Dear Sir/Madam,

We refer to the Draft VAT 413 – Guide for Estates circulated by the South African Revenue Service to invite comments from the public. Please find SAICA National Tax Committee’s comments relating to this draft guide.

Any reference in this document to the Act will be to the Value-Added Tax Act, No. 89 of 1991.

We trust that the comments we have inserted below will assist to enhance the quality of the overall document.

Comments regarding the Foreword

Legislation

It is stated that the guide is based on legislation promulgated on 1 February 2013. The guide actually incorporated the 2014 amendments and the reference in the foreword should therefore be updated.

Binding nature – practice generally prevailing and effective

It is stated that “the information in this Guide is issued for guidance only and does not constitute a binding general ruling as contemplated in Chapter 7 of the TA Act” and that “the
guide is therefore intended to provide guidance regarding the VAT implications in respect of deceased and insolvent estates of natural persons.”

The guide therefore does not set out a practice generally prevailing, but there are some issues raised in the guide that do. We suggest that they be incorporated in an Interpretation note or binding ruling.

The previous edition of this guide has been withdrawn with effect from 5 March 2014. It is clear that the intention is that the effective date of the new guide is to be 5 March 2014.

**Chapter 2**

**Paragraph 2.1 - Introduction**

The first sentence of this paragraph reads as follows:

> “This chapter introduces concepts, terms and definitions mentioned in the guide and also contain terms which are not VAT specific.”

We recognise that the intention, as stated in the foreword is that “technical and legal terminology has also been avoided wherever possible”. It is suggested that where a term is defined in the legislation it should be identified as such. The lay reader may not know the difference and we believe it is important to know where a term has a specific meaning assigned to it in terms of the law. We accept that the intention is not to duplicate these definitions in the guide.

Reference should be made to the Glossary.

**Paragraph 2.3 – Connected persons**

*Connected person*

The first sentence of this paragraph currently reads as follows:

> “The term “connected person” is important in the context of this guide as supplies between connected persons will most likely occur. As a result of these supplies, it may be necessary to apply special time and value of supply rules.”
We submit that the term “connected person” is important in the context of estates, particularly of deceased estates as supplies by the executor (in the estate of a deceased natural person) will often be made to persons who are connected persons in relation to the deceased person.

It may then be useful to add that the spouse of the deceased or anybody related to the deceased or his or her spouse within the third degree of consanguinity, would be a relative. This is instead of merely referring to the definition of relative in the Income Tax Act.

**Paragraph 2.4 – Partnerships**

The first sentence of this paragraph currently reads as follows:

> “Although a partnership is not a separate legal entity, the definition of “person” in section 1(1) of the VAT Act specifically provides for a partnership to be a person for VAT purposes. The term VAT “partnership” is, however, not defined in the VAT and TA Act.”

The definition of person

The definition of person in section 1(1) of the VAT Act does not specifically include partnerships. This is inferred by the inclusion of bodies of persons. We recommend that this technical correction be made.

We recommend that the following textual changes be made.

> “Although a partnership is not a separate legal entity, the definition of “person” in section 1(1) of the VAT Act specifically provides for a partnership to be a person for VAT purposes. The term VAT “partnership” is, however, not defined in the VAT and TA Act[s].”

**Paragraph 2.5 – Time and value of supply**

The special time of supply rules dealt with at the bottom of page 10 and the top of page 11 set out the time of supply rules for fixed property. As the time that output tax and input tax adjustments must be made in respect of fixed property transactions differ from the time of supply rules (i.e. it is always dealt with on a payments basis), we recommend that this issue also be dealt with in the Guide as it sometimes results in confusion in practice.
The second paragraph on page 11 seeks to explain the circumstances under which connected party rules will not apply. This is a difficult concept to explain in words. We recommend that an example be inserted to explain the principle.

