BINDING GENERAL RULING (VAT) 64 (Issue 2)

DATE: 21 May 2024

ACT	**:**	**VALUE-ADDED TAX ACT 89 OF 1991**
SECTION	**:**	**SECTIONS 18D, 18(1), 16(3)(*o*), 10(29), 9(13) AND 72**
SUBJECT	**:**	**TEMPORARY APPLICATION OF NEW DWELLINGS FOR EXEMPT SUPPLIES SIMULTANEOUSLY HELD BY DEVELOPERS FOR TAXABLE PURPOSES**

Preamble

For purposes of this ruling –

- **"BGR"** means a binding general ruling issued under section 89 of the Tax Administration Act 28 of 2011;
- **"OMV"** means the open market value of the property as defined in section 3;
- **"section"** means a section of the VAT Act;
- **"TA Act"** means the Tax Administration Act 28 of 2011;
- **"VAT"** means value-added tax;
- **"VAT Act"** means the Value-Added Tax Act 89 of 1991; and
- any other word or expression bears the meaning ascribed to it in the VAT Act.

All BGRs and Acts referred to in this BGR are the latest versions, unless indicated otherwise, available on the SARS website at **www.sars.gov.za**.

1. Purpose

This BGR clarifies the VAT treatment of newly built residential dwellings that have been developed and held for sale under a taxable supply by developers, but that are simultaneously temporarily applied to make exempt supplies of residential accommodation in a dwelling.

2. Background

Property developers have submitted over the years that they experience certain difficulties in complying with the VAT law when they develop residential properties for sale in difficult economic times. The difficulty arises in that there are high holding costs associated with the development, marketing and sale of properties. As a result, developers often let newly developed dwellings out as residential accommodation to cover some of the holding costs whilst the properties are marketed for sale. When this occurs, section 18(1) will be triggered at the time that any property is applied to make exempt supplies as contemplated in section 12(*c*) (albeit temporarily). As a result, the developer will be required to declare output tax on the OMV of the property at the time of such change in application.

In order to provide some relief in this regard, the VAT Act was amended with effect from 10 January 2012 by the insertion of a relief provision in the form of section 18B. Under section 18B, the liability of the developer to declare output tax on the change in use adjustment that would have otherwise been required under section 18(1) was suspended for a maximum period of 36 months. Under section 18B(3), the developer would only have to declare output tax at a later date, being the earlier of the date that the temporary letting period had been exceeded, or the property was permanently applied for a non-taxable purpose. Developers that experienced such difficulties were previously allowed to temporarily let the affected properties for a period of up to 36 months during the relief period that commenced on 10 January 2012 and ceased to apply on 1 January 2018.[1]

Section 18B was a temporary measure with a limited lifespan, but a more permanent relief mechanism in the form of section 18D (together with associated provisions, being sections 9(13),10(29) and 16(3)(*o*)) has now been introduced with effect from 1 April 2022 to deal with temporary letting by developers.[2] Whilst there are some similarities between section 18B and section 18D, there are also some important differences.

For example –

- the term "developer" was defined in both sections 18B and 18D, but "temporarily applied" has only been defined in section 18D;
- the temporary letting period has been reduced from a maximum of 36 months in section 18B, to a maximum of 12 months under section 18D;
- section 18D requires that the adjustment is made at the time the property is temporarily applied for letting, instead of only at the end of the relief period as was the case under section 18B; and
- the consideration used for calculating the required output tax adjustment under section 18D is an amount equal to the adjusted cost to the vendor of the fixed property[3] rather than the OMV of the fixed property concerned, as would have been the case under section 18B.

Subsequent to the introduction of section 18D on 1 April 2022, section 18D and related provisions were amended twice in 2023.[4] The reason for the amendments was to clarify certain issues that have been identified to have caused uncertainty. Whilst most of those issues have now been addressed, certain difficulties remain. In particular, the amendment to bring in specific exit rules under section 18D(6)[5] highlighted an omission in connection with the corresponding deduction of input tax under

---

1 See BGR 48 "The Temporary Letting of Dwellings by Developers and the Expiry of Section 18B" and BGR 55 "Sale of Dwellings by Fixed Property Developers following a Change in Use Adjustment under Section 18(1) or 18B(3)".

