



Frequently Asked Questions on BGRs 40 and 41

Non-Executive Directors

Value-Added Tax (VAT)
Pay-as-you-Earn (PAYE)

Binding General Ruling (BGR) 40 (issued on 10 February 2017) confirms that non-executive directors (NEDs) are not common law employees and that no control or supervision is exercised by the company concerned, over the manner in which an NED performs his or her duties or the NED's hours of work.

Based on the above, the fees earned for services rendered as an NED (hereinafter referred to as NED fees) do not constitute "remuneration" as contemplated in paragraph 1 of the Fourth Schedule to the Income Tax Act and should therefore not be subject to the mandatory deduction of employees' tax (PAYE) by the company concerned.

Binding General Ruling 41 (also issued on 10 February 2017) clarified that NEDs are carrying on an "enterprise" in respect of services rendered as an NED. Binding General Ruling 41 (Issue 2) was subsequently issued on 4 May 2017 to clarify certain aspects relating to an NED's liability date for VAT registration. Binding General Rulings 40 and 41 both apply with effect from 1 June 2017.

Following the publication of the aforementioned BGRs, various questions have been received regarding the liability for an NED to register for VAT, as well as the relevant income tax implications. The questions and answers below are therefore intended to provide more clarity on certain practical and technical aspects relating to the BGRs.

Should your particular question on NEDs not be answered below, you can submit a ruling application to the South African Revenue Service headed "Application for a VAT Class Ruling" or "Application for a VAT Ruling" together with the VAT301 form by e-mail to **VATRulings@sars.gov.za**.

Further information on the process to apply for a VAT ruling or VAT class ruling is available in the *VAT Rulings Process Reference Guide* on the **SARS website**.

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SOUTH AFRICAN REVENUE SERVICE

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	Question	Answer
1.	Do the BGRs apply to NEDs of public entities, private companies and state-owned companies?	<p>Yes. The BGRs apply to any person appointed as an NED under the Companies Act 71 of 2008. It does not matter what type of company the NED serves – whether it be a public, private, state owned or non-profit company.</p> <p>The South African Revenue Service cannot rule on whether a particular entity falls within the definition of a “company” for purposes of the Companies Act and whether a particular individual is an NED or not.</p>
2.	I am a member of an audit committee. Do the BGRs apply to me?	<p>Yes. The BGRs apply to the extent that the member is an NED, serving in any of the various committees of a company.</p> <p>This includes, for example, Board committees, Risk and Audit committees, Remuneration committees and Social and Ethics committees.</p>
3.	Should all NEDs register for Value-Added Tax (VAT)?	<p>No. Only those NEDs that earn NED fees and other income from taxable supplies that have, in total, exceeded the compulsory VAT registration threshold of R1 million in any consecutive period of 12 months (or will exceed that amount in terms of a written contractual arrangement).</p> <p>Non-executive directors that earn fees below the compulsory VAT registration threshold can choose to register voluntarily if the minimum threshold of R50 000 has been exceeded and all the other requirements for voluntary registration have been met.</p>
4.	What happens if I am not liable to register as a vendor, and do not register voluntarily?	You will not levy and account for VAT on the supply of your NED services. Furthermore, you will not be able to deduct any VAT incurred on goods or services acquired in order to supply your NED services.
5.	Must I still register for VAT if my NED fees exceed the VAT registration threshold, but Pay-As-You-Earn (PAYE) is being deducted?	Yes. Binding General Ruling 40 clarifies that the fees earned by an NED (sole proprietor) should not be subject to PAYE unless the NED voluntarily elects for PAYE to be deducted from those fees. However, fees earned by non-resident NEDs remain subject to the compulsory deduction of PAYE as stipulated in BGR 40. It should be noted that the registration for VAT and the deduction of PAYE has no bearing on each other.
6.	Must a non-resident NED register for VAT?	This will depend on whether or not the NED is conducting enterprise activities in the Republic, or partly in the Republic.
7.	Can an NED choose to register and account for NED fees in a company?	No, an NED is appointed to serve a company as a natural person. As such, the NED will be providing those services in the capacity of a sole proprietor. A company cannot render services in that capacity.