*Textual*

Paragraph 3 line 3 on page 11 currently reads as follows:

“… open market value, the consideration for the supply is equal to the open market value if the recipient …”

We recommend that the following words be inserted:

“… open market value, the consideration for the supply is [deemed to be] equal to the open market value if the recipient …”

**Paragraph 2.6 – Accounting basis**

*Textual*

Paragraph 3 line 2 on page 11 currently reads as follows:

“… value of taxable supplies does not exceed…”

We recommend that the following word be inserted:

“… value of [their] taxable supplies does not exceed…”

**Paragraph 2.7 – Representative vendor**

*Textual*

The sentence currently reads as follows:

“The following persons act in a representative capacity in respect of estates:

- An executor acts on behalf of deceased persons and their estates;
- A trustee acts on behalf of insolvent persons and their estates.”

Suggestion:

“The following persons responsible for the duties imposed by the Act in respect of estates:

- The executor of the estate of a deceased person;
- The trustee of the estate of an insolvent person.”
The use of the word “administrator”

It is accepted that the word “administrator” is used in section 46(g) and (h) of the Act, but we submit that the use of the word “administrator” in the second sub-paragraph is confusing. Paragraph 2.8.1 states that “the deceased/insolvent estate’s representative vendor is referred to as the administrator…”

It is possible that the intention is to refer to the “person acting in a representative capacity”; the “executor” and the “trustee” as the “administrator”. We suggest that the last two sentences in this paragraph be clarified with regard to the meaning of the word administrator. The term decided on (probably administrator) must then be used consistently throughout the guide.

It may be useful to bring paragraph 2.8.1 into paragraph 2.7.

Paragraph 2.8.3 – Estate

The first two sentences currently read as follows:

“A deceased/insolvent person’s estate includes all property owned by the person (irrespective of whether that property is movable or immovable). For purposes of this guide, the term “estate” will be used with reference to both deceased and insolvent estates, unless the context requires specific reference to be made to either a deceased or insolvent estate.”

It is submitted that the first sentence is out of order here and that it would make more sense if it follows the second sentence. It would then be useful to also briefly explain what the estate of an insolvent person would include.

Paragraph 2.8.4 - Liquidation and distribution account

The paragraph states that the “The L&D account generally consists of … Plan of distribution of the proceeds of the property in the estate…”

The use of the word “proceeds” is simply wrong. Neither the executor nor the trustee can distribute the proceeds. The ‘distribution account' typically deals with “the balance for distribution” and it is suggested that the guide be amended in this regard.

It is also suggested that it is more common to use the words “Income and expenditure account” rather than “Trading account” in the L&D accounts.
Chapter 3

Paragraph 3.2.1 - Duty to register for VAT

We agree that it is problematic if the deceased or insolvent person did not register as a vendor if he or she was required to do so in terms of section 23(1) of the Value-Added tax Act. We agree that the failure, by the deceased or the insolvent to register, needs to be rectified and accept that the ‘administrator’ would be the right person to take this issue up with SARS.

Our comment is in the first place made because of the reference to section 234 of the Tax Administration Act in the previous sentence. How can one say that the ‘administrator’ is a person who wilfully and without just cause fails or neglects to register. We accept that, if enterprise activities are carried on by the ‘administrator’ and the threshold is exceeded (other than in circumstances as envisaged in the proviso to section 23(1)), the administrator has a duty to apply to register the estate.

We suggest that the guide provides guidance to ‘administrators’ in this paragraph to deal with this issue should it come to their intention during the administration of the estate. This may include reference to the voluntary disclosure programme.

Paragraph 3.2.6 - Duty to advertise or quote prices inclusive of VAT

Two different matters are being dealt with in this paragraph. The first relates to the advertising and the second to the duty of the administrator, if the estate is a vendor and the supplies are taxable ones, to levy output tax.

It is suggested that it be dealt with in separate paragraphs or that the heading is changed.

It is common that administrators would make use of agents to realise assets in the estate. It is suggested that this aspect also be dealt with in the guide.

