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The VAT implications for residential property developers in relation to short term letting or temporary letting of a dwelling: a comparative study of South Africa, New Zealand, Australia and Estonia.

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Table of Contents

List of abbreviations and acronyms

ATO	Australian Tax Office
BGR	Binding General Ruling
CIR	Commissioner for Inland Revenue
CSARS	Commissioner for South African Revenue Service
GST	Goods and Services Tax
OECD	Organization for Economic Co-operation and Development
SARS	South African Revenue Service
VAT	Value-added tax

ABSTRACT

The purpose for which a property will be used is an essential element in establishing proper value-added tax (VAT) treatment. The VAT implications for property developers where the developer may have to temporarily let a dwelling or dwellings before finding a suitable buyer still remain unclear even after the promulgation of the new section 18D which came into effect on 1 April 2022. Property developers had to pay VAT on the open market value of the property which had been substantially higher than the VAT that was claimed on the costs incurred on the development of the properties. This had a negative cash flow effect on the property developers. The new section 18D is addressing the issues previously experienced when dealing with VAT on the letting of residential dwellings that were developed for sale. This section however, still leaves a lot of questions unanswered because of its failure to address all possible transactions that may result from temporary leasing and the subsequent sale of residential dwellings.

This study considers the challenges experienced or that may be experienced by property developers and the implications of the VAT regulations where residential property in a dwelling is concerned. The implications on property developers where dwellings are temporarily let to cover certain costs before finding a suitable buyer are examined. The study will examine the VAT implication on property developers in relation to temporary letting of a dwelling in South Africa. The South African VAT implications will be compared to the VAT implications in New Zealand, Australia and Estonia.

KEY WORDS

Value-added tax, goods and services tax, residential property, property developers, dwelling, fixed property, exempt supply, temporary letting, change in use, transfer duty

1.1 INTRODUCTION

Value-added tax (VAT) was introduced in South Africa in 1991. It replaced the general sales tax known as the GST (Kearney, M.,(2005:1).) VAT is defined as a tax on consumption of goods and services in South Africa (Kearney, M.,(2005:1)). It is a tax that is not assessed directly by SARS, but a tax that is indirect, levied on consumption of goods and services (VAT 404:1). Section 7(1) of the Value-Added Tax Act 89 of 1991 (VAT Act) states that VAT is calculated at 15% of the value of the supply. Section 1 defines the term 'goods' and it expressly includes fixed property. Fixed property is defined in section 1 as land together with any improvements on the land and includes any share in a share block company which confers a right to or an interest in the use of immovable property, a sectional title unit and any time-sharing interest.

In terms of section 12(c) of the VAT Act, the letting and hiring of a dwelling is an exempt supply. An exempt supply is a supply where there is no VAT levied and no corresponding input tax is claimed in respect of the supply ((VAT 404:49).) This exemption on letting and hiring of a dwelling is only applicable to an agreement for the letting and hiring of a dwelling and does not apply to a dwelling that is sold (ed. Stiglingh (2021:1075)).

The provision of commercial accommodation is not an exempt supply. Commercial accommodation is defined in section 1 as:

> '(a) lodging or board and lodging, together with domestic goods and services, in any house, flat, apartment, room, hotel, motel, inn, guest house, boarding house, residential establishment, holiday accommodation unit, chalet, tent, caravan, camping site, houseboat, or similar establishment, which is regularly or systematically supplied but excluding a dwelling supplied in terms of an agreement for the letting and hiring thereof;
>
> (b) lodging or board and lodging in a home for the aged, children, physically or mentally handicapped persons; and
>
> (c) lodging or board and lodging in a hospice'

Commercial accommodation is subject to VAT at the standard rate. In terms of section 10(10) of the VAT Act, where commercial accommodation is provided for a period exceeding 28 days, where domestic goods or services are included in an all-inclusive charge, the consideration is deemed to be 60% of the all-inclusive charge. In effect, this means that VAT is levied on 60% of the all-inclusive charge.

It is not always easy to establish as to whether the supply of accommodation in a residential establishment consists of commercial accommodation (Badenhorst (2018)). The courts have been required to interpret the nature of accommodation which would assist in the correct VAT treatment (Clegg D (2019)). A distinction between supplies that form part of a supply of accommodation and supplies that would normally be charged separately may also be problematic (M Ferreira (2012,15)). In *Respublica (Pty) Ltd v CSARS 864/2014* - 29 February 2016, the question was whether the supply under a written agreement of a building and related goods and services to an educational institution to be used by its students amounted to the supply of commercial accommodation as defined in section 1 of the VAT Act. In this case, Respublica entered into a property lease agreement with the Tshwane University of Technology (TUT). The agreement provided for the supply of domestic goods and services to the students, including electricity, water, laundry services, and building management. It was argued by Respublica that sub-lease to the students was a supply of commercial accommodation. SARS maintained that accommodation is defined as "lodging or board and lodging", which meant that this supply cannot be made to TUT because it can only be made to natural persons. SARS argued that the tenant was TUT because of the fact that the lease agreement was between Respublica and TUT which resulted in the fact that the lease could not be that of lodging.

The court held that the provision of accommodation in this instance was the supply of commercial accommodation as defined in the VAT Act, running for a period exceeding 28 days and, therefore, VAT was to be levied at 60% of the consideration for the supply. Respublica argued that the students were an integral part of the lease agreement and the sole purpose for the supply of the property was to the accommodation of students, included in the supply included were domestic goods and services. Respublica's argument that was advanced was that the lodging is not restricted to natural persons according to the VAT Act.

The Supreme Court reversed the high court's decision on appeal and held that the provision of accommodation was not a supply of residential or commercial accommodation but it was held to be supply of a building under a lease and therefore the consideration for the supply was subject to VAT at the standard rate (*C: SARS v Respublica (Pty) LTD (1025/2017) [2018]*).

In certain circumstances, developers of residential property that is intended for sale may be forced to let out the residential dwellings to cover costs before a buyer can be found (M Ferreira (2012, 33)). Section 18(1), relating to a change in use adjustment, and section 10(7), in terms of which the value of supply of goods or services is determined where a change in use takes place, may place a substantial financial burden on the developer (Moodaley and Badenhorst (2020)).

Section 18(1) states that if a vendor acquires goods or services for taxable purposes and subsequently uses them wholly for non-taxable purposes, the vendor is deemed to have supplied the goods or services at their market value in the tax period in which they are first used wholly for non-enterprise Activities. Section 10(7) states that when goods or services are deemed to be supplied by a seller under section 18 (1), the supply is deemed to be made for a consideration in money equal to the open market value of the supply.

