This output tax adjustment is equivalent to the amount of VAT which would not have qualified as input tax had the standard rate been applied.

#### **Example 5 – Going concern acquired wholly or partly for purposes other than making taxable supplies**

##### *Facts:*

Property Company XYZ is a registered vendor which sells a commercial building to a pension fund. The building is 70% tenanted. The pension fund is only a registered vendor for its property rental activities. The written contract between the parties complies with the requirements of section 11(1)(e) and the supply is treated as a zero-rated supply in terms of section 11(1)(e). The consideration payable for the building was R5 000 000. The time of supply occurred on 25 March 2009. Property Company XYZ declared this amount as a zero-rated sale in field 2 of its March 2009 VAT return.

The pension fund, however, acquires the property with the intention of using the vacant space for purposes of conducting its pension fund activities, which is an exempt activity. The pension fund accounts for VAT on a monthly basis under category C.

##### *Question:*

What are the VAT implications for the pension fund when it acquires the building?

*Result:*

As the pension fund does not intend to use the entire building wholly for purposes of making taxable supplies, the provisions of section 18A are applicable. The pension fund must, therefore, account for VAT on 30% of the purchase price.

In view of this, the pension fund is required to account for R210 000 which is calculated below in field 12 of its March 2009 VAT return:

	R
Purchase Price	5 000 000
Percentage used for other than taxable purposes	30%
Section 18A value [R5 000 000 x 30%]	1 500 000
VAT @ 14% [R1 500 000 x 14/100]	210 000

The adjustment places the pension fund in the same position as it would have been, had it acquired the building as a standard-rated supply.

#### 4.14 The 95 per cent/5 per cent rule

In instances where the intended use of such enterprise in the course of making taxable supplies is not less than 95% (calculated on the value) of the total intended use thereof, the enterprise may be regarded as having been acquired wholly for the purpose of making taxable supplies [refer to the proviso to section 18A(1)].

In such a case the purchasing vendor acquiring the enterprise is not required to make the adjustment contemplated in section 18A.

#### 4.15 Suspensive conditions

A supply of an enterprise as a going concern which is conditional upon certain suspensive conditions being fulfilled, does not constitute a taxable supply for VAT purposes until such time that the suspensive conditions have been fulfilled. This is largely due to SARS interpreting a “suspensive condition”<sup>4</sup> as follows:

“... to suspend the full operation of the obligation and renders it dependent on the uncertain future event. A contract which is subject to a suspensive condition is a valid contract from the moment of its conclusion and neither party can unilaterally rescind from it. ...Once the condition is fulfilled the enforceability and all other consequences of the contract come into full operation. A suspensive condition must be fulfilled in its entirety unless the parties intended that fulfilment of part of the condition should lead to the enforceability of a part of the contract. A condition intended to be for the benefit of one party only may be waived by such party before the time for fulfilment of the condition has expired. Non-fulfilment of a condition precedent annuls the contract retrospectively and each party must give restitution unless the contract provides otherwise, and subject to any rights acquired in good faith by third parties.”

Once fulfilment of the suspensive conditions and transfer of ownership to the purchaser occurs, the purchaser will be liable to account for input and output tax of that enterprise and for the obligations and responsibilities imposed by the VAT Act from the date of the fulfilment of that condition.

In this regard, the supplier is required to account for input and output tax of that enterprise until such time that the suspensive conditions are fulfilled and the enterprise is transferred to the purchaser. The obligations and responsibilities imposed by the VAT Act on that enterprise rests on the supplier.

<sup>4</sup> Lexis Nexus, Law of Contract in South Africa, Christie, 5th Edition 2006

#### **4.16 Tax invoices**

Generally, the sale of a business results in the change of a vendor's registered details. This change in the vendor's details is not communicated or takes time to be communicated to suppliers of that business to update their records. Accordingly, these suppliers issue tax invoices bearing the incorrect details of the vendor (e.g. name or VAT number).

This creates an administrative difficulty as the purchasing vendor is in possession of tax invoices that are not in compliance with section 20(4) resulting in the input tax deduction being denied in terms of section 16(3).

Sections 20(5A) and 21(8) make provision for a transitional arrangement for vendors who have acquired an enterprise from another vendor that has subsequently deregistered as a vendor. In this regard, the requirement that a tax invoice, debit or credit note be issued reflecting the name, address and VAT number of the supplier or recipient, as the case may be, will not be applicable for a maximum period of six months from the date of the supply of the enterprise. As a result, the tax invoice, debit or credit note may reflect the name, address and VAT registration number of the vendor that sold the enterprise. This transitional arrangement therefore allows vendors to comply with the provisions of sections 20, 21 and 16.

#### **4.17 Documentary proof**

The supply of a going concern which can be zero-rated in terms of section 11(1)(e) is subject to the supplying vendor retaining certain documentary proof.