Paragraph 3.2.7 - Duty to submit VAT returns and pay tax

The return (VAT201) in respect of the last tax period (before date of death or sequestration)

It would in most if not all instances be impossible for the administrator to furnish the return in respect of this tax period in time. The main reason may be that the administrator has not yet
been appointed as executor or trustee. It may therefore not be possible for the administrator to attend to this immediately on appointment.

We submit that these are “exceptional circumstances” as envisaged in section 218 of the Tax Administration Act and that SARS should provide some guidance (in this guide) to the Administrator to deal with the outstanding returns.

*The issuing of estimated assessments by SARS*

Section 95(2) of the Tax Administration Act provides that SARS must “make the estimate based on information readily available to it” and it is suggested that SARS should not estimate before the administrator was contacted to obtain the information.

**Paragraph 3.3 – Executor and trustee fees (regulated fees)**

*Textual*

Kindly insert a full stop after the last sentence of the first paragraph.

*The administrator’s fees*

Where dealing with the quantification of the administrator’s fees, we recommend that you also deal with the new time of supply rules applicable to services where the value of the services cannot be determined up-front – section 9(4)(a) of the VAT Act – effective 1 April 2014.

The paragraph essentially only deal with the fee of the trustee and it is suggested that it also deals with the executor’s fee. The directive issued by the Chief Master should then be referred to.

*Example 1*

It appears that the purpose of the example is to illustrate how the executor’s fee is to be calculated where the estate has both enterprise and other assets (goods not held for purposes of making taxable supplies). We agree that the executor’s fee is determined on the amounts exclusive of VAT.
Chapter 4

Paragraph 4.1 – Introduction

The first sentence states that “the VAT consequences resulting from the death or sequestration of a natural person will vary from case to case.”

This is not true as the tax consequences of death and sequestration are the same – refer to section 53. It is possible that the intention is to refer to the realisation of goods in the course of the administration of the respective estates. It is suggested that this sentence be clarified.

Comments regarding registration

We submit that the information in the last three paragraphs should be moved to paragraph 4.2.

The third paragraph refers to “the liability to register” and our previous comment in this respect is equally applicable here.

We suggest that it would be appropriate to insert the word [or] after subparagraph (b).

We agree that “any supplies made by the estate after date of death/sequestration” relate to the cessation of the activities of the deceased or insolvent and as such should not create an obligation to register the estate as a vendor. The paragraph does not provide the reason when it is stated that these supplies may be disregarded, but it becomes clearer in paragraph 4.2.

Paragraph 4.2 – Deceased/insolvent person was a registered vendor at date of death/sequestration

It may be more appropriate to move this to the beginning of paragraph 4.2.1.

Paragraph 4.2.3 – Deceased/insolvent person was liable to register for VAT

It is stated that “…the administrator has to assess whether that person was liable to be registered…”

The obligation to register, in terms of section 21(1), was on the deceased or insolvent and in this instance arose prior to death or sequestration. The administrator is appointed to administer the estate and does not have to deal with transactions prior, for instance death. We
submit that there is no obligation on the administrator to assess whether deceased or insolvent failed to apply, if required to do so. It is possible that the administrator may become aware, during the course of administering the estate that the deceased or insolvent should have been registered. The administrator will then deal with this accordingly. The same will apply if the section 23(1) threshold was exceeded in the last tax period before death or sequestration.

We again confirm that we don’t believe it is the duty of the administrator to do steps 1 to 4. They are principally audit steps that should rather be done by SARS.

We recommend that this discussion be removed from the guide, together with the examples.