This requirement for property developers to account for VAT on the open market value of the temporarily let residential properties which is disproportionate to the exempt income received could result in cash flow problems for the developers (Moodaley and Badenhorst, 2020).

A taxpayer is required to distinguish between the intended use and the Actual use of the residential property and when there is a difference, a change in use adjustment needs to be made (du Preez and Klein (2014, 54)). Until 31 December 2017, section 18B provided temporary relief where taxpayers were not required to make an adjustment for a period of 36 months. This meant that residential property developers who let their properties held for sale could do so for 36 months before the VAT under the change in use adjustment provisions became payable.

According to Binding General Ruling (VAT) 47 (BGR47), this relief came into operation from January 2012 and was planned to expire on 1 January 2015 but it was extended to 31 December 2017, after which it ceased to apply.

This relief measure came into effect after the Minister of Finance, in his 2010 Budget review, recognised that the requirement that developers must account for VAT on the open market value of the units temporarily let, is out of proportion to the exempt income received by the owners of the properties. He suggested that a better method in dealing with the VAT on temporary letting of residential properties developed for resale should be investigated (Moodaley & Badenhorst (2021)). There was no other form of relief since section 18B ceased to apply on 1 January 2018 until the new section 18D came into effect on 1 April 2022. The cessation of the relief provided for in terms of section 18B resulted in substantial cash flow problems for developers who had to account for significant amounts of VAT in a single period (Vanmali, Kruger and Miya 2018). This meant that the developers who used to rely on this provision to avoid having to make a change of use adjustment under section 18(1) would have to make the necessary adjustment. This took the property developers of residential dwellings back to the cash flow problems experienced.

The new section 18D specifically deals with the change in use adjustment required to be made by property developers when they temporarily lease their residential properties which were originally developed for sale. 18D also addresses the deemed input tax deduction available to developers when the temporarily let residential property is finally sold.

SARS issued Binding General Ruling 55 (BGR 55) on 10 September 2020 to clarify the issues which may be encountered during the sale of a dwelling by fixed property developers following a change in use adjustment under section 18(1) and the cessation of section 18B. Binding General Ruling 55 stated that the subsequent sale of a dwelling, which was subject to the deemed supply under sections 18(1) and 18B(3) by the developer is not subject to VAT. The purchaser will be required to pay transfer duty on the acquisition of such a dwelling. According to Moodaley and Badenhorst (2021:3), this Binding General Ruling does not reflect a correct VAT position where there is temporary letting of units, where there is no permanent change in use and the intention of the developer is to sell when a suitable buyer is found. This BGR seemed to give the opinion that SARS is of the view that the residential properties developed for sale but the use changes and are let while waiting for a buyer is a permanent change (Moodaley and Badenhorst (2021:3)).

Section 18D, 9(13) and 10(29) were inserted in the VAT Act and are effective from 1 April 2022 (Taxation Laws Amendment Act 20 of 2021).

Property developers in South Africa do not get a VAT rebate, as opposed to countries like the United Kingdom, Canada and Australia. The rebates would result in a lower effective VAT rate (Julyan (2004:130).)

This research intends to analyse the imposition of VAT for South African property developers, specifically looking into the provisions of sections, 10(7), 10(10), 12(c), 18(1), and the new sections 18D, 9(13) and 10(29).

This will be done in relation to VAT on property developers and will be compared to VAT imposition on property developers in New Zealand, Australia and Estonia where there is a short term or temporary letting of dwellings.

The GST in New Zealand is legislated in the Goods and Services Tax Act (GST Act). GST is charged at 15% of the taxable supply (section 8(1) GST Act). According to Section 14(1)(cb) of the GST Act, the supply of accommodation in a dwelling by way of a lease is exempt

Where there is a change in use, an adjustment needs to be made in terms of section 21 of the GST Act. The adjustment periods in New Zealand depend on the value of goods and services. At the end of each adjustment period, the Taxpayer needs to establish if an adjustment is still necessary, depending on the value of the goods and services ((21)(4)(G).)

According to Your Europe VAT rules and rates, because Estonia is part of the European Union, it uses the European standard VAT rules which can be applied differently by each country. The standard VAT rate in Estonia is 20%, except for certain exceptions (Estonia VAT Act, Section 15(1)). Accommodation or accommodation services are one of the exceptions to the 20% rate. VAT is levied at 9% on accommodation or accommodation services with breakfast in Estonia (Estonia VAT Act, Section 15(4).) The 9% rate excludes goods or services accompanying such accommodation services (Estonia VAT Act, Section 15(2)(4).) If a property developer has deducted 100% of the input VAT on the purchase or construction of residential property, and the property is let or rented tax-free, the deducted input VAT must be adjusted by 1/10 at the end of each calendar year (Dec) within 10 years. Input VAT may be deducted on construction costs or other costs or on the purchase of a building only if it is used for taxable turnover (Estonia, RTL (2004, 39, 654).)

Australia is one of the countries with the lowest GST rates in the world at a maximum of 10% on most goods, services and other items supplied or consumed in Australia (World tax rates (2021)). This Tax is legislated in A new tax system (Good and Services Tax) Act 1999. In the event where a property is temporarily let by a property developer, an adjustment needs to be made. This is when a taxable supply stops being a taxable supply for a period of time ((Section 19-10).) The property developer needs to calculate whether the adjustment is an increase or a decrease, this is calculated in terms section 129-40 of the new tax system (GST Act 1999).

1.2 THE RESEARCH PROBLEM

The primary research problem is the lack of clarity or certainty on some parts of the newly inserted section 18D of the VAT Act. This new section addresses the issue of lack of relief measures for property developers who temporarily let their developed dwellings. The cessation of the relief measures that section 18B afforded the residential property developers meant that property developers had to go back to applying section 18(1) and 10(7), deemed supply provisions where VAT was accounted for at an open market value of such a property. More than 7 years later, December 2015 to April 2022, without any form of relief for residential property developers who temporarily let their residential property, there is a now a new relief measure, which helps to address the VAT treatment for the change in use of residential properties. This new relief measure appears to have its own shortcomings, which will be discussed further in this report.

This research will seek to compare the VAT treatment for the temporary letting of a dwelling and the subsequent sale of fixed residential property that was temporarily let among various jurisdictions. The research will try to suggest changes that can be made to the South African VAT rules to clarify the VAT position for the residential property developers.

The comparison will be made between South Africa, New Zealand, Australia and Estonia to establish whether the current VAT treatment in South Africa is compatible with those of the listed countries. New Zealand was chosen for this purpose because the South African VAT Act is based on the New Zealand GST Act and therefore the expectation is that the VAT treatment on properties could be expected to be comparable (M Ferreira (2012:54).) The current GST rate is 15% in New Zealand, equalling the South African VAT rate. The OECD tax trends which sets out the information on Value Added Tax and Goods and Services Tax (VAT \ GST) and gives information on international aspects and the efficiency of the VAT \ GST proved that the New Zealand GST rate of 15% (which is equal to the South African VAT rate) was below the OECD average of 19,2% as of 31 December 2020.

