



Reviewing the section 72 decision with regard to the VAT treatment of telecommunication services

Background

In 2019 changes were made to section 72 of the VAT Act, which provides the Commissioner with the discretionary powers to make arrangements or decisions as to the manner in which the provisions of the VAT Act shall be applied or the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax provided for in terms of the VAT Act, provided that the Commissioner is satisfied that as a consequence of the manner in which any vendor or class of vendors conducts his, her or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of the VAT Act.

These changes have an impact on the arrangements or decision made in terms of this section before 21 July 2019. One of the arrangements and decisions made in terms of section 72 of the VAT Act before 21 July 2019, which is impacted by these changes refers to the VAT treatment of telecommunication services.

South Africa is a signatory to the International Telecommunications Regulations that were concluded at the World Administrative Telegraph and Telephone Conference, Melbourne 1988 (the Melbourne ITR) as well as the International Telecommunication Regulations that were concluded at the World Conference on International Telecommunication held in Dubai in 2012 (effective 2015) (Dubai ITR). In terms of these ITRs, the SA vendors may only levy VAT on these charges if the customer has a South African billing address. SA vendors supplying roaming and other services to non-resident telecommunications suppliers are thus obliged, in terms of the Dubai ITR, to zero-rate these charges levied to their non-resident counterparts.

The Melbourne ITR/ Dubai ITR agreement explained

The intention of these agreements is to ensure that VAT is not levied more than once on the same transaction, and thus it has a specific provision relating to the levying of tax on telecommunication services provided. There are, however, inconsistencies in the real-world application of the VAT provision contained in the ITR's.

Some countries are party to the Melbourne ITR/Dubai ITR, yet they still have specific provisions relating to telecommunication services in their VAT legislation. If the VAT legislation of a country does not adequately address the place of supply and the provision of the ITR's is not consistently applied, double taxation could arise. The VAT Act in South Africa does not have any provisions relating specifically to the supply of telecommunication services. South Africa is, however, party to these agreements and have signed both the Melbourne ITR and Dubai ITR.





Nevertheless, prior to 21 July 2019 there was still the risk that service providers follow the general VAT principles and not the Melbourne Agreement. Hence the Commissioner issued rulings in terms of section 72 of the VAT Act to vendors in the telecommunications industry to zero-rate the charges levied to their non-resident counterparts so as to give effect to the Dubai ITR, in respect of transactions between resident telecommunications service suppliers and non-resident telecommunications services suppliers.

What were these inconsistencies?

The Organisation for Economic Co-Operation and Development (“OECD”) is an organisation which tries to harmonise global systems, especially harmonising tax treatment when it comes to cross-border activities with countries that apply different rules to determine tax liabilities. The OECD developed guidelines for VAT/GST to address inconsistencies and to prevent double taxation where there are inconsistencies in the application of VAT/GST to international trade. However, not all countries are party to the OECD, and thus should these countries transact with each other, differences in the treatment of VAT could still arise.

There are two types of users: outbound users, which refers to residents of that country with a subscriber identity module (SIM) card of that home country and travelling abroad in another country; and inbound users, which refers to foreigners holding SIM cards of their home country operators and roaming in another country. Some countries do not levy VAT on inbound or outbound users, while other countries levy VAT on both inbound and outbound users. Whilst other countries levies VAT on outbound users only, and others levy VAT on specific inbound users. Hence, it is evident that this could result in double taxation being levied, or no VAT being levied at all.

There is uncertainty as to the VAT treatment of telecommunication services, as it is very different in nature to normal services rendered.

International mobile roaming

International mobile roaming is when a resident of one country visits another country and is able to use the same SIM card in the visited country to communicate using the cellular phone, without having to change his or her phone number. For instance, when a cellular phone is used, it will automatically detect the cellular networks of the service providers available at that location. If this location is in the home country of the cellular user, it will select the service provider that supplied the SIM card. When a customer visits a foreign country, the cellular handset will detect only the networks available in that country.

The process is explained as follows: ‘There are always signalling communications between the visited and the home operator when roaming, even when the call is routed inside a visited country’. Therefore, if a visitor attempts to make a call, the visited country’s network operator searches to identify who the home country’s network operator is. In order for roaming to occur, there has to be a roaming agreement between the home country and the visited country’s network operators. If an agreement between the two operators is in place, the visited network operator communicates with the home network operator to ensure whether it should allow the customer to roam or not.