**Paragraph 4.3 - Continuation of trading activities**

The first sentence of this paragraph reads as follows:

“An executor may continue to carry on with the deceased’s enterprise, in which case, VAT must be levied…”

In terms of section 53(1) it is not only where the executor (or trustee) continues to carry on the enterprise that the tax apply. It also applies where “…anything is done in connection with the termination of the enterprise…”

**Paragraph 4.4.2 – Collection of trade debtors**

In the first sentence it is stated that “a potential liability for output tax will exist in respect of all debtors of the deceased/insolvent person's enterprise which existed at the date of death or sequestration.” Clearly this will only be in respect debt collected after date of death or sequestration. The purpose of this paragraph is to remind administrators that the output tax on the debtors at date of death or sequestration, of a deceased or insolvent vendor registered on the payments basis has not yet been accounted for to SARS. It is accounted for in the tax period of actual receipt, unless section 15(2A) applied – see below (R100 000 or more).

For vendors not allowed to account for the tax payable on a payments basis the tax would already have been accounted for earlier or will be accounted for by the administrator if the return was only due after date of death or sequestration.

*The consideration in money was R100 000 or more*
The concession that allows vendors to account for the tax payable on the payments basis does not apply in respect of any supply of goods (other than fixed property) or services in respect of which the consideration in money is R100 000 or more. If such a supply took place in a tax period before the date of death or sequestration, the tax would already have been accounted for.

*Adjustment for amounts written off as irrecoverable*

The paragraph doesn’t deal with all instances where the administrator “has written off” the consideration that “has become irrecoverable” and it is suggested that it deals with this as well. An adjustment would also be available if less than the face value of the consideration is collected.

The instances where an adjustment may be made for irrecoverable debts will include vendors registered on the payments basis in this instance (consideration more than R100 000 and debt not collected).

**Paragraph 4.4.3 – Short term insurance claims**

We suggest that the heading of this paragraph be changed to “Indemnity payments.” It could then be explained that this would normally be related to short term policies. We accept that the statement that the output tax arises “if it relates to a loss incurred in the course of carrying on the enterprise” is meant to distinguish it from other insurance payments, such as for instance in terms of a life policy or non-enterprise events (or assets). This is in line with section 8(8).

It is important, and should be mentioned in this paragraph that the time of this deemed supply is on the day of receipt of that payment or on the date of payment to such other person. This is relevant to the administrator who must account for the tax.

The paragraph also does not deal with section 8(8) comprehensively. If this is not done, we suggest that reference is made to another guide where the issue is dealt with.

We also recommend that examples dealing with short term insurance receipts for loss of profit, also subject to the tax, are included in the guide. Sometimes the link to cash payments causes confusion in practice.
Paragraph 4.5.1 – Goods and services used wholly for taxable purposes

The second sentence of the first paragraph in this part refers to “sale or distribution.” It is suggested that the value-added tax consequences where the assets are distributed by the administrator, for instance to the heirs for no consideration, is also a supply (by operation of law). It is suggested that it is not sufficient to merely include “distribution” in the sentence and that this principle should be explained in more detail.

The reference to a supply “of an enterprise as a going concern” should include at least a reference to Interpretation Note 57 or should be dealt with in a separate paragraph. The reference to IN57 (in the examples) is not sufficient.

In paragraph 4 line 4 the guide refers to “… outstanding cash value…” We recommend that a note indicating that the cash value (being a defined term) is essentially the capital amount outstanding on the debt be included.

Paragraph 4.5.2 – Goods and services used wholly for non-taxable purposes

In paragraph 1 lines 1 & 2 the guide refers to “… is attributed wholly to the making of non-enterprise supplies …” We recommend that you change the wording to [is attributed wholly to the making of non-enterprise supplies activities.” This will delink the content from the supply concept that is closely linked to the concept of an enterprise.

Bullet 3 at the top of page 26

The content in the bullet refers to “in respect of which an input tax deduction was denied (for example motor cars and entertainment assets).”

Technically this is not correct. Such assets may well (normally) have been acquired and used in the enterprise activities and an input tax deduction has merely been denied as a result of section 17(2), not as a result of such assets not being used in a VAT enterprise. The examples in the paragraph 4.5.1 address this.