In this regard, Interpretation Note No. 31, "Documentary Proof Required to Substantiate a Vendor's Entitlement to Apply the Zero Rate to the Supply of Goods or Services in terms of Section 11(3)", dated 31 March 2005 deals with the documentary proof required for the zero rating of goods and services.

In Interpretation Note No. 31, the documentary proof required for a supply contemplated in section 11(1)(e) is the –

- seller's copy of the zero-rated tax invoice;
- contract of sale between the purchaser and the seller confirming the disposal as a going concern and any other agreements applicable; and
- purchaser's notice of registration (VAT103) or proof that purchaser has applied for registration before concluding the agreement.

#### **5. Conclusion**

A vendor applying the zero rate to a supply that does not comply with the requirements set out in this Note is liable for the tax, interest and penalties applicable to that supply.

## Annexure – The law

### Section 1 – Definitions

“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—

...

- (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;

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

“VAT registration number”, in relation to any vendor, means the number allocated to that vendor by the Commissioner for the purposes of this Act;

### Section 8 – Deemed supplies

(7) The disposal of an enterprise as a going concern, or a part thereof which is capable of separate operation, shall for the purposes of this Act be deemed to be a supply of goods made in the course or furtherance of such enterprise.

(16) (a) The supply by a vendor—

- (i) of any goods (other than fixed property acquired prior to the commencement date by a vendor who is a natural person if such property was used by him mainly as his private residence and no deduction of any amount has been made by him under section 16(3) in respect of such property); or
- (ii) of services,

where such goods or services were acquired or imported by him partly for the purpose of consumption, use or supply in the course of making taxable supplies (including supplies which would have been taxable supplies if section 7 of this Act had been applicable prior to the commencement date) and were held or utilized by him partly for the said purpose immediately prior to the supply by him of such goods or services, shall be deemed to be made wholly in the course or furtherance of his enterprise.

(b) The supply by any vendor of fixed property acquired prior to the commencement date by such vendor, being a natural person, shall be deemed to be made otherwise than in the course or furtherance of his enterprise provided—

- (i) such property was used by him prior to such supply mainly as his private residence; and
- (ii) no deduction of any amount has been made by him under section 16(3) in respect of such property.

### Section 9 – Time of supply

(1) For the purposes of this Act a supply of goods or services shall, except as otherwise provided in this Act, be deemed to take place at the time an invoice is issued by the supplier or the recipient in respect of that supply or the time any payment of consideration is received by the supplier in respect of that supply, whichever time is earlier.

### Section 10 – Value of supply

(1) For the purposes of this Act the following provisions of this section shall apply for determining the value of any supply of goods or services.

(2) The value to be placed on any supply of goods or services shall, save as is otherwise provided in this section, be the amount of the consideration for such supply, as determined in accordance with the provisions of subsection (3), less so much of such amount as represents tax: Provided that—

- (i) there shall be excluded from such consideration the value of any postage stamp as defined in section 1 of the Post Office Act, 1958 (Act No. 44 of 1958), when used in the payment of consideration for any service supplied by the postal company as defined in section 1 of the Post Office Act, 1958;
- (ii) where the portion of the amount of the said consideration which represents tax is not accounted for separately by the vendor, the said portion shall be deemed to be an amount equal to the tax fraction of that consideration.

(3) For the purposes of this Act the amount of any consideration referred to in this section shall be—

- (a) to the extent that such consideration is a consideration in money, the amount of the money; and
- (b) to the extent that such consideration is not a consideration in money, the open market value of that consideration.

### Section 11 – Zero rating

(1) Where, but for this section, a supply of goods would be charged with tax at the rate referred to in section 7(1), such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where—

- (e) the supply is to a registered vendor of an enterprise or of a part of an enterprise which is capable of separate operation, where the supplier and the recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern: Provided that—
  - (i) such enterprise or part, as the case may be, shall not be disposed of as a going concern unless—
    - (aa) such supplier and such recipient have, at the time of the conclusion of the agreement for the disposal of the enterprise or part, as the case may be, agreed in writing that such enterprise or part, as the case may be, will be an income-earning activity on the date of transfer thereof; and
    - (bb) the assets which are necessary for carrying on such enterprise or part, as the case may be, are disposed of by such supplier to such recipient; and
    - (cc) in respect of supplies on or after 1 January 2000, such supplier and such recipient have at the time of the conclusion of the agreement for the disposal of such enterprise or part, as the case may be, agreed in writing that the consideration agreed upon for that supply is inclusive of tax at the rate of zero per cent;

- (ii) where the enterprise or part, as the case may be, disposed of as a going concern has been carried on in, on or in relation to goods or services applied mainly for purposes of such enterprise or part, as the case may be, and partly for other purposes, such goods or services shall, where disposed of to such recipient, for the purposes of this paragraph and section 18A be deemed to form part of such enterprise or part, as the case may be, notwithstanding the provisions of paragraph (v) of the proviso to the definition of “enterprise” in section 1; or

