

The South African Revenue Service (SARS) has ruled in Binding General Ruling (BGR 41), that non-executive directors (NEDs) should register and account for VAT on their directors' fees where the fees exceed the VAT registration threshold of R1 million in a 12-month period. BGR 41 was made effective from 1 June 2017.

What is the Binding General Ruling (BGR) about?

As no control or supervision is exercised by a company over the manner in which a non-executive director (NED) performs his or her duties or the NED's hours of work NEDs are not regarded as common law employees.

The fees earned for services rendered as a NED do not constitute "remuneration" and should therefore not be subject to the mandatory deduction of employees' tax (PAYE) by the company concerned. It was clarified that NEDs are carrying on an "enterprise" in respect of services rendered as a NED and should therefore register for VAT where the fees exceed the VAT registration threshold.

Who does the BGR apply to?

The Ruling applies to any person appointed as an NED under the Companies Act 71 of 2008. It does not matter what type of company the NED serves – whether it be a public, private, state owned or non-profit company. This also applies to the extent that the member is a NED, serving in the various committees of a company. This includes, for example, Board committees, Risk and Audit committees, Remuneration committees and Social and Ethics committees.

What about executive directors?

Executive directors are normally regarded as employees of the company which they serve. The BGR only deals with individuals that are appointed as NEDs to serve on the board of a company as contemplated in the Companies Act. As such, NEDs are regarded as independent contractors (sole proprietors) that provide services to the company concerned in their personal capacity and are therefore treated differently to employees of the company.

Should all NEDs register for VAT?

- Only those NEDs that earn NED fees and other income from taxable supplies that have, in total, exceeded the compulsory VAT registration threshold of R1 million in any consecutive period of 12 months (or will exceed that amount in terms of a written contractual arrangement).
- NEDs that earn fees below the compulsory VAT registration threshold can choose to register voluntarily if the minimum threshold of R50 000 has been exceeded and all the other requirements for voluntary registration have been met. .

How to determine total fees and income from taxable supplies?

- The value of all taxable supplies of goods or services made in the course or furtherance of the enterprises conducted by the NED as a sole proprietor must be added together.
- *For example, if, in addition to your NED fees for serving on the board of a company, you also supply forensic accounting services to other clients in the normal course of conducting an enterprise as a sole proprietor, then you need to add the total value of NED fees and the total value of service charges from the forensic accounting business together. The resultant total value of income from taxable supplies in a 12 month consecutive period must then be compared to the R1 million compulsory VAT registration threshold to see if you have to register.*
- Any salary (or any other type of remuneration) earned in the capacity as an employee is not taken into account when determining the VAT registration liability. The reason is that NED fees or other charges for goods or services supplied constitute consideration received for the taxable supply of goods or services, whereas remuneration earned for services supplied to your employer is not.
- The value of other benefits (for example company car) received by the NED forms part of the calculation of the consideration charged in respect of the NED services. The NED is therefore required to account for VAT based on the open market value of the benefit as well as any other component of consideration which is used to calculate the total of the NED fees.

What about income tax?

The fact that the payments to an NED are not subject to PAYE, does not mean they are not subject to normal tax. The normal tax liability arising from the income earned must be settled via the provisional tax system during the year of assessment.

Effective Date

The levying and accounting for VAT on NED fees earned was already effective from 1 June 2017. Those NEDs that became liable to register before 1 June 2017, but have not done so, will be required to register and start accounting for VAT from 1 June 2017 on NED fees earned from this date, unless the NED chooses an earlier date of registration.