Australia is chosen because of its comparability to the South African economy, their economy is mostly reliant on Mining and Agriculture. The South Africa economy is also very reliant of mining and agriculture (du Preez and Klein (2014, 49).) The OECD for 2020 proved that the Australian GST rate of 10% was below the OECD average of 19,2% as of 31 December 2020. 10% is still the applicable GST rate for 2022.

Estonia was chosen to explore its VAT treatment on residential property developers in relation to temporary letting of dwelling because it is said to have the world's best tax systems (Invest in Estonia (2020)). Estonia is also said to have the most competitive tax system in the world according to the Tax Foundation's Tax competitive index of 2021. The index proved that Estonia has the best tax system in the OECD for the eighth year running. According to this index the best tax system is driven by the four favourable aspects of its tax system which are; the 20% corporate income tax rate that solely applies to distributed profits. Secondly, individual income is taxed at a fixed rate of 20%, which is not applicable to personal dividend income. Thirdly, a property tax is levied on the value of land only, not on the real estate value or capital. Finally, it features a territorial tax structure that exempts 100% of overseas earnings made by residential corporations from domestic taxation, subject to a few exclusions (Tax Foundation (2021).)

South Africa is not a member of the OECD, but has interactions with various members of the organisation. The formal relationship that South Africa has with the OECD is that it is a key partner and a member in of the Committee for Scientific and Technological Policy (CSTP) (OECD- Our global reach.)

The main research question is; how do the VAT rules for property developers who temporarily let their residential properties in South Africa compare to that of New Zealand, Australia and Estonia?

1.3 THE SUB QUESTIONS

1. What is the VAT treatment on residential properties, VAT treatment on the change in use of residential properties and the eventual sale of residential properties that were temporarily let in South Africa?

2. What is the VAT treatment on residential properties, VAT treatment of the change in use of residential properties and the eventual sale of residential properties that were temporarily let in New Zealand, Australia and Estonia?

3. How do the VAT rules applicable to property developers in South Africa compare to those of New Zealand, Australia and Estonia?

4. What changes can be made to the South African VAT rules to better accommodate the economic reality of the residential property developers?

5. What can be done by SARS to simplify the VAT provisions for residential property developers when they temporarily lease their residential dwelling while waiting for suitable buyers?

1.4 RESEARCH METHODOLOGY

Qualitative research is defined by Strauss and Corbin (1990:11) as any research type where the findings are not reached by way of quantification or statistical procedures. That is the research approach that will be followed in this research which will be based on a literature review of journals, books, blogs, articles, case law and legislation relating to the temporary letting of dwellings by residential property developers.

1.5 SCOPE AND LIMITATION

The scope of the research covers mainly the VAT provisions for property developers who develop dwellings with the main purpose to sell them but end up leasing these dwellings due to the inability to sell them more quickly. In South Africa, the provisions of the VAT Act to be mainly looked at are sections 10(7), 10(10), 12(c), 18(1), the new sections 18D, 9(13) and 10(29) and the 18B which ceased to apply. The provisions of the GST Act to be considered in New Zealand are 10(6), 14(c), 14(1)(cb), 14(1)(d), 21(c), 21(5), 21(5)(c), 21(F)(3)(c), 21(F)5, and 21(G). In Australia, sections 7.1, 9.5, 9.25(4), 9.25(5), 75.10, 75.20, 87.5 and 195. Of the GST Act will be considered. Estonia's VAT Act sections to be mainly considered are sections 2(3)(1), 3(1), 3(2), 3(3), 15(1), 15(4), and 29(1). The limitation of the research is that there will be no questionnaires or interviews to be conducted and other taxes that could result from property transaction will not be considered.

1.6.1 CHAPTER 2

The VAT treatment of residential property in South Africa relating to the temporary letting of dwellings by property developers

2.1 **Introduction**

A vendor is defined in section 1 as any person that is required to be registered for VAT. A VAT vendor is entitled to a VAT input claim, which is the VAT paid for goods and services supplied to the vendor for the purposes of making taxable supplies (VAT 404: 2). The business Activities carried on by a VAT vendor are called an enterprise (VAT 404: 5). For a transaction to attract VAT, there should be a supply, which is defined in section 1 as including a sale, rental agreement and an instalment credit agreement. VAT is levied on the value of the supply, which is typically equal to the consideration for the supply (Section 10(2)).

The regular supply of a dwelling is subject to the imposition of VAT in terms of section 7(1). A dwelling is included in the definition of goods in section 1:

> 'dwelling" means, except where it is used in the supply of commercial accommodation, any building, premises, structure, or any other place, or any part thereof, used predominantly as a place of residence or abode of any natural person or which is intended for use predominantly as a place of residence or abode of any natural person, including fixtures and fittings belonging thereto and enjoyed therewith'

Residential accommodation is generally defined as 'the house used predominantly as a place of residence or abode of a natural person'. Meaning that it is a place where a person would normally live and sleep (M Ferreira (2012, 18)). Residential property is not defined in the VAT Act, but residential property developed by a property developer, for residence by natural persons qualifies as a dwelling.

If the property developer is a registered VAT vendor, output tax must be accounted for on the supply of the residential property (VAT 409: 50). The developer is also entitled to an input tax claim on development costs of the residential properties. A VAT registered property developer who develops residential properties for sale is entitled to deduct the VAT incurred on development costs as input tax (VAT 404:50.)

A normal sale of a dwelling by a property developer attracts VAT at the standard rate (S7(1)(a)). In terms of section 18, when residential property developers change the purpose for their developed residential properties, from that of sale to temporary rental, for a period until a buyer is found, a VAT adjustment needs to take place. This adjustment results from the fact that when a residential property is developed by a property developer, for sale, that forms part of an enterprise which is defined in section 1 as:

> 'In the case of any vendor, any enterprise or Activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or Activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club'

The definition of an enterprise expressly excludes the making of exempt supplies. The significance of the enterprise requirement was proven in the De Beers case; where De Beers's enterprise consisted of a Mining, Marketing and selling of diamonds. In this case the following issues were brought to the court: The meaning of 'enterprise', the meaning of 'imported service', whether foreign advisory services utilised in the Republic were for the purpose of making taxable supplies and whether the tax on local advisory qualifies for input tax deduction.

