

## **INTERPRETATION NOTE: NO. 61**

DATE: 29 March 2011

**ACT : VALUE-ADDED TAX ACT NO. 89 OF 1991 (the VAT Act)**  
**SECTION : SECTION 39(7)(a)**  
**SUBJECT : REMISSION OF INTEREST IN TERMS OF SECTION 39(7)(a)**

### ***Preamble***

In this Note –

- references to sections are to sections of the VAT Act unless otherwise stated; and
- unless the context otherwise indicates, any word or expression in this Note bears the meaning ascribed to it in the VAT Act.

### **1. Purpose**

This Note provides guidelines on the remission of interest imposed in terms of section 39.

### **2. Background**

South Africa's value-added tax (VAT) self-assessment system requires persons to provide correct information to the Commissioner to establish their VAT liability and pay the correct amount of VAT within the prescribed period. Persons who fail to meet their VAT obligations are liable to pay a penalty and interest.

Section 39 imposes a penalty and interest on any VAT and additional tax which is not paid within the period contemplated in subsections (1)(a), (2), (3), (4), (6), (6A) or (8) or on the date referred to in subsection (5).

In terms of section 39(7)(a), the Commissioner has a discretion to remit interest, in whole or in part. As a result of the amendment to section 39(7) which came into effect on 1 April 2010, the circumstances under which the interest imposed may be remitted for periods pre- and post 1 April 2010 differ. The Commissioner is therefore required to consider the applicable provisions when remitting the interest imposed for the aforementioned periods.

#### **2.1 Pre-1 April 2010**

The interest charged before 1 April 2010 in respect of the late payment of tax, may be remitted by the Commissioner where he or she is satisfied that the non-payment of VAT –

- did not result in financial loss (including loss of interest) to the state, having regard to the output tax and input tax relating to the supply in respect of which interest is payable; or

- did not benefit the person concerned or any other person under the control or acting on behalf of that person financially (taking interest into account) by not effecting payment within the prescribed period.

## 2.2 From 1 April 2010

The interest charged in respect of the late payment of tax post 1 April 2010 may be remitted by the Commissioner where he or she is satisfied that the non-payment of VAT was due to circumstances beyond the control of the person concerned or any other person under the control or acting on behalf of that person.

## 3. The law

For ease of reference, section 39 of the VAT Act is quoted in the Annexure.

## 4. Application of the law

### 4.1 General principles

Interest is, in terms of section 39, charged in situations where a person has failed to pay an amount of VAT or additional tax as required in terms of the VAT Act. The interest on unpaid VAT is payable for each month or part thereof and is calculated from the first day of the month following the month during which payment of the VAT was due.

In order for the Commissioner to consider remitting interest that has been levied in terms of section 39, the person concerned must make a request in writing. The person bears the burden of proving that the facts and circumstances of the case meet the requirements of the applicable law for the remission of the interest in whole or in part. Each case will be considered on its own merits.

#### **Example 1 – Interest imposed pre- and post 1 April 2010**

##### *Facts:*

A vendor who is liable to pay VAT by 25 January 2010 fails to make the necessary payment until 10 May 2010. Interest was charged on the unpaid VAT at the prescribed rate for February, March, April and May 2010.

##### *Result:*

Any request for remission of interest charged for February and March 2010 must meet the criteria for remission of interest which applies for the period before 1 April 2010 (see **2.1**) whereas the request for remission of interest charged for April and May 2010 will be considered against the criteria which came into effect on 1 April 2010 (see **2.2**).

### 4.2 Five year limitation on refund of interest

Notwithstanding the fact that the Commissioner may be satisfied that the interest imposed in terms of section 39 may be remitted under section 39(7)(a), such refund cannot be made in terms of section 44(2) read with section 44(3) where the application for the refund is made more than five years from the date on which the payment of interest was made. An application for the remission of interest resulting in a refund that will fall within the aforementioned five year limitation will not, therefore, be considered by the Commissioner.

