

BINDING GENERAL RULING (VAT) 56

DATE: 6 April 2021

ACT : VALUE-ADDED TAX ACT 89 OF 1991
SECTION : SECTION 72
SUBJECT : APPLICATION FOR A DECISION UNDER SECTION 72

Preamble

For purposes of this ruling –

- “**BGR**” means a binding general ruling issued under section 89 of the Tax Administration Act 28 of 2011; and
- “**Public Notice 299**” means the Public Notice setting out the application and cost recovery fees for binding private rulings and binding class rulings under section 81(1) of the TA Act, published on 1 April 2021 in *Government Gazette* 44383;
- “**Public Notice 300**” means the Public Notice in terms of section 72(3) prescribing a list of transactions or matters in respect of which the Commissioner may decline to make a decision under section 72(1), published on 1 April 2021 in *Government Gazette* 44383;
- “**section**” means a section of the VAT Act;
- “**VAT**” means value-added tax;
- “**VAT Act**” means the Value-Added Tax Act 89 of 1991;
- “**TA Act**” means the Tax Administration Act 28 of 2011; and
- any other word or expression bears the meaning ascribed to it in the VAT Act or the TA Act, respectively.

1. Purpose

This BGR prescribes the requirements and conditions relating to an application for a decision under section 72, pursuant to section 72(2) read with section 90 of the TA Act.

2. Background

Since the inception of VAT in South Africa, the VAT Act contained provisions in section 72 that provides the Commissioner for the South African Revenue Service (SARS) (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, subject to certain requirements being met.

Challenges regarding the application of the mandatory wording of the other provisions of the VAT Act versus the discretionary wording of the provisions of section 72 arose. In order to address these, changes were made in section 72 to align the provisions of this section with the construct and policy intent of the other provisions of the VAT Act.

The changes in section 72 introduced by Act 34 of 2019 with effect from 21 July 2019, limit the extent of the Commissioner's discretion in making a decision under this section, by clarifying that a decision under section 72 cannot –

- have the effect of reducing or increasing the liability for VAT; or
- be contrary to the construct and policy intent of the VAT Act as a whole, or any specific provision in the VAT Act.

In addition, the Commissioner must be satisfied that similar difficulties, anomalies or incongruities have arisen or may arise for any other vendor or class of vendors (other than the applicant) of the same kind or who make similar supplies of goods or services.

Whilst the application for a decision under section 72 will be facilitated through the Advance Tax Rulings system, the decision will be under section 72. In this regard, certain provisions¹ of the TA Act relating to advance rulings were introduced in the amended section 72 to align with the process of application and issuing of decisions under section 72.

These include, amongst others –

- a fee of R2 500 that is payable on applications for a decision under section 72 in accordance with section 81 of the TA Act read with Public Notice 299;
- the issuing, in accordance with section 90 of the TA Act, of procedures and guidelines in the form of BGRs for the implementation and operation of the process to obtain a decision under section 72.

In addition, under section 72(3) read with Public Notice 300, the Commissioner may decline to make a decision in respect of the list of transactions set out in the said Public Notice.

This BGR sets out certain requirements and conditions relating to an application for a decision under section 72.

3. Ruling

This ruling constitutes a BGR issued under section 89 of the TA Act insofar as it relates to the items listed in (a) to (j)

- (a) An application for a decision under section 72 must be made via eFiling.
- (b) An application for a decision under section 72 may be made by one person who is a party to a transaction or by two or more parties to a transaction as co-applicants. If there is more than one applicant, each applicant must join in designating one applicant as the lead applicant to represent the others, provided that the applicants are vendors.
- (c) A person may make an application for a decision under section 72 on behalf of a class of vendors.

¹ Sections 75, 81, 83, 84, 85, 86, 87, 89 and 90.

- (d) An application for a decision under section 72 must contain the following minimum information:
- (i) The applicant's name, VAT registration number (if applicable),² postal address, email address and telephone number.
 - (ii) The name, postal address, email address and telephone number of the applicant's representative, if any.
 - (iii) The relevant statutory provision(s) or legal issue(s) applicable in the circumstances.
 - (iv) A full and accurate description of the transaction (including financial implications) for which the decision is sought.
 - (v) A complete description of any other transaction entered into by the applicant or class member before the application was filed or that may be undertaken after filing the application, if that other transaction may have a bearing on the tax consequences of the transaction, or may be considered to be part of a series of transactions involving the transaction in respect of which the decision is sought.
 - (vi) Specify the relevant provisions in the VAT Act that result in the difficulties, anomalies or incongruities.
 - (vii) A concise description of the difficulties, anomalies or incongruities that have arisen or that may arise when applying the aforementioned provisions of the VAT Act.
 - (viii) The applicant's interpretation of the relevant statutory provisions or legal issues, as well as an analysis of any relevant authorities that the applicant considered or is aware of, and whether those authorities support or are contrary to the specific section 72 decision the applicant is seeking.
 - (ix) The reasons why the applicant believes the specific section 72 decision should be granted.
 - (x) A complete description of the impact the transaction might have upon the tax liability of the applicant or class member or if relevant, any connected person in relation to the applicant or class member.
 - (xi) An explanation to support the view that the decision (if granted) will not reduce or increase the liability for tax levied under the VAT Act.
 - (xii) An indication of how the difficulties, anomalies or incongruities that have arisen or that may arise, will apply equally to other vendors or a class of vendors that may face the same or similar business circumstances.
 - (xiii) An explanation to show that the decision (if granted) will not be contrary to the construct and policy intent of the VAT Act as a whole or any specific provision in the VAT Act.

² Only a vendor or a class of vendors may apply.

- (xiv) A statement that none of the grounds for the rejection of the application under section 72(3) of the VAT Act read with Public Notice 300 apply to the application.
 - (xv) In the case of a class of vendors –
 - (aa) a description of the class of vendors; and
 - (bb) the impact the transaction might have upon the tax liability of the class of vendors or, if relevant, any connected person in relation to the applicant or class of vendors.
 - (xvi) A statement confirming that the applicant(s) has or have complied with any registration requirements under a tax Act with regard to any tax for which the applicant(s) is or are liable, unless the application concerns a section 72 decision to determine that a person is not required to register under the VAT Act.
 - (xvii) A statement confirming that all tax returns required to be rendered by the applicant under a tax Act have been rendered and tax has been paid or arrangements acceptable to SARS have been made for the submission of any outstanding returns or for the payment of any outstanding tax. In the case of a class of vendors making application, the class of vendors' representative should provide the aforementioned statement on behalf of the class of vendors.
 - (xviii) Consent to the publication of the section 72 decision (positive and negative).
 - (xix) A description of the information that the applicant believes should be deleted from the final section 72 decision before publication in order to protect the confidentiality of the vendor or class of vendors.
- (e) SARS may require additional information from an applicant at any time.
 - (f) An application must be accompanied by an application fee set out in Public Notice 299 read with section 81 of the TA Act.
 - (g) SARS must provide the applicant with a reasonable opportunity to make representations if, based upon receipt of the application and any additional information, it appears that the decision under section 72 will differ materially from the proposed decision sought by the applicant.
 - (h) An applicant may withdraw an application for a decision under section 72 at any time.
 - (i) A co-applicant to an application for a decision under section 72 may withdraw from an application any time.
 - (j) A withdrawal does not affect the liability to pay the fees under section 81 read with Public Notice 299. The fee is generally non-refundable.

4. Period for which this ruling is valid

This BGR applies to all applications for decisions under section 72 from the date of issue until it is withdrawn, amended or the relevant legislation is amended.

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