### Section 16(3)(h) – Input tax deductions

in the case of a vendor who has supplied goods or services during that tax period otherwise than in terms of section 18(2), an amount determined in accordance with the formula

$$A \times B \times C,$$

in which formula—

“A” represents the tax fraction;

“B” represents the lesser of—

- (i) (aa) the adjusted cost (including any tax forming part of such adjusted cost) to the vendor of the acquisition, manufacture, assembly, construction or production of those goods or services: Provided that where the goods or services were acquired under a supply in respect of which the consideration in money was in terms of section 10(4) deemed to be the open market value of the supply, the adjusted cost of those goods or services shall be deemed to include such open market value to the extent that it exceeds the consideration in money for that supply; or
- (bb) where the vendor was at some time after the acquisition of such goods or services deemed under section 18(4) to have been supplied with such goods or services, the amount which was represented by ‘B’ in the formula contemplated in section 18(4) when such goods or services were deemed to be supplied to the vendor; or
- (cc) where the vendor was at some time after the acquisition of such goods or services required to make an adjustment contemplated in section 18(2) or (5), the amounts then represented by ‘A’ in the formula contemplated in section 10(9) or ‘B’ in the formula contemplated in section 18(5) respectively, in the most recent adjustment made in terms of section 18(2) or (5) by the vendor prior to such supply of goods or services; and
- (ii) the open market value of the supply of those goods or services at the time those goods or services are deemed to be supplied; and

“C” represents the percentage that, immediately before the time of the supply, the use or application of the goods or services for the purpose other than that of making taxable supplies was of the total use or application of the goods or services;

Provided that where such goods consist of second-hand goods contemplated in the proviso to paragraph (b) of the definition of ‘input tax’ in section 1, the amount determined in terms of this subsection shall not exceed the amount of transfer duty or stamp duty, as the case may be, which was or would have been payable, less any amount which has previously been deducted in terms of the provisions of subsection (3)(a)(ii) or (b)(i) of this section or section 18(4) or (5), in respect of such acquisition, original issue or registration of transfer, as the case may be”.

## Section 18A – Adjustments in consequence of acquisition of a going concern wholly or partly for purposes other than making taxable supplies

(1) Where—

- (a) an enterprise or part of an enterprise has been supplied to any vendor; and
- (b) the supply of such enterprise or part was charged with tax at the rate of zero per cent in terms of section 11(1) (e); and
- (c) such enterprise or part, as the case may be, or any goods or services which formed part of such enterprise or part are acquired by such vendor wholly or partly for a purpose other than for consumption, use or supply in the course of making taxable supplies,

such enterprise, part, goods or services, as the case may be, shall be deemed to have been supplied by him by way of a taxable supply by him in the course of his enterprise: Provided that where the intended use of such enterprise, part, goods or services, as the case may be, in the course of making taxable supplies is equal to not less than 95 per cent of the total intended use of such enterprise, part, goods or services, as the case may be, the enterprise, part, goods or services concerned may for the purposes of this Act be regarded as having been acquired wholly for the purpose of consumption, use or supply in the course of making taxable supplies.

(2) Notwithstanding anything in this Act, the value of the supply deemed by subsection (1) to have been made by the vendor, shall be the full cost to such vendor of acquiring such enterprise, part, goods or services, as the case may be, reduced by an amount which bears to the amount of such full cost the same ratio as the intended use or application of the enterprise, part, goods or services in the course of making taxable supplies bears to the total intended use or application of the enterprise, part, goods or services: Provided that—

- (i) the cost to such vendor of acquiring such enterprise, part, goods or services may be reduced by any amount which represents an appropriate allocation of such full cost to the acquisition of any goods or services which form part of such enterprise or part of an enterprise and in respect of the acquisition of which by the vendor a deduction of input tax would be denied in terms of section 17(2); or
- (ii) where such enterprise, part, goods or services were acquired—
  - (aa) by means of a supply made by a vendor for no consideration or for a consideration in money which is less than the open market value of the supply; and
  - (bb) in circumstances where the supplier and the recipient are connected persons,

the cost of such enterprise, part, goods or services shall be deemed to be the open market value of the supply of such enterprise, part, goods or services.

(3) Notwithstanding anything in this Act, the supply deemed by subsection (1) to have been made by the vendor shall be deemed to be made in the tax period in which the supply of the enterprise or part of an enterprise is made.

(4) For the purposes of this section and sections 10(9), 18(4) and (5), the cost to the vendor of any goods or services acquired by a vendor in the circumstances contemplated in subsection (1) shall be deemed to be an amount equal to the aggregate of an amount which represents an appropriate allocation of the full cost to the vendor of the enterprise or part of an enterprise to those specific goods or services and an amount determined by applying the rate of tax applicable at the time of supply contemplated in subsection (3) to the amount of such appropriate allocation.