

REGULATORY FEES ARE VATABLE: By Jonathan Hore

Delivering the 2020/2021 national budget speech on Monday, 3 February 2020, the Minister of Finance & Economic Development mentioned that the number of state-owned enterprises in the country exceeds 60. I want to analyse the VAT treatment of regulatory fees which are charged by some of these entities. Experience shows that the matter is subject to divergent views and hence today's article. In this article, words importing the masculine shall be deemed to include the feminine.

THE COMMON REGULATORS

It is common knowledge that so many professions are regulated to ensure best practices and preserve the quality of service provided to the public. You may know that the Botswana Energy Regulatory Authority (BERA) regulates providers of energy whilst NBFIRA regulates non-banking financial institutions. Other professions which are regulated include the following: accountants, audit firms, medical practitioners, architects and engineers. Well, I certainly can't exhaust them all but I guess that gives us a good idea of what I am analysing today.

In order for these organisations to survive as corporate organisms, they obviously need income, which usually comes in the form of regulatory fees. Some may charge subscriptions but no matter the name they may give to the fees, it still remains regulatory fees. The question then is whether such regulatory fees are subject to VAT when levied to the regulated persons. But I must state that where a regulator charged a levy or some form of tax, that falls outside the purview of today's analysis.

VATABLE SERVICES

The VAT Act specifies that services are generally subject to tax at the rate of 12% except if they are exempted in the Second Schedule to that Act. You may want to know that regulatory fees are not listed on the said schedule which means that they are chargeable to VAT. In addition, one aspect we need to make clear is that the regulatory fees are levied in respect of the service provided by the regulator to the regulated person. In other words, the regulated persons need approval to practice or operate their business. Put differently, the regulator provides a 'supply' which is simply a service that is consumed by the regulated person.

I must also state that services or goods which are chargeable to VAT can be divided into two, being standard-rated and zero-rated supplies. In general, where a service or good is provided to a Botswana resident when such resident is in Botswana, VAT would be chargeable at 12%. On the other hand, where services or goods are provided to persons outside Botswana, the general rule is to apply VAT at the zero rate. To put this into perspective, regulators who charge fees to Botswana-based persons must levy VAT at 12% whilst 0% is likely to be applied when the regulated person is non-resident. I will now turn to the registration of regulators.

REGISTRATION REQUIREMENTS

A regulator, just like any other person, is required to mandatorily register for VAT upon attaining sales of at least P1m. In simple, a regulator which makes more than P1m in any period of 12months must register with BURS within 21days of reaching that threshold. This means is that such registrations are forced on the regulator by the law, i.e. there is no room for discretion on the regulator's part.

However, such regulators may apply for what is commonly referred to as voluntary registration upon attaining sales of P500 000. Previously, any person who wanted to trade could register even without making any sales but BURS found it itself with lots of small businesses who did not have a clue about VAT compliance. The law was then amended with effect from 23 January 2015 to require that voluntary registrations could only be made upon attaining sales of P 500 000. This also means that regulators can voluntarily register upon attaining the said threshold. Once registered for VAT, the regulator is then required to charge VAT on the regulatory fees and comply with VAT filing obligations.

We have established above that regulators must register for VAT upon attainment of the set registration thresholds and thereafter charge VAT. If the regulator bills regulation fees to a person who is also registered for VAT, the regulated person can claim the VAT charged through the VAT return. However, if the VAT is charged on a non-VAT registrant, the VAT becomes a final tax, i.e. the person bears the tax as a cost.

PENALTIES

There are some instances where a regulatory authority charges a penalty for non-compliance with prescribed regulations. In those instances, the regulator will not be providing a service but simply reprimanding the regulated entity. In other words, the regulator does not provide value or a service and neither does the regulated consume anything. In such instances, my considered view is that there is no VAT on penalties on the basis that VAT is only charged when a supply is provided.

Well folks, I hope that was insightful. As Yours Truly says goodbye, remember to pay to Caesar what belongs to him. If you want to join our Tax Whatsapp group, send me a text on the cell number below.