In this case, the taxpayer, De Beers Consolidated Mines Ltd (DBCM), was in the business of mining and selling diamonds. During November 2000, the company entered into a complex transaction whereby a consortium would be formed to be a holding company of DBCM and another linked Swiss company (De Beers Centenary AG (DBAG)). The new company would be the owner of DBCM and all its subsidiaries. DBCM approached an independent adviser based in London to help establish whether the offer by the consortium was fair and reasonable. South African advisers were also appointed to help finalised the transaction. The London based company invoiced DBCM for services rendered. The South African advisers also invoiced DBCM and included VAT. DBCM claimed the VAT as input tax in their VAT returns.

On assessment, the commissioner for SARS determined that the services from the London based company were an imported service and charged DBCM VAT in terms of section 7(1)(C). This section provides that VAT is payable at the standard rate on the supply of an imported service. The taxpayer, DBCM lodged an objection against these assessments and SARS disallowed the objection. For this reason, DBCM lodged an appeal and the appeal was held in the tax court in Cape Town on 14 October 2015.

The appeal was upheld and the court ordered that a revised assessments must be issued to the taxpayer. It was held by the tax court that the services by the London based company did not constitute an imported service. It was held that these services were utilised by the company in the course of furtherance of its enterprise for purposes of making taxable supplies. An imported service is defined in section 1 as a service rendered to a recipient who is a resident of South Africa, by a supplier who is a resident or carries on a business outside the republic, and that service is utilised for purposes other than those of making taxable supplies. The VAT paid by the Taxpayer for the local advisers was held not to fully deductible. The court ordered that the taxpayer must calculate a ratio to which part of this is deductible.

The commissioner for SARS appealed this court's decision and the appeal was held on 7 May 2012 and judgment was handed down on 1 June 2012. The commissioner for SARS appealed the finding by the tax court that the service rendered by the foreign company did not constitute an imported service and the finding and that the part of the VAT by local service providers constituted input VAT in the hands of DBCM. DBCM had a cross appeal, appealing the finding by the tax court that the VAT charged to it by the local service providers did not constitute deductible input tax. The Supreme Court of Appeal (SCA) had to deal with the question whether the decisions taken by the tax court were correct. After considering the facts, three questions emerged: (a) Were the local services acquired by DBCM for the consumption purposes, use, or supply in the course of making taxable supplies at all; (b) If so, were they acquired 'wholly' for that purpose; and (c) If not wholly, to what extent were they acquired for that purpose, having regard to the Act's provision of section 17?

Section 17 addresses the permissible deduction which states that:

> 'Where goods or services are acquired or imported by a vendor partly for consumption, use or supply (hereinafter referred to as the intended use) in the course of making taxable supplies and partly for another intended use, the extent to which any tax which has become payable in respect of the supply to the vendor or the importation by the vendor, as the case may be, of such goods or services or in respect of such goods under section 7(3) or any amount determined in accordance with paragraph

> (*b*) or (*c*) of the definition of "input tax" in section 1, is input tax, shall be an amount which bears to the full amount of such tax or amount, as the case may be, the same ratio (as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or section 41B) as the intended use of such goods or services in the course of making taxable supplies bears to the total intended use of such goods or services'

After considering all the facts of the case, the decisions taken in the tax court and the regulations as set out in the Act, the SCA came to a decision that diamond mining, marketing, and diamond sales comprised DBCM VAT enterprise. The advisory services were acquired for the benefit of the departing shareholders rather than to improve or increase the value of diamond mining operations. Because of this finding, the SCA was unable to concur that the foreign adviser's assistance was essential to De Beers' diamond mining enterprise. This case helps us determine whether an enterprise is carried on, and we need to know that as a property developer because if there is no carrying on of an enterprise, VAT can only be charged by a Vendor who carries on an enterprise (VAT 404:10).

A regular supply of residential property is subject to the imposition of VAT in terms of section 7(1). The definition of goods in section 1 expressly includes a dwelling. If the property developer is a registered VAT vendor, output tax must be accounted for on the consideration of the residential property. The developer is also entitled to an input tax claim on development costs of the residential properties.

An issue arises when the residential properties that were initially developed for a purpose of sales are let while waiting to be sold. According to section 12(c), the supply of dwelling under an agreement of letting and hiring shall be exempt from the imposition of VAT. That means the supply of residential property changes from being subject to VAT at standard rate to being an exempt supply. In this instance, there needs to be a change in use adjustment.

Section 18(1) provides that where any goods or services have been acquired by a vendor for VAT enterprise purposes and such goods or services are subsequently applied wholly for a purpose other than in the course of making taxable supplies, the vendor is deemed to have supplied such goods or services at their open market value in the tax period when they are first applied wholly for non-enterprise Activities. If a vendor was making taxable supplies of residential accommodation as a property developer, and changes that to making an exempt supply of residential accommodation supplied for rental, the use has changed and therefore a change in use adjustment is necessary. Section 18(1) currently requires the developer to levy output tax on the open market value of the dwelling in instances where section 18D does not apply. The necessity to account for output tax on the open market value of the unit per section 18(1), which is out of proportion to the exempt income received led to cash flow problems for the property developers.

A new provision, section 18D, which took effective from 1 April 2022, deals with the temporary letting of a dwelling differently from section 18(1). According to the explanatory memorandum on the Taxation Laws Amendment Bill, 2021, on the new sections 9(13), 10(29), 16(3)(o) and section 18D of the VAT Act, concerns had been raised about the unfair value assigned to the change in use adjustments. Furthermore, it had been brought to the notice of the Government that there appears to be some disagreement among taxpayers as to whether the change in use adjustments results in the subsequent supply of residential fixed property being exempt from VAT, either permanently or temporarily according to the amendment bill of 2021. This resulted in some taxpayers understanding the legislation to mean that output tax is still applicable when the residential fixed property is then sold To address these concerns, it was proposed that the VAT Act be amended by adding the new section dealing with the deemed change in use adjustment when a residential fixed property is let for the first time, including whether the deemed change in use adjustment causes the residential fixed property to exit the VAT net or not, and the subsequent supply when the residential fixed property is sold (Explanatory Memorandum on Taxation Laws Amendment bill, 2021.) These changes were thought to be more reasonable than the existing provisions (Explanatory Memorandum on Taxation Laws Amendment bill, 2021).

A developer is defined in section 18D(1) as any vendor who regularly or continuously extends, constructs or substantially improves fixed property consisting of a dwelling or substantially improves , extends or constructs parts of that property consisting of a dwelling or dwellings for the purpose of sale.

The new section, section 9(13) dealing with the time of supply where there is a change in use in terms of section 18D was inserted in the VAT Act with effect from 1 April 2022. Under section 9(13), the time of supply for any supply of goods or services deemed to be made as anticipated by section 18D(2) is deemed to be the tax period in which the agreement for the letting and renting of lodging in a residence comes into effect. This time of supply applies to the supply of goods and services that are deemed to be made in terms of section 18D(2).