We recommend that this distinction be addressed in the final guide. If the same assets were held for, as the guide calls it, non-taxable purposes they are treated no differently to the assets listed in the other bullets in this paragraph.
**Auctioneer**

It is stated that “…the administrator may enter into an agreement with an auctioneer to treat non-taxable assets sold at auction as taxable. The sale will then be subject to VAT and the auctioneer will account for the VAT as if it were the auctioneer’s own supply. In this instance, the administrator should not account for VAT…”

As was indicated earlier it is not technically correct to refer to goods that “…did not form part of the deceased/insolvent person’s enterprise…” It is then only possible for the administrator to enter into an agreement provided for in section 54(5) if the estate is not a vendor or if the goods to be supplied by auction were not held by the estate for the purposes of making taxable supplies. No mention is then made of the consequences on the estate with respect to input tax.

We suggest that the draft guide be updated with reference to enterprise assets.

**Paragraph 4.5.3 – Goods and services partially used for taxable purposes**

**General comment**

We recommend that an example be inserted to demonstrate the use of the formula A x B x C in practice. These are difficult concepts to grasp and apply in practice.

**Paragraph 4.6.2 - Accounting basis**

**The first two sentences of the paragraph**

It is submitted that a general statement should be added to indicate that where the vendor was allowed to account for tax on the payments basis and the administrator pays the amount due in respect of a taxable supply to the estate a deduction of the input tax can be made.

For those instances where the invoice basis applied a deduction will also be available if the section 22(3) adjustment was done and the amount is subsequently paid. Another example of when it was not “…yet accounted for at the time of death/sequestration…”would be where be the tax invoice was not held by the vendor when a previous return was furnished – section 16(2).
Paragraph 4.7 - Partnerships

Based on the content under this paragraph, we recommend that the heading be changed to [Marriages in community of property]

The example is also not useful. It states, in the solution that Mr Plough will have to register as a vendor, but according to the facts he was already so registered. The point is then that this registration by SARS was incorrect as it did not recognise that the person was not a sole proprietor, but a body of persons. The example provides no guidance on how this should be corrected.

The point that the example wanted to make was that such a partnership, after the death of one of the spouses (partners), only consists of one individual. Section 51(2) applies where a partnership is dissolved in consequence of withdrawal of not all its members and a new partnership comes into being. It then uses the phrase “consists of the remaining members of the dissolved partnership…” We agree that in the case of a marriage in community of property, where only one of the partners remain, it then mean that there is no partnership after death.

It is suggested that the example and the discussion before the example, deal with this scenario as it is more likely to be encountered by administrators.

We have already commented on going concern transfers earlier in our document.

Paragraph 5.1 – Introduction and Paragraph 5.2 - Distribution of assets

Example 8 – Page 31 (Open market value)

As the open market value of goods includes the tax (refer to section 3(1)(b) of the VAT Act) it is only the tax fraction that should be applied to the market value to determine the output tax.

Paragraph 5.3.1 - Property owned by the deceased and others in common

It is not clear what the purpose of this paragraph is. We agree that an undivided share of ownership in fixed property is a real right to property and as such goods as defined in the Act. The example, see our comments below, does not add clarity.
Example 9 – Page 32

Scenario

It is stated that Mr Rough and Mr Harsh are VAT registered farmers who jointly own vacant land used for grazing purposes and that Mr Rough and Mr Harsh are not connected persons.

The solution then states that the land “formed part of” the deceased enterprise. This assumes that in making the land, held in common, available to the individuals they were not carrying on an enterprise or were not registered as a body of persons. The solution basically assumes that the deceased made an input tax deduction in respect of a part of the land. The solution would be different if they were in fact registered (they would then be connected persons) or if no input tax was deducted.

Our comment in essence is that goods held in common by the deceased for purposes of making taxable supplies are treated no different to other goods held for the same purpose. The discussion in paragraph 5.3.7 confirms this.

Example 10 – Page 32

Scenario

The same comment made under the heading Example 9 applies in this instance. The fact that Mr Harsh will be renting the property from the heir is not relevant to the treatment of the interest of the deceased in the joint property.