2 See the Taxation Laws Amendment Act, 2021 as per *GG* 45787 of 19 January 2022.

3 Between 1 April 2022 and 31 March 2024, the "adjusted cost" referred to in section 10(29) only included the cost of the construction, extension or improvements to the fixed property. With effect from 1 April 2024, the "adjusted cost" includes the cost of the land itself as well as any construction, extension or improvements to the fixed property.

4 See the Taxation Laws Amendment Act, 2022 as per *GG* 47826 of 5 January 2023, and the Taxation Laws Amendment Act, 2023 as per *GG* 49894 of 22 December 2023 for further details.

5 The provision was introduced to clarify that when the letting of the dwelling extends beyond the "temporarily applied" period or when the developer applies the dwelling permanently for exempt or other non-taxable purposes during the "temporarily applied" period, an output tax adjustment based on the OMV of the property concerned must be made under section 18(1).

section 16(3)(*o*) when the developer has exceeded the 12-month period allowed for temporary letting, or when there is a permanent change in use or application of the dwelling for exempt or other non-taxable purposes. It is for that reason, that a decision under section 72 is included in this BGR to allow an input tax deduction under section 16(3)(*o*) to a developer when a change in use or application is required under section 18(1) in the circumstances described in section 18D(6)(*a*) or (*b*).

The explanation with regard to the application of section 18D before 1 April 2024, may be found in issue 1 of this BGR.

3. Discussion

Section 18D applies to any newly developed units of fixed property that are "temporarily applied" for exempt supplies as contemplated in section 12(*c*) for the first time on or after 1 April 2022. Section 18D(1) defines the terms "developer" and "temporarily applied" for the purposes of section 18D.

The definition of "developer" as defined in section 18D(1)(*a*) is a replication of the definition that was previously in section 18B(1) and refers to a person who develops fixed property for sale in the course or furtherance of an enterprise.

The term "temporarily applied" as defined in section 18D(1)(*b*) refers, in short, to any leasing of newly developed dwelling units by the developer for use as residential accommodation for a period of 12 months or less whilst the property continues to be marketed for sale. The term "temporarily applied" is interpreted to mean a fixed period of 12 months or less or shorter periods that, in aggregate, do not exceed 12 months in respect of each unit of property concerned. It is also considered that a monthly lease for an unspecified period also falls within the meaning of "temporarily applied" but only for a maximum period of 12 months. Should that monthly lease continue beyond 12 months, it means that the developer would have exhausted the relief under section 18D for that particular property and must accordingly make an output tax adjustment on the OMV of that property as required under section 18(1). In the case of a fixed period lease exceeding 12 months from the beginning, section 18D will not apply at all. Instead, the relevant adjustment under section 18(1) must be made on the OMV of the property at the time the property is applied for exempt supplies.

It follows that, only when the supplier is a "developer" and the property concerned is "temporarily applied" as defined in section 18D(1)(*b*) for residential accommodation for a period of 12 months or less, can the dispensation under section 18D apply. In all other cases, section 18(1) will apply in respect of the change in application from taxable supplies (sale of dwellings by a developer) to exempt supplies (supply of residential accommodation in a dwelling).

The output tax adjustment based on the OMV under section 18(1) will also apply for any temporary letting of dwellings by developers that occurs between 1 January 2018 and 31 March 2022. This is the period between the date that section 18B ceased to apply and the date that section 18D came into effect.

Section 18D(2) requires that, as soon as the property has been temporarily applied for exempt supplies, the developer must make an output tax adjustment based on the "adjusted cost"[6] of the fixed property.[7] No output tax will be payable on the rentals as they constitute consideration paid or payable in respect of exempt supplies.

If a property is supplied[8] during the 12-month period that it is temporarily applied for exempt supplies, that supply will remain a taxable supply under section 7(1)(*a*).[9] The developer will be able to claw back, as an input tax adjustment under section 16(3)(*o*), the same amount that was previously declared as output tax under section 18D(2) on the adjusted cost of the fixed property when the unit was first temporarily applied for exempt supplies. The adjustment may be made in the same tax period as the time of supply for the property under section 9(3)(*d*). Similarly, an input tax adjustment under section 16(3)(*o*) will become available to a developer if there is any permanent change in intention or application of a dwelling as contemplated in section 18D(6)(*a*) or (*b*) that requires an output tax adjustment to be made on the OMV of the property under section 18(1) during the 12-month period that the property is being temporarily applied for exempt supplies.[10] The adjustment may be made in the same tax period as the time of supply for the change in use under section 18(1).