Another new section inserted and applicable from 1 April 2022 is section 10(29) dealing with the value of supply. Under this section the value of supply where goods are deemed to be supplied in terms of section 18D(2), the supply shall be deemed to be made for a consideration in money equivalent to the adjusted cost to the vendor of the construction, expansion, or improvement of the fixed property or a portion of the fixed property that is supplied.

2.2 VAT treatment of residential property developed for sale versus the development of residential property for letting.

A dwelling is defined as any structure or building used predominantly as a place of residence of a natural person. The supply of a dwelling under a letting and hiring agreement is an exempt supply according to section 12(c).

The supply of a dwelling is generally exempt but the supply of a residential dwellings by a property developer is not VAT exempt, this is because of the nature of the property developing enterprise. Commercial accommodation on the other hand is subject to VAT at the standard rate. In terms of section 10(10) of the VAT Act, where commercial accommodation is provided for a period exceeding 28 days, where domestic goods or services are included in an all-inclusive charge, the consideration is deemed to be 60% of the all-inclusive charge. In effect, this means that VAT is levied on 60% of the consideration. Commercial accommodation is defined in section 1 and it includes the supply of lodging, or board and lodging, together with goods and services (furniture, water, electricity, cleaning, maintenance, etc.) in any residential establishment which is regularly and systematically supplied, excluding a dwelling supplied in terms of an agreement for letting and hiring thereof.

It is not always easy to establish whether the accommodation supply in a residential establishment comprises commercial accommodation (Badenhorst (2018)). A distinction between supplies that form part of a supply of accommodation and supplies that would normally be charged separately may also be problematic (M Ferreira (2012,15)). As mentioned above, in the Respublica case, the question was whether the supply of a building and related goods and services under a written agreement to an educational institution for use by its students amounted to the supply of commercial accommodation as defined in section 1 of the VAT Act. The court held that the provision of accommodation in this instance was the supply of commercial accommodation as defined in the VAT Act, running for a period exceeding 28 days and, therefore, VAT was to be levied at 60% of the consideration for the supply.

On appeal, the Supreme Court of Appeal reversed the high court's decision and held that the provision of accommodation was not a supply of residential or commercial accommodation but a supply of a building under a lease and therefore the consideration for the supply was subject to VAT at the standard rate.

> 'The essential distinction between the supply of commercial accommodation and the supply of a dwelling is that the exempt supply of a dwelling involves the letting of a particular physical unit in terms of a lease agreement. The supply of a dwelling gives the recipient of the supply certain legal rights to the physical unit. The supply of commercial accommodation on the other hand does not involve any letting of a physical unit.'

2.3 Change in use adjustment

Property developers, under certain circumstances, may be forced to let out their properties to cover some costs while waiting to find a suitable buyer (M Ferreira (2012, 33)). This change results in a change in use adjustment in terms of section 18(1), which states that where the use of goods and services changes wholly or partly from taxable use to wholly or partly non–taxable use, the goods shall be deemed to have been supplied in the course or furtherance of the vendor's enterprise. The deemed VAT would be calculated using section 10(7), which states that the value for the supply shall be deemed to be made for a consideration in money, equal to the open market value of the supply. Section 16(3)(h) allows for an additional input tax to be claimed where there is no change in use adjustment but an asset was previously used to make both taxable and non-taxable supplies, the input tax is limited to the taxable supplies. In this case, the Formula to be used is A x B x C with A representing the tax Fraction, B representing the lesser of the adjusted cost or the market value of the goods at the time of supply. C represents percentage for non-taxable use immediately before the time of supply.

These provisions were seen to be disadvantageous to the vendor because of the disproportionality of the Input tax payable calculated on the open market value compared to the exempt income received by the property developers when temporally letting their properties. This disadvantage was recognised by the then Minister of Finance, Mr Pravin Gordan in his 17 February 2010 budget speech. Section 18B of the VAT Act was then amended to include some form of relief to the property developers when temporarily letting their residential properties. This meant that the property developers didn't have to declare a deemed VAT for a period of 36 Months, applicable for leases commencing from 1 January 2012 to 1 January 2015. This was extended to 31 December 2017.

section 18B was applicable from 1 January 2012 and December 2017 18B . In The National Treasury: Explanatory Memorandum on the taxation laws amendment bill, 2011, it was explained that section 18B was promulgated because the developers that develop residential properties with the intention of selling them are sometimes forced to rent them out due to weak selling market conditions, this provides the developers with temporary cash flow while still holding the properties. This change was explained in the memorandum to place residential property developers in 'unenviable' position of being forced to pay VAT. These VAT changes were said to have a possibility of forcing certain developers into insolvency.

A short term solution that allowed temporary residential rentals was proposed. From a practical and legal standpoint, the VAT laws addressing change in use adjustments for property developers who temporarily rent residential homes are problematic. From a practical standpoint, imposing VAT on developers prematurely is a bad idea, Because of events beyond their control, it appears to be a poor business decision, especially in the short term. If the charge has the potential to jeopardize their long-term viability from the standpoint of legal theory. There are a lot of questions on the VAT's essential assumptions. The proper resolution of these theoretical concerns will likely necessitate a thorough investigation. For the time being, legislative Action is urgently needed to prevent the VAT system from forcing certain VAT developers into insolvency. The continuous global economic instability, which is affecting the local residential property market, emphasizes the importance of this.

To that end, it was proposed that developers who rent residential fixed properties for the purpose of eventual sale be provided temporary relief. Developers were given a maximum grace period of

36 months to rent fixed residential property before sale, while not attempting to resolve broader legal theoretical difficulties. When the fixed property is let for the first time, the 36-month period begins. The presumed change-in-use charge would be applied if the vendor rents the residential fixed property for more than the allowed 36 months. This deemed charge will result in a deemed supply at the property's open market value as of the 36-month cut-off date.

Two requirements had to be met in order to qualify for the relief:

> 'the vendor at issue must be a "developer as defined" where a "developer" generally means a vendor who continuously or regularly construct, extend or substantially improves fixed property consisting of any dwelling or for the purpose of disposing of that fixed property and the developer must have the overriding purpose/intention of selling the property as soon as the opportunity arises.'

This relief measure ceased to apply after 31 December 2017, no other relief measure was available and property developers had to go back to applying the provisions of sections 18(1) and 10(7).