Furthermore, no refund will be made where the Commissioner is satisfied that the payment of interest was made in accordance with the practice generally prevailing when the payment was made, unless the claim for the refund is received by the Commissioner within six months of the date of payment.

### 4.3 Remission of interest

#### 4.3.1 Pre-1 April 2010

##### (a) No financial loss to the state

The first alternative mentioned in 2.1 allows the Commissioner to consider the remission of interest, in whole or in part, taking into account whether the state suffered a loss as a result of the non-payment of the tax on a supply, having regard to the input and output tax relating to that supply.

A vendor who did not pay the tax on a taxable supply of goods or services and who can satisfy the Commissioner that the recipient of the supply who is a vendor was entitled to deduct the full amount of the input tax but did not deduct such amount, can request the Commissioner to remit the interest on the non-payment of the tax because having regard to the input tax and output tax on the supply, there was no loss to the state.

The first alternative in 2.1 is not applicable to a vendor who failed to pay the VAT levied on the importation of goods into the Republic of South Africa due to the fact that section 39(7)(a)(i) requires an enquiry regarding output and input tax relating to the supply. As the VAT payable in respect of the importation does not fall within the ambit of output tax as defined, this provision does not apply.

A vendor who applies for remission of interest in situations where the vendor alleges that having regard to the input and output tax of a supply there is no loss to the state, needs to provide a written statement setting out the facts and a statement from the recipient of the supply confirming the facts relating to the recipient.

#### **Example 2 – Circumstances determining whether or not the state suffers a financial loss**

##### *Facts:*

Vendor A made a standard-rated supply of equipment to vendor B. Both vendors fall within Category A. Vendor A who is liable to pay VAT by 25 March 2010 made payment on 2 April 2010 and interest was levied in terms of section 39(1). As vendor A did not issue a tax invoice in respect of the supply of the equipment to vendor B, vendor B could not deduct the VAT incurred as input tax in its return which was submitted on 25 March 2010.

##### *Result:*

As vendor A's failure to make payment on 25 March 2010 did not result in a financial loss to the state having regard to the fact that vendor A is liable to account for output tax and vendor B is entitled to an input tax deduction, the Commissioner may remit the interest imposed in whole or in part.

Should vendor A fail to pay the VAT in respect of a standard-rated supply made to an end-consumer, the state would suffer a financial loss (including the loss of interest) having regard to the fact that vendor A is liable to account for output tax and the recipient is not entitled to an input tax deduction.

**(b) The person concerned did not benefit financially**

The second alternative in 2.1 allows the Commissioner to consider the remission of interest, in whole or in part, taking into account whether the person who failed to pay the tax, or any other person under the control of the person or acting on behalf of the person did not benefit financially by not making the payment within the prescribed period. In determining whether the person benefited financially from the non-payment of the tax, interest must be taken into account. The financial benefit is generally evidenced by the person earning interest or reducing the amount of interest paid on, for example, an overdraft facility.

**Example 3 – Circumstances under which interest may not be remitted**

*Facts:*

A vendor failed to pay on the due date the VAT levied on the importation of goods into the Republic of South Africa. Interest was charged in respect of the late payment of VAT.

*Result:*

As the vendor benefitted financially by not making the payment of VAT within the prescribed time, interest may not be remitted.

**Example 4 – Circumstances under which interest may be remitted**

*Facts:*

A vendor filed its two monthly VAT return for February on 25 March 2010. In order to ensure timely payment, the vendor initiated the transfer of funds on 23 March 2010. The vendor's bank account was debited on 23 March 2010 but SARS's bank account was credited on 1 April 2010 and interest was levied on the late payment of the VAT amount due.

*Result:*

As the vendor's account was debited on 23 March 2010 the vendor did not benefit financially by not making the payment on 25 March 2010. Accordingly, interest may be remitted for the period during which the VAT was not paid.

