

Non-Executive Directors: Employees' tax (PAYE) and VAT

By Johan Kotze, Tax Executive

There have been inconsistent views as to whether non-executive directors (NEDs) should be subject to PAYE on their fees from the companies on whose boards they are serving. The incentive to exclude these fees from PAYE would be the ability to claim all sorts of expenses as deductions in determining the fees subject to VAT.

Less emotive has been whether NEDs' fees should be subject to VAT.

In the Minister of Finance's 2016 Budget he acknowledge that different views exist on these aspects, and proposed that it be investigated and clarity be provided.

SARS has now issued two Bindings General Rulings (BGR) on these aspects:

- BGR 40 dealing with PAYE and
- BGR 41 dealing with VAT. BGR 41 has since been replaced with a second issue, in which SARS advised as to the dates from which the VAT ruling will applicable.

The purpose of BGR 40 is to provide clarity as to the PAYE consequences of fees earned NEDs and the deductions which NEDs can claim from these fees.

BGR 40 accepts that the NED is not a common law employee of the company, because no control or supervision is exercised over the manner in which such NED performs his or her duties, or the NED's hours of work.

The director's fees received by an NED are thus not '*remuneration*' and not subject to the PAYE.

The NED would have to take it into account when provisional tax payments are made.

It is further accepted that because the amounts received by an NED are not '*remuneration*', the prohibition under section 23(m) will not apply in respect of such fees. The NED is therefore entitled to claim general deductions in production of these fees, in determining its taxable income.

This ruling does not apply to non-resident NEDs, who should seek advice in their regard.

BGR 41 accepts that, because the NED is not a common law employee and the NED's fees are not regarded as '*remuneration*' subject to PAYE, the NED may have to register for VAT. A NED

whose fees exceed the compulsory VAT registration threshold of R1 million, in any consecutive 12-month period, would have to register for VAT.

BGR 41 provides that such NEDs must apply for VAT registration by no later than 1 June 2017.

As it stands, NEDs probably have not dealt with VAT in respect of their fees from companies and their fees would thus include VAT, thereby reducing their fees by 14/114. If possible, NEDs should ensure that their fees are exclusive of VAT.

The reasoning adopted in BGR 40 and BGR 41 can equally apply to independent members of other committees of companies, such as audit committees, and trustees.

For more information on the above, please contact:

Johan Kotze

Executive in the Tax Department

Shepstone & Wylie Attorneys

jkotze@wylie.co.za

+27 11 290 2540