After the cessation of section 18B, SARS issued VAT BGR 48 aimed at explaining the temporary letting of dwellings by developers and the expiry of section 18B for residential properties applicable to all dwellings temporarily let dwellings by the developer for the first time during the periods from 10 January 2012 until 31 December 2017. The ruling explained in BGR 48 was that a developer who constructed properties for sale but then used one or more of them for temporary letting during the relief period must account for the output tax adjustment. The adjustment was based on the open market value of each dwelling, in the tax year in which the 36-month term comes to an end. The 36-month period is computed from the date on which any agreement for the temporary letting of a dwelling is entered into. Developers who fail to make the adjustments in the relevant tax periods are liable for assessments for the VAT which would result in interest and penalties (BGR 55). This meant that property developer had to make the required change in use adjustments. This has been the case until the recent changes in the Act where section 18D will be applicable from 1 April 2022. This means that for a period just over 4 years, there has been no form of relief for residential property developers who temporarily lease their dwellings while waiting for suitable buyers.

The BGR ruling also stated that; if any of these residences are used for a purpose that non-taxable permanently within the relief period, the developer must account for the adjustment of output tax in the tax period in which the dwelling is used for non-taxable purposes permanently.

Because section 18B expired on 31 December 2017, any such dwelling that is temporarily rented from 1 January 2018, is no longer eligible for the relief offered under that section.

The new Section 18D applicable from 1 April 2022 provides some form of clarity and addresses the difficulties previously experienced by property developers when there was a change in use of developed properties. Section 18D(1)(a) defines a 'developer' as a vendor who regularly constructs, extends or substantially improves a fixed property consisting of any dwelling. 'Temporarily applied' is also defined in section 18D(1)(b) and it means the application of a fixed property or portion thereof in supplying accommodation in a dwelling under an agreement or agreements for letting and hiring relating to a period or combined periods not exceeding 12 months. This section states that if the periods exceed 12 months, this section will not apply, which means the provisions of section 18(1) will be applicable. This section now only applies to property developers who temporarily let their property for combined periods longer than 12 months. This means that the cash flow problems previously experienced by property developers before the promulgation of section 18D may still exist, because at the time of lease agreement conclusion, sometimes there is no telling of how long it will take to find a buyer. This might even force some property developers to limit the lease periods to 12 months to avoid the harsh regulations of section 18(1).

Section 18D(2) states that when a residential property developer constructs residential fixed property for the purpose of sale but enters into a temporary lease for such a property temporarily as residential accommodation in a dwelling, the fixed property is deemed to be supplied by the vendor for a consideration in money equal to the adjusted cost to the vendor of the construction, extension, or improvement of such fixed property or portion thereof. The developer will be required to make the output tax adjustment which is equal to the tax fraction of the adjusted cost, in the tax period in which the lease agreement comes into effect. The adjusted cost is defined in section 1 as the VAT inclusive cost of goods and services in respect of the development of property. Under section 18D(3) and 18D(4), if a property developer sells a property that was temporarily let, within a period not exceeding 12 months, the sale will be deemed to be a taxable supply. The developer must account for VAT on the consideration charged.

Section 18D(5) provides that the property developer is entitled to claim a deemed input tax deduction equal to the adjusted cost for the construction, extension or improvement of such fixed property, where the property is sold during the 12 months period, is temporarily applied for the 12-month period, and then after the 12-month period is immediately no longer used to supply accommodation in a dwelling; or falls within the proviso to "temporarily applied", being property subject to a fixed term lease that is greater than 12 months, and which was subject to a section 18(1) adjustment. The calculation of Tax payable is calculated in terms of Section 16(3)(0). Section 16(3)(o) states that the tax payable is calculated by subtracting from the output tax sum, an amount equal to the amount calculated in terms of section 10(29), which is the value of the supply of goods and services which is the consideration in money equalling the adjusted cost to the vendor for the construction, extension or improvement of a fixed property or a portion thereof to the vendor

This new section addresses the difficulties previous experienced by property developers, but it also leaves a lot of questions unanswered. The developer is now entitled to a higher input tax which is equal to the adjusted cost for the construction, extension, or improvement of such a property (van Schalkwyk and Moodaley (2022).)

2.4 Sale of a dwelling following a change in use.

Before the introduction of section 18B which took effect from 10 January 2012, SARS issued VAT news no. 14 in the year 2000, which stated that it carried the same status as a general ruling. This letter explained the VAT implications of temporary letting of residential properties intended for sale. This letter stated that vendors may claim an input tax deduction on the VAT incurred for the developing or acquisition of a property acquired for resale or development. Where the vendor is unable to sell the properties and decides to let them until a buyer is found, an output tax must be declared on each property let out. When the properties are later sold, the vendor must levy VAT on the sale price, the vendor is allowed a deduction of the VAT declared and paid when the properties were let. The letter also noted the difficulties that might result and stated that if a Vendor experienced difficulties in paying the VAT resulting from the change in use adjustment, they could contact SARS and make arrangements to pay the VAT in monthly instalments over a period of 6 months. These instalments were without penalties and interest.

Under section 18B, the subsequent sale of a dwelling which was temporarily let was considered to be a supply in the course or furtherance of an enterprise for the developer and therefore, it was subject to VAT at the standard rate. The purchase price would be the consideration. This was the case until the expiry of section 18B on 1 January 2018. After this expiry, Taxpayers were required to use section 18(1) and levy VAT at an open market value of the properties upon sale.

This was before the issue of BGR 55. BGR55 was issued by SARS on 10 September 2020 in an attempt to clarify the issues that may be encountered upon a sale of a residential dwelling that was temporarily let by a residential property developer. This ruling states that the subsequent sale of residential property which was temporarily let and for which the developer declared a deemed supply is not subject to VAT. According to this BGR, the sale would be subject to a transfer duty. The purchaser would be liable for the transfer duty. This transfer duty liability was applicable from the date of issue of the BGR which is the 10 September 2020 until its withdrawal. The new section 18D(3) provides that; where the residential dwelling is sold, within 12 months of the temporary letting, it will be considered a supply in the ordinary course or in the furtherance of the vendor's enterprise. This sale will be subject to VAT at standard rate. The VAT will be levied on the consideration charged for the property and the date will be the earlier of the date of any payment for the consideration and the date of the property registration at deeds registry. Section 18D(5) states that; the developer is entitled to a deemed input tax deduction equalling the adjusted cost for the construction, extension or improvement of such a property if the property is sold within 12 months, temporarily applied for 12 months and not used any longer to supply accommodation in a dwelling or the property is applied temporarily and is subject to a fixed term lease that is greater than 12 months which was subject to section 18(1) adjustment.