	Question	Answer
8.	What if I am already registered for VAT, but I did not account for VAT on NED fees?	You must start levying and accounting for VAT on NED fees earned from 1 June 2017.
9.	When determining if I exceed the compulsory VAT registration threshold, must I only take into account NED fees earned?	No , you must add together the value of all taxable supplies of goods or services made in the course or furtherance of all your enterprises that you conduct as a sole proprietor . For example, if, in addition to your NED fees for serving on the board of a company, you also supply forensic accounting services to other clients in the normal course of conducting an enterprise as a sole proprietor, then you need to add the total value of NED fees and the total value of service charges from the forensic accounting business together. The resultant total value of income from taxable supplies in a 12-month consecutive period must then be compared to the R1 million compulsory VAT registration threshold to see if you have to register.
10.	Must I add my salary earned as an employee together with my NED fees when determining my VAT registration liability?	No . Any salary (or any other type of remuneration) earned in the capacity as an employee is not taken into account when determining your VAT registration liability. The reason is that NED fees or other charges for goods or services supplied constitute consideration received for the taxable supply of goods or services, whereas remuneration earned for services supplied to your employer is not.
11.	My employer nominated me to serve as an NED (nominee NED) of a company in which he is a shareholder (in addition to my normal duties as an employee). The NED' fees for my services are paid directly to my employer and retained by him. Must I include these fees when determining my VAT registration liability?	Yes . The NED fees must be included when calculating the value of your taxable supplies in determining whether you are liable to register for VAT or not. This rule applies even if those fees are paid to, and retained by, your employer. Only a natural person can be legally appointed as an NED of a company. Therefore, the fees retained by your employer are still regarded as consideration payable for services rendered by you as an NED in your individual capacity (that is, as a sole proprietor) and VAT must accordingly be accounted for thereon.

	Question	Answer
12.	<p>I am a South African resident and an NED of a non-resident company. Part of my duties include regular travel abroad to physically attend board meetings in another country. Must I include the fees earned as the NED of that company in full when determining my VAT registration liability?</p>	<p>Yes. The NED fees received from the non-resident company must be included in full when calculating the value of your taxable supplies in determining whether you are liable to register for VAT or not. It may be that some or all the NED fees received in this regard qualify to be charged with VAT at the zero rate, however the NED services are considered to be rendered in the course or furtherance of an enterprise conducted by you in the Republic. The fact that you are required to travel abroad from time to time in rendering the services does not mean that you are not conducting an enterprise in the Republic to that extent.</p>
13.	<p>I serve as an independent member of the board of a public entity (not being a company). Am I regarded as an NED and subject to the same maximum VAT-inclusive rates of remuneration prescribed by the National Treasury which apply to NEDs?</p>	<p>There are a few things to consider in this regard.</p> <p>The first is that the VAT rules for any independent person supplying services in that capacity on the board of an entity, whether it is a company or not, or whether it is a public entity or not, will apply to you. Therefore, whether your title is that of an NED or not, you will determine your liability to register for VAT and to charge VAT in the same manner.</p> <p>Secondly, if National Treasury has determined that independent members of boards of public entities are regarded as NEDs and bound by the same prescribed maximum VAT-inclusive rates of remuneration, then, yes, those rates will apply to you too.¹</p> <p>Thirdly, since the prescribed rates are listed as maximum rates that are already VAT-inclusive, it means that if you are a vendor charging fees at the maximum rate, the VAT that you declare on your VAT 201 return will be calculated by applying the tax fraction (currently 15/115) to the consideration charged.</p> <p>Lastly, note that SARS cannot prescribe to a vendor or any authority how to set or determine prices to be charged, except in certain cases relating to connected parties, and the general requirement that prices charged by vendors must include VAT.</p>

¹ Reference to “remuneration” in this case does not imply that the amounts payable are those envisaged in the Income Tax Act as being subject to PAYE.