**4.3.2 From 1 April 2010 – Circumstances beyond the control of a person**

Circumstances beyond a person's control are generally those that are external, unforeseeable, unavoidable or in the nature of an emergency, such as an accident, disaster or illness which resulted in the person being unable to make payment of VAT due.

**Example 5 – Circumstances beyond a person’s control**

The following examples are generally considered to be circumstances beyond the control of a person and would, accordingly, qualify for a remission of interest:

- The destruction by fire, flood or other natural or human-made disaster of the person’s place of business records.
- Key personnel not available due to sudden resignation, ill health or death.
- A person has initiated an electronic funds transfer (EFT) payment timeously and such payment is not made due to a banking system failure.

**Example 6 – Circumstances that are generally not considered to be beyond a person’s control**

The following examples are generally not considered to be circumstances beyond the control of a person and would, accordingly, not qualify for a remission of interest:

- A person’s financial position.
- Failure to timeously initiate an EFT payment instruction to a financial institution.
- A misunderstanding or lack of knowledge of a VAT liability.
- Misconduct on the part of the person or any other person under the control or acting on behalf of that person.
- Negligence on the part of the person or any other person under the control or acting on behalf of that person.

**5. Request for remission of interest**

Any application for remission of interest should be in writing and accompanied by the following supporting information and documentation:

- The name, address and VAT registration number of the person.
- The tax periods and payment dates involved.
- Full details of circumstances beyond the control of a person that prevented the person from complying.
- Supporting documentation such as the trace number assigned to the transaction as proof that the person timeously initiated the EFT payment.
- A complete history of events, including what measures were taken and when they were taken to resolve the non-payment.
- The name, address and telephone number where the person may be reached if further information or explanation is needed.

**6. Factors to be considered by the Commissioner when deciding the extent of the remission of interest**

Once the Commissioner is satisfied that the circumstances are beyond the person’s control, the Commissioner will consider the following factors in deciding the extent of the remission of interest:

- Does the person have a satisfactory history of compliance (for example, have VAT returns been filed and payments made on time)? Full remission may be considered for a person with a consistently good payment record. On the other hand, partial remission may be considered, where there is repeated failure by the person to make payment.
- Has the person paid the VAT in question as soon as practically possible? In considering the extent of any remission of interest, it is also necessary to consider what steps were taken, if any, to ensure that the circumstances causing late payment do not recur in the future.
- What facts and circumstances prevented the person from paying the VAT amount on the due date?
- How did the facts and circumstances prevent the person from complying?
- Has the circumstance occurred before? Were measures put in place to ensure that this situation does not recur in future?
- Any other information or documentation that the Commissioner may consider relevant in assessing the application.

## **7. Decision on application**

The Commissioner will respond in writing to the person's application for remission of interest. Should the Commissioner decide not to remit the interest, either in whole or in part, a written notice will inform the person of the reasons for the decision and the person's right to object.

## **8. Objections**

A person, who is dissatisfied with the Commissioner's decision, may lodge an objection. The objection must be lodged within 30 days of the date of the decision, unless the Commissioner permits it to be lodged at a later date. The Commissioner will issue a written notice of the decision in respect of the person's objection. In the event that the person's objection is disallowed or only partly allowed, reasons for the decision will be included in the notice.

The Commissioner will refund the amount of interest paid which is properly refundable, subject to the provisions of section 44(3), if the person's objection is successful.

## **9. Appeals**

Any person, who is dissatisfied with the final decision of the Commissioner in respect of the objection, may appeal against that decision.

Further information on the objection and appeal procedure is available in the *Guide on Tax Dispute Resolution* which can be found on the SARS website [www.sars.gov.za](http://www.sars.gov.za).