2.5 Conclusion

Some industry experts are in disagreement with the South African VAT laws surrounding the VAT treatment of residential dwelling, both when there is change in use and with BGR 55, the transfer duty application on a sale following a change in use. Moodaley and Badenhorst said that the VAT laws placed a financial burden on the developer and this could result in cash flow problems for the developers. They suggest that a more reasonable method in dealing with the temporary letting of residential properties should be investigated. Badenhorst and Moodaley are also in disagreement with the new BGR 55 saying that the BGR does not reflect a correct VAT position for property developers. It is recommended that the property developers seek professional advice when dealing with temporary letting of residential properties, because of the complexity of the VAT rules for these transactions (Nieman, (2020).) This BGR may not be applicable anymore after the new section 18D was inserted in the VAT Act.

Property developers may be forced to pay output tax due to circumstances beyond their control (M Ferreira (2012, 15)). Economic difficulties resulting in temporary rental of residential properties developed with the intention to sell resulting in output tax payments are not fair on the Taxpayer (Badenhorst (2018)). The added Transfer duties that are applicable upon sale of previously temporarily let property would add to the purchase price. This could have result in an increased purchase price, which could result in even more difficulties to find buyers.

Section 18D appears to provide some clarity on VAT treatment for the temporary letting of residential property by property developers. It is however still unclear and does not seem to address all the issues that may be encountered. Van Schalkwyk and Moodaley are of the opinion that, even though section 18D provides some clarity and some relief for the Taxpayers, property developers must still seek profession help when dealing with the section because of its lack of clarity.

This section can also put SARS at a disadvantage because of the higher input tax that may be deducted, equalling the adjusted cost and not the tax fraction of the adjusted cost.

The tax position is also unclear where the developer intended to temporarily lease for 12 months and made an adjustment in terms of section 18D(2) but due to some other circumstances, they have to extend the lease period. In this case, the property developer cannot make another adjustment in terms of section 18(1). Deemed input tax deduction will be denied because the section 18D(5) requirement will not have been met. Action to be taken by the taxpayer remains unclear on this issue. Section 18D(5) (b) and (c) state that the 12 month temporary application must have expired and the residential accommodation no longer let or section 18(1) adjustment was applied for a lease exceeding 12 months for the deduction to be allowed. The section does not mention that this deduction is allowed when the residential property is eventually sold. This section does not explicitly mention this and the timing for the allowance may be confusing if not clarified.

1.6.2 CHAPTER 3

VAT or GST rules in New Zealand, Australia and Estonia.

3.1 GST rules in New Zealand

3.1.1 Introduction

The Introduction of GST in New Zealand was on 1 October 1986, the rate was 10%. Currently, GST is charged at 15% of the taxable supply (section 8(1) GST Act). A taxable Activity is defined in section 5 and it includes all forms of supply where goods are acquired or produced and sold by a person in the course of furthering a taxable Activity. A taxable Activity is defined as:

> 'a) any Activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration; and includes any such Activity carried on in the form of a business, trade, manufacture, profession, vocation, association, or club:
>
> (b) without limiting the generality of paragraph (a), the Activities of any public authority or any local authority or public purpose Crown-controlled company.'

The New Zealand's GST approach has been recommended by industry experts for countries wanting to introduce VAT or GST (Dicks and White, 2001: 2). The South African VAT Act is based on the New Zealand GST Act. It is expected that the South African VAT treatment on properties be comparable to that on New Zealand ((M Ferreira (2012:54).)

The GST rate is added to the purchase price of the taxable goods or services the same way it is done in South Africa. An adjustment is made when there is a change in use of residential property. This is also the case in South Africa. The difference is how the adjustment to the GST is calculated. This will be discussed further in this chapter.

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3.1.2 VAT treatment of residential property developed for sale versus the development residential property for letting.

The meaning of goods is defined in section 2 of the New Zealand GST Act as 'all kinds of personal or real property; but does not include choses in Action (choses in action are a personal right to an intangible object), money or a product that is transmitted by means of a radio, cable, wire, optical or other electromagnetic system or by means of a similar technical system'. This definition includes real property, which means that property developers or property dealers are required to charge GST, they are also entitled to a GST claim.

The supply of accommodation in a dwelling by way of hire or a service occupancy agreement or license to occupy is exempted from GST (Section 14 paragraph 1(c)). According to Section 14(1)(cb) of the GST Act, the supply of accommodation in a dwelling by way of a lease is exempt. The sale of a dwelling by a registered person in the furtherance of any taxable Activity is also an exempt supply, however, this exemption only applies to a sale that has been used by a registered person for more than 5 years for the supply of accommodation in a dwelling by way of a hire (S14(1)d). The supply of a dwelling by a registered person forms part of a taxable Activity and therefore would be liable for GST at 15%.

Section 1 defines a dwelling as premises that a person occupies or that a person will occupy as the principal place of residence where a person has quiet enjoyment. Commercial dwelling is defined as:

> A hotel, motel, homestay, farmstay, bed and breakfast establishment, inn, hostel, or boarding house, a serviced apartment managed or operated by a third party for which services in addition to the supply of accommodation are provided and in relation to which a resident does not have quiet enjoyment, as that term is used in section 38 of the Residential Tenancies Act 1986, a convalescent home, nursing home, rest home, or hospice, a camping ground, premises of a similar kind to those referred to in subparagraphs (i) to (iv); and excludes a hospital except to the extent to which the hospital is a residential establishment and a dwelling referred to in paragraph (b)(iii) of the definition of dwelling.

The supply of domestic goods and services in a commercial dwelling where the supply exceeds 4 weeks, the value attributable to that part of the supply shall be deemed to be 60% of the value of the supply of domestic goods and services. GST would be levied at 9% of this value (S10(6).) The time for the supply of residential property in New Zealand is deemed to be the date when the sale or agreement is concluded, or the date when payment is received, whichever date comes first (S9(1)).

3.1.3 Change in use adjustment

In *CIR v. Carswell Investments Ltd, 20 N.Z.T.C. 17 (2001)* a property developer let twenty properties while waiting for them to be sold. It was agreed by the Taxpayer and the commissioner that the principal purpose for holding the properties was to sell them. The selling of these properties constituted a taxable supply. The commissioner considered the provisions of section 14(c) which states that the supply of accommodation in a dwelling is an exempt supply. The property developer argued that the main purpose for leasing the properties was not to derive rent income but a security measure for the properties while they were being marketed for sale. The judge in this case considered the total rent received from the letting of these properties. Eight of the twenty properties were let for a period of more than 3 years and a substantial amount was received as rent income. The court found that the purpose changed from that of sale to that of rental, which meant a change from taxable to a non-taxable purpose which warranted a change in use adjustment. This resulted in a change in use and warranted a change in use adjustment.