	Question	Answer
14.	I have been appointed as an NED from 1 August 2017 and will earn NED fees exceeding R1 million in the next 12 months from that date. Must I register on 1 June 2017?	No. You are only required to register with effect from 1 August 2017, provided you were not already liable to register for VAT because of any other taxable supplies that you made before that date. Only those NEDs that became liable to register before 1 June 2017, but have not done so, will be required to register and start accounting for VAT from 1 June 2017 on NED fees earned from this date, unless the NED chooses an earlier date of registration.
15.	What happens if I am liable to register with effect from 1 June 2017, but I only apply for registration after that date?	Your liability date remains 1 June 2017 and you must levy and account for VAT on any NED fees earned from that date. If as a result of the late registration you end up paying your VAT late, then penalties and interest for any tax periods covering the period from 1 June 2017 onwards will be payable. You can apply for the penalty to be waived if you have a good reason why payment was late. The waiving of interest will only be considered if you did not pay on time due to exceptional circumstances which were beyond your control. In either case, your application for remission of penalty and/or interest should be in writing.
16.	I am registered as a vendor and I previously accounted for VAT on NED fees before 1 June 2017. What must I do?	The issuing of the BGRs will not affect you. You must therefore continue to charge and account for VAT on your NED fees and any other charges for goods or services supplied in the course or furtherance of your enterprise.
17.	I am an executive director. Do the BGRs apply to me?	No. Executive directors are normally regarded as employees of the company which they serve. The BGRs only deal with individuals that are appointed as NEDs to serve on the board of a company as contemplated in the Companies Act. As such, NEDs are regarded as independent contractors (sole proprietors) that provide services to the company concerned in their personal capacity and are therefore treated differently to employees of the company.
18.	If PAYE has been deducted from my fees as an NED, does it have to continue until 1 June 2017?	No. The deduction of PAYE can be stopped with immediate effect.

	Question	Answer
19.	I am an NED and receive other benefits, for example, a company car in addition to the NED fees. How should it be treated for income tax purposes and VAT purposes?	<p>The Seventh Schedule to the Income Tax Act 58 of 1962 must still be used to value such taxable benefits granted to the NED. Although the taxable benefit is valued under the Seventh Schedule, it will nevertheless not be included in “remuneration” and no PAYE needs to be deducted or withheld. The value of the benefit will be included in the total fees earned by the NED and subject to normal tax on assessment.</p> <p>For VAT purposes, the value of the benefit forms part of the calculation of the consideration charged in respect of the NED services. The NED is therefore required to account for VAT based on the open market value of the benefit as well as any other component of consideration which is used to calculate the total of the NED fees.</p>
20.	If I elect to voluntarily have PAYE deducted from my NED fees earned, under which income source codes should the following be disclosed: Fees, travel reimbursements, other reimbursements and a company car?	The fees, company car and other reimbursements should be disclosed under income source code 3620. Travel reimbursements should be disclosed under income source codes 3702 or 3703, whichever is applicable.
21.	In the event that an NED registers for VAT, does the NED still remain liable for income tax?	<p>Yes. The fact that the payments to an NED are subject to VAT and not subject to PAYE, does not mean they are not subject to normal tax.</p> <p>The normal tax liability arising from the income earned must be settled via the provisional tax system during the year of assessment.</p>
22.	I am an independent contractor. Do the BGRs apply to me?	<p>No, the BGRs only apply to NEDs. However, whether or not a person is an independent contractor and whether such person has a liability to register for and charge VAT on their services must be determined by applying the normal VAT rules as contemplated in the definition of “enterprise”. You will be liable to register and account for VAT if the income earned from your activities as an independent contractor exceed the VAT registration threshold of R1 million in any consecutive period of 12 months or will exceed that amount in a period of 12 months in terms of a contractual obligation in writing.</p> <p>SARS does not rule on whether or not a person is an independent contractor.</p>

	Question	Answer
23.	How does an NED apply for VAT registration?	<p>The following options are available for purposes of making the application:</p> <p>a) Via eFiling</p> <ul style="list-style-type: none"> • If the applicant is an existing eFiler, he or she can register for VAT via the RAV01 form. In the event that the registration is applied for on eFiling, the VAT application (VAT101 form) should only be completed if an interview is required. • If the applicant is not an eFiler, he or she must first register as an 'eFiler' and can then register for VAT via the RAV01 form. <p>b) At a SARS branch, via virtual, audio or walk in appointment made via the SARS website.</p> <p>The applicant can complete the VAT101 form and submit it in person at the nearest SARS Branch.</p>
24.	What is the main industry classification code to be used on the VAT registration application form?	<p>The main industry classification code to use is 2572.</p>
25.	Which supporting documentation must be submitted with the VAT registration application form?	<p>The standard supporting documents that are required for a normal VAT registration application must be submitted, that is, proof of identity; proof of address; proof of banking details; representative/tax practitioner' details and financial information.</p> <p>The following documents will be accepted as proof of financial information:</p> <ul style="list-style-type: none"> • Copy of the letter of appointment as an NED; • IRP 5 certificate with a source code 3620 or 3621 (where PAYE was deducted from the NED's fees); or • Copy of the minutes of the directors' meeting where the consideration for NED services has been approved; or • Copy of a service contract/agreement evidencing the consideration for NED services.