Open market value

As the open market value of goods includes the tax (refer to section 3(1)(b) of the VAT Act) it is only the tax fraction that should be applied to the market value to determine the output tax.

We recommend that you also insert an example of a supply subject to actual VAT (i.e. to demonstrate how the valuation should be done).

Paragraph 5.3.2 - Bequest price and contributions
**Example 11**

The following is stated in the solution:

“If the requirements of this section are not met, the supply will be subject to VAT at the standard rate. In this instance the estate would have to account for output tax of R630 000 (R4.5m × 14%).”

As the amount of the bequest price is consideration the tax must be equal to the tax fraction of the consideration (and not R4.5m x 14%).

**Cash contribution**

This is a separate topic and should be dealt with in a new paragraph. It is not the same as a bequest price.

The following statement is made in the solution to example 12:

“The contribution is voluntary and is not regarded as payment for any supply made by the estate.”

It is clear from the statement and its application in the example that this is the practice generally prevailing in this regard. We suggest that this practice be issued as a binding general ruling.

**Paragraph 5.3.3 – Fideicommissum**

It is suggested that reference is made to the glossary to the Transfer Duty Guide. The fideicommissum is explained on page 113 of that guide.

The following statement is made in the last sentence before example 13:

“Assets subject to a fideicommissum can, however, constitute a going concern which may be zero-rated if the requirements of section 11(1)(e) read with IN57 are met.”

**Example 13**

The example only deals with the creation of the fideicommissum.

We suggest that another example be added to explain the tax consequences on the death of the holder of the fideicommissum (Mr Filius).
Paragraph 5.3.4 - Usufruct

It is suggested that reference is made to the glossary to the Transfer Duty. The usufruct is explained on page 110 of that guide.

In step 5 the reader is referred to example 16. The calculation however is done in example 14.

Example 14
We suggest that the amount of the usufruct so determined is consideration and the tax must therefore be equal to the tax fraction of this consideration – not R3 196.55 (22 383.53 × 14%).

Paragraph 5.3.6 - Usus and habitation

It is suggested that reference is made to the glossary to the Transfer Duty Guide. The usus (use) and habitation is explained on page 110 of that guide.

Paragraph 5.3.7 - Grazing rights

See also our earlier comments made in relation to paragraph 5.3.1.

Paragraph 5.3.9 - Massing of estates

It is not clear how the part dealing with testamentary trusts fits in with the massing of estates. This should be clarified.

Paragraph 6.2 – Unpaid debt

It is stated that “…in the case of sequestration, the prescribed period ends on the date of sequestration.”

We suggest that a footnote be added where the reference to section 22(3)(ii) of the Act is then provided.

Paragraph 6.3 - Repossessions and surrender of goods

The guide deals with the changes to section 8(10) brought about by the Taxation Laws Amendment Act, 2013 and, as was suggested earlier, the reference to this Act should be added.
The last sentence in the second last paragraph states the following:
   “…the full consideration should be paid to the trustee and accounted for in the L&D account and corresponding VAT return.”

It is submitted that the full consideration is only accounted for on the VAT return and that the consideration excluding the output tax should be accounted for in the L&D account.

**Paragraph 6.4 - Auctions**

The last sentence of the first paragraph reads as follows:
   “The full consideration for the supply of goods should be accounted for in the L&D account. (Also refer to paragraph 4.3.2)”

There is of course no paragraph 4.3.2 and it possibly was meant to refer to paragraph 4.5.2.

The second paragraph also states that the “…trustee will therefore only include the amount received in respect of these goods (excluding any VAT charged by the auctioneer) in the L&D account.”

The same comment made above (in our comments on paragraph 6.3) about the “full consideration … accounted for in the L&D…” and “… include the amount received…” applies in this instance.

Please do not hesitate to contact us, should you have any questions regarding the above.


Yours faithfully

Piet Nel CA(SA)
PROJECT DIRECTOR: TAX
The South African Institute of Chartered Accountants