The proviso to section 18D(6) also introduced a transitional rule to deal with a situation where a written agreement of sale for a dwelling was concluded during the period in which it was temporarily applied for exempt purposes, but the time of supply only occurs after the end of the 12-month period allowed for temporary letting.[11] In such a case, the transaction will remain a taxable supply under section 7(1)(*a*) read with section 9(3)(*d*) and no adjustment will be required under section 18(1).

If the temporary letting ceases altogether within the 12-month period allowed under section 18D, the developer will also be entitled at that time to claw back under section 16(3)(*o*), the output tax that was previously declared under section 18D(2).[12] However, the developer must, in that case, have proper and convincing documentary proof that the temporary letting has in fact ceased completely during the 12-month period allowed under section 18D. Any subsequent sale of the dwelling will be a taxable supply under section 7(1)(*a*) read with section 9(3)(*d*).

A developer must declare output tax under section 18(1) on the OMV of any dwelling units that remain unsold if the property continues to be let for a period exceeding 12 months in aggregate after it was first temporarily applied for exempt supplies.[13]

---

6 The "adjusted cost" is defined in section 1(1). In short, it refers to the cost incurred by a vendor to acquire any goods or services either under a taxable supply, or a non-taxable supply, but in either case, if that vendor is, or may be entitled to claim an input tax deduction on such acquisitions.

7 Before 1 April 2024, in terms of the previous wording of section 10(29), the adjustment was based on the "adjusted cost" of the construction, extension or improvement to the fixed property and did not include the adjusted cost of acquisition of the property itself.

8 Meaning that the time of supply under section 9(3)(*d*) has occurred during that period.

9 Section 18D(3).

10 This statement must be viewed in light of the decision in **4.5**, which is made under section 72 to deal with the omission with regard to the deduction of input tax under section 16(3)(*o*) and which is mentioned in **2**.

11 Typically, this is when the transfer of the property to the purchaser is delayed, which, in turn, may delay the date of payment of the consideration to the seller.

12 See section 18D(5)(*b*).

13 This rule was previously implicit in the structure and mechanism of the law in section 18D. With effect from 1 April 2024, a specific provision in the form of section 18D(6) was introduced to clarify the application of the law in that regard.

The adjustment must be made in the tax period covering the first day of the 13th month of letting.[14] However, in this case, the developer will also be able to claw back an input tax deduction under section 16(3)(*o*) as explained above. Any subsequent sale of the affected properties after the tax period in which the section 18(1) adjustment was required to be made, will not be regarded as taxable supplies. Instead, the purchasers will be liable to pay transfer duty on the transactions concerned.

4. Ruling

This ruling constitutes a BGR issued under section 89 of the TA Act insofar as it relates to the rulings under **4.1** to **4.5**. The ruling in **4.5** is also a decision made under section 72, considering that there is an omission in regard to section 16(3)(*o*) when the circumstances in section 18D(6) apply.

4.1 Adjustment for dwellings temporarily applied for exempt supplies

A developer that temporarily applies any dwellings for exempt supplies under section 12(*c*) must make an output tax adjustment under section 18D(2) based on the adjusted cost of the fixed property as contemplated in section 10(29). Under section 9(13) the time of supply for the adjustment is the date that the agreement for the letting and hiring of the accommodation in a dwelling comes into effect.[15]

4.2 Sale of dwellings whilst being temporarily applied for exempt supplies

The supply of any dwelling referred to in **4.1** during the 12-month period in which it was temporarily applied for exempt supplies under section 12(*c*) will be a taxable supply as contemplated in section 7(1)(*a*). The consideration for the supply will be the amount paid or payable for the property, or the OMV of said property, as determined in accordance with section 10(2).[16] The time of supply rule for fixed property under section 9(3)(*d*) will be applicable. Similarly, when a written agreement of sale for a dwelling was concluded during the period in which that dwelling was temporarily applied for exempt purposes, but the time of supply only occurs after the end of the 12-month period allowed for temporary letting as contemplated in the proviso to section 18D(6), that supply of fixed property will be a taxable supply under section 7(1)(*a*). No adjustment is required under section 18(1) when the circumstances in the proviso to section 18D(6) apply. (See also **4.5** in this regard.)