This would mean, therefore, that the customer has to arrange with his or her home network operator to allow roaming services before the customer visits the foreign country. Once the visited network receives positive confirmation that it can allow the customer to roam, it ‘creates a temporary subscriber record for the device. The home network updates its information to indicate that the subscriber is using the host network to ensure that any information sent to that device will be correctly routed. The visited network will calculate its international mobile roaming charges by keeping a record and details of all calls made. The home operator is then billed by the visited operator for the charges incurred.

The home operator would then, in turn, charge the customer for the international roaming services. It has to be kept in mind that satellites move around the world and that the signals do not travel from the one country from where the call is made directly to the country in which the call is received. The signal may pass through various countries' networks first before it reaches its final destination. Thus, determining the exact place of supply is onerous, as it affects a number of countries.

VAT Act and International roaming services

With international mobile roaming services it is difficult to ascertain at which rate VAT should be levied.

Section 11(2)(l)(iii) of the VAT Act (89/1991) states that a service to a non-resident may be zero-rated provided that the service is not rendered to this person when he or she is physically located in South Africa. The assumption, thus, based on this section, is that should a foreigner visit South Africa and make a call using his home country's operator's SIM card, the South African service providers would invoice his home country's operator with an amount inclusive of VAT at 15%, as the foreigner was physically present in South Africa when he used the South African networks.

Section 11(2)(k) of the VAT Act (89/1991) states that a service may be zero-rated if the services are physically rendered elsewhere other than in South Africa. It needs to be determined where the service is physically rendered, in order to determine whether the supply can be zero-rated or not. The difficulty with telecommunication services, however, is that there are different views in different countries as to where the place of supply would be, owing to the nature of the service. The person making the phone call may be physically present in another country, but the signal passes through the networks in South Africa. The assumption is thus that if a South African resident visits a foreign country and he makes a call from there using his South African SIM card, his consumption of the service mostly happens in that foreign country and thus when the South African service provider invoices this resident for the call, it should be at an amount inclusive of VAT at 0%.

Due to the differences in application of VAT in different countries, the ITU drew up regulations referred to as the Melbourne Agreement to 'promote efficient operation and harmonious development of telecommunications across jurisdictions.

It is assumed that this agreement supersedes the South African VAT Act (89/1991), as this agreement is a form of a double tax agreement. Section 42K of the Dubai ITR states that 'Where, in accordance with the national law of a country, a fiscal tax is

levied on collection charges for international telecommunication services, this tax shall normally be collected only in respect of international services billed to customers in that country, unless other arrangements are made to meet special circumstances.'

This therefore alludes to the fact that where a foreigner visits South Africa and uses South African networks, the South African telecommunication service provider will bill the foreign network provider at an amount inclusive of VAT at 0%. The foreign operator can then recharge this amount to his customer at a price inclusive of VAT.

Similarly, where a South African resident visits a foreign country and makes calls from there, the South African operator would receive a bill from the foreign network operator at a price inclusive of VAT at 0% and would then invoice its customer at a price inclusive of VAT at 15%. This is therefore in direct contrast to the normal VAT principles of the South African VAT Act (89/1991).

Proposal

In view of the fact that the 2019 changes to section 72 of the VAT Act imply that all the rulings issued by the Commissioner before 21 July 2019 that relate to the VAT treatment of telecommunication services will no longer be valid after 31 December 2021, at issue is whether these rulings should be discontinued or extended in accordance with the new provisions of section 72 of the VAT Act.

In order to ensure that the provisions of the Dubai ITR are upheld, it is proposed that changes be made in section 11 of the VAT Act dealing with zero ratings. As such, it is proposed that a new subsection be inserted which deals with zero rating of supplies between resident telecommunications services suppliers and non-resident telecommunications services suppliers in terms of the Dubai ITR Agreement.

Conclusion

Although 111 countries are currently party to this agreement, there are more countries in total in the world, which again indicates that there could be differences in the VAT application when dealing with these other countries. The countries dealing with each other may also perhaps not both be parties to this agreement.

The proposed change of the insert a sub section to section 11 of the VAT Act will indeed help in clarifying the cross boarder VAT treatment of telecommunication companies when dealing with each other.

Once this sub section has been inserted, Telecommunications companies should just be careful not to apply the zero rating provisions when dealing with countries that are not party to the Melbourne ITR/ Dubai ITR. It is our understanding that the zero rating provision will only be applicable to countries that are party to the Melbourne/ Dubai ITR.

Credit: Content taken from research done by Schoeman, Steyn & Homeier: Tax on International Mobile Telecommunication Services.

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