## Annexure – The law

### Section 39 – Penalty and interest for failure to pay when due

(1) (a) If any person who is liable for the payment of tax and is required to make such payment in the manner prescribed in section 28(1), fails to pay any amount of such tax within the period for the payment of such tax specified in the said provision, he shall, in addition to such amount of tax, pay—

- (i) a penalty equal to 10 per cent of the said amount of tax; and
  - (ii) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.
- (b) Where any amount of tax has in relation to any tax period of any vendor been refunded to the vendor in terms of the provisions of section 44(1), read with section 16(5), or has in relation to that period been set off against unpaid tax in terms of the provisions of section 44(6), and such amount was in whole or in part not properly refundable to the vendor under section 16(5), so much of such amount as was not properly so refundable shall for the purposes of paragraph (a)(i) be deemed to be an amount of tax required to be paid by the vendor within the said period and for the purposes of paragraph (a)(ii), an amount of tax required to be paid by the vendor during the period in which the refund was made.

(2) If any person who is liable for the payment of tax in accordance with the provisions of section 29 fails to pay any amount of such tax within the period allowed for the payment of such tax in terms of that section, he shall, in addition to such amount of tax, pay—

- (a) a penalty equal to 10 per cent of the said amount of tax; and
- (b) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.

(3) If any person who is liable for the payment of tax in accordance with the provisions of section 8(2C) or 8(2D) fails to pay any amount of such tax within the period allowed for the payment of such tax in terms of that section, the person shall, in addition to such amount of tax, pay where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.

(4) Where any importer of goods which are required to be entered under the Customs and Excise Act, fails to pay any amount of tax payable in respect of the importation of the goods on the date on which the goods are entered under the said Act for home consumption in the Republic or the date on which customs duty is payable in terms of the said Act in respect of the importation or, if such duty is not payable, the date on which it would be so payable if it had been payable, whichever date is later, that importer shall, in addition to such amount of tax pay—

- (a) a penalty equal to 10 per cent of the said amount of tax; and
- (b) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.

(5) Where any person who is liable for the payment of tax fails to pay any amount of such tax on the date on which in terms of the Customs and Excise Act, liability arises for the payment of the excise duty or environmental levy referred to in section 7(3)(a), that person shall, in addition to such amount of tax, pay—

- (a) a penalty equal to 10 per cent of the said amount of tax; and
- (b) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on that amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.

(6) If any person who is liable for the payment of tax and is required to make such payment in the manner prescribed in section 14, fails to pay any amount of such tax within the period allowed for payment of such tax in terms of the said section, he shall in addition to such amount of tax, pay—

- (a) a penalty equal to 10 per cent of the said amount of tax; and
- (b) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.

(6A) If any person who is liable for the payment of additional tax in accordance with the provisions of section 60 fails to pay any amount of such tax on or before the last business day of the month in which the last day of the period allowed for the payment of such tax in terms of that section falls, he shall, in addition to such amount of tax, pay interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month during which the said tax is not paid.

### Pre-1 April 2010

(7) To the extent that the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1)(a), (2), (3), (4), (6) or (6A) or on the date referred to in subsection (5), as the case may be—

- (a) (i) did, having regard to the output tax and input tax relating to the supply in respect of which interest is payable, not result in any financial loss (including any loss of interest) to the State; or
- (ii) such person did not benefit financially (taking interest into account by not making such payment within the said period or on the said date, he may remit, in whole or in part, the interest payable in terms of this section; or
- (b) was not due to an intent not to make payment or to postpone liability for the tax, he may remit, in whole or in part, any penalty payable in terms of this section.

### From 1 April 2010

(7) Where the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1)(a), (2), (3), (4), (6), (6A) or (8) or on the date referred to in subsection (5), as the case may be—

- (a) was due to circumstances beyond the control of the said person, he or she may remit, in whole or in part, the interest payable in terms of this section; or
- (b) was not due to an intent not to make payment or to postpone liability for the payment of the tax, he or she may remit, in whole or in part, any penalty payable in terms of this section.

(8) Notwithstanding anything to the contrary in this section, the Commissioner may prescribe, by notice in the *Gazette*, that any interest on any outstanding amount payable in terms of this Act, is calculated on the daily balance owing and compounded monthly from such date and for such period as the Commissioner may prescribe.