4.3 Adjustment after expiry of the prescribed 12-month period or permanent application for exempt or other non-taxable purposes during that period

Under section 18D(6)(*a*), a developer will be required to make an output tax adjustment based on the OMV of the property under section 18(1) read with section 10(7) if any dwelling referred to in **4.1** is let for a period in aggregate of more than 12 months. The time of supply under section 9(6) is the day immediately after the 12-month period referred to in the definition of "temporarily applied" in section 18D(1)(*b*) has been exceeded.[17] The subsequent sale of such a property will not be a taxable supply under

[14] See, however, footnote 17 concerning a situation that involves multiple lettings.

[15] This is the date on which the lease term commences (or is extended in the case of multiple leasing events) and not the date that the lease agreement or extension is signed.

[16] Section 10(2) applies unless otherwise provided in section 10. For example, if the transacting parties are "connected persons" as defined in section 1(1), then the special value of supply rule under section 10(4) may be applicable in certain situations.

[17] In a case of multiple temporary letting periods, the adjustment must be made at the commencement of the final leasing period that will cause the aggregate 12-month period to be exceeded and not at

section 7(1)(*a*), but instead, the purchaser will be required to pay transfer duty. Similarly, under section 18D(6)(*b*), a developer will be required to make an output tax adjustment based on the OMV of the property under section 18(1) read with section 10(7) if any "temporarily applied" dwelling referred to in **4.1** is applied permanently for exempt or other non-taxable purposes during that period. Any subsequent sale of that property will not be a taxable supply under section 7(1)(*a*), but instead, the purchaser will be required to pay transfer duty.

4.4 Claw-back deduction under section 16(3)(*o*)

Under section 18D(5), the developer in the situations described in **4.2** and **4.3** above will be entitled to claw back the output tax previously declared pursuant to section 18D(2) by way of a deduction under section 16(3)(*o*). The deduction will therefore only apply if the developer has previously been required to declare output tax as contemplated in section 18D(2). The deduction is calculated by applying the tax fraction to the adjusted cost of the fixed property and may be made in the same tax period within which the time of supply of the sale of the fixed property falls or the adjustment under section 18(1) occurs – as the case may be.

The claw-back deduction under section 16(3)(*o*) is also allowed to the developer if the temporary application of the property for exempt supplies ceases completely within a period of 12 months. The subsequent sale of such a property will be a taxable supply under section 7(1)(*a*). (See also **4.5** in this regard.)

4.5 Decision made under section 72

A decision is hereby made under section 72 that a developer will be entitled to a corresponding input tax deduction under section 16(3)(*o*) in the same tax period that the adjustment under section 18(1) must be made if –

- a developer has made, or was required to make an output tax adjustment under section 18D(2) in respect of any "temporarily applied" dwellings; and
- an output tax adjustment under section 18(1) is subsequently required by that developer in the circumstances described in section 18D(6)(*a*) or (*b*).

4.6 Effective date and scope of application

Section 18D applies only to any newly developed units of fixed property that are "temporarily applied" for exempt supplies as contemplated in section 12(*c*) for the first time on or after 1 April 2022.

Section 18D does not apply to –

- any property which is the subject of a fixed period lease exceeding 12 months as contemplated in the proviso to the definition of "temporarily applied" in section 18D(1)(*b*);
- any temporary letting of dwellings by developers that were previously subject to the provisions of section 18B; or

---

the end of an aggregate period of 12 months or at the end of the final lease period. For example, if the first temporary letting period under a lease is for six months and thereafter a further lease for eight months is concluded with another tenant, the output tax adjustment must be made at the beginning of the second lease period.

- any temporary letting of dwellings by developers between 1 January 2018 and 31 March 2022.

The following amendments in connection with the application of section 18D came into effect from 1 January 2024:

- The deletion of section 18D(5)(*c*)
- The amendment of section 10(29) regarding the inclusion of the land in the calculation of the adjusted cost of the fixed property

5. Period for which this ruling is valid

This BGR applies from the date of issue until it is withdrawn, amended or the relevant legislation is amended.

Senior Manager: Leveraged Legal Products
SOUTH AFRICAN REVENUE SERVICE
Date of 1st issue : 21 June 2023