In the CIR v John David Morris, 1997, the taxpayer, a property developer and a building contractor constructed two flats for the purpose of selling them. Morris then let out the properties while he was marketing them. Morris believed that the letting of the properties was a subsidiary objective and the main objective was to sell these properties. For this reason, Morris claimed the input tax credits with regard to the construction costs. The New Zealand High Court found that the taxpayer's fundamental objective of producing taxable goods persisted even when flats were also used to provide the letting residential accommodation which is a non-taxable supply.

Where there is a change in use for a property developer, from taxable to non-taxable, the result is deemed tax. If the intention for a property developer was to sell residential properties, but changes to renting out residential properties, it is accepted that the developer has changed use ((M Ferreira (2012,43).)

Where there is a change in use, an adjustment needs to be made in terms of section 21 of the GST Act. Section 21A provides for an adjustment by a registered person where at the end of an adjusting period, the registered person must identify the difference in Actual use of the goods or services and for the adjusting period, make an adjustment. Section 21C declare the adjustment for first time to be the percentage for the intended use compared to the percentage for the Actual use. For subsequent periods, the percentage for Actual use is the most recent period in which the adjustment has been made and the percentage intended if there is no adjustment made, this adjustment is based cost or market value, whichever one of the two is lower.

In the *CIR v Lundy Family Trust and Behemont Corporation Ltd* case, two Taxpayers, the Lundy family trust and Behemoth Corporation Limited operated a property development business where the development of residential properties was the main business. The taxpayers purchased and developed ten properties for sale, but were unable to sell them. The residential properties were let but kept on the market at all times. The following expenses had been incurred; the acquisition and construction of residential properties, rates, insurance, property management costs for the letting of these residential properties and costs of selling the properties. These residential properties were already sold when this case was heard in court. Many of the costs were eligible for input tax deductions because they were incurred for the primary purpose of making taxable supplies. The subsequent letting of these properties which is an exempt supply under New Zealand GST law raised the issue of whether the taxpayers were required to "adjust" the input tax deductions claimed over the period of holding the properties, and whether those adjustments should be reversed on eventual sale. The issue was that taxpayers in New Zealand are entitled to a deduction for input tax on "goods and services obtained for the primary purpose of making taxable supplies," according to the GST legislation. However, when goods and services obtained for the primary purpose of making taxable supplies are used for another purpose, adjustments are made under section 21 of the NZ GST law. The adjustment is performed by deeming that the taxpayer makes a taxable supply at the lowest of cost or market value. Both the taxpayers and the CIR agreed that modifications were required, but they couldn't agree on how to do them.

To reach its decision, the court said the amount of tax levied on the supply of goods and services where such products or services are bought for the primary purpose of making taxable supplies can be claimed as an input tax deduction. Adjustments are made to the extent that the products or services are used for any non-taxable purpose and will be deemed supplies. When goods and services are not purchased primarily for the purpose of making taxable supply, an input tax deduction is permitted (under paragraph 21(5)) to the extent that they are used for a taxable purpose. The adjustment for non-taxable use was considered by the Court as "a tool for ensuring the claw back of unjustified input tax credits if they are no longer tied to a taxable Activity." Subsection 21(5), on the other hand, according to the Court, "is the mechanism for ensuring that adequate input tax credits are available when they are tied to a taxable Activity". The Court also said that where the acquisition's value has fallen below its cost, the claw back or input tax deduction should be based on the lower value. The court noted the fact that both parties accepted that the properties were used for a non-taxable purpose when they were let and that a s 21(1) adjustment was required. The question was the amount and what kind of adjustment there will be.

According to the court, the costs at issue were the acquisition costs of the properties, The court agreed that depreciation was an appropriate means of apportioning the cost of the buildings, and that the cost of the land should be apportioned using the same technique. "Both the land and the buildings are used in the residential letting process, and the buildings aren't used up any more than the land is." On the apportioning between the taxable and non-taxable use, the court held that the provision of the GST law requires an adjustment where goods are applied for a non-taxable purpose, On service costs, the court held that they were applied to each purpose with the taxable use remaining the principal purpose which is the sale of residential properties and these costs would have been incurred whether the residential properties were let or not.

For this, the court held that 75/25 apportionment was reasonable. On the adjustment on sale, the court considered the purpose of the provisions of adjustment on which is to allow input tax credit where goods are not applied for a the principal purpose of making taxable supplies but applied for a taxable purpose noting that the acquisitions have been “used up’ at the time of sale. The market value will be lower than the cost and that will result in a lesser adjustment and there goods are sold for at cost or greater than cost, the result would be the reversal of the previous adjustment for non-taxable use. The VAT apportionment rules have since changed but the principle is still that where there is change in use, an adjustment needs to be made.

Currently, the adjustment periods in New Zealand depend on the value of goods and services. At the end of each adjustment period, the Taxpayer needs to establish if an adjustment is still necessary, depending on the value of the goods and services (21(G).) There are exceptions to the change in use provisions. In terms of section 20(3D) for the calculation of tax payable, a Taxpayer need not apportion input for an adjustment period when making taxable and exempt supplies if the exempt supplies are less than $90 000 or, for the adjusting period, 5% of the total consideration for all taxable and exempt supplies. The formula used to calculate the 1st adjustment is set out in section 21E as follows; (consideration for taxable supply ÷ total consideration for supply) × 100.

3.1.4 Sale of a dwelling following a change in use.

According to Section 14(1)(cb) of the GST Act, the supply of property to be used for a principal purpose of accommodation in a dwelling by any person who is not a registered person in the course of furtherance of a taxable Activity by way of a lease is exempt. The sale of a dwelling by a registered person in the furtherance of any taxable activity is also an exempt supply (S14(1)(d)) but the sale of a dwelling in the furtherance of enterprise or as a taxable Activity is subject to GST at standard rate. The selling of a property following a change in use adjustment is treated as sale in the furtherance of an enterprise (21F). The person making the sale needs to make a final adjustment on the amount using the following formula: Tax fraction x Consideration x (1 - previous use). The tax fraction is outlined in section 2(1) and it means; a ÷ (100 + a) where 'a' is the GST rate applicable, currently at 15%. 21F(5) explains the amount of consideration received, or treated as received, for the provision is referred to as consideration. The consideration means received or treated as received for the supply (21F (3)(b)), Actual deduction is the amount already deducted up to the date of disposal (21F (3)(c)). This Actual deduction must not exceed the full input tax deduction on acquisition. Previous use is explained in section 21F5(c) as the percentage of intended usage or previous Actual use in the time before the period of disposal

3.1.5 Conclusion

New Zealand also applies the change in use adjustments where there is a change between the intended use and Actual use. The difference between New Zealand and South Africa currently is in the method of calculating the input tax adjustment. It is recommended that Taxpayers must talk to professionals when dealing with the unique property tax transactions (IR361 June (2021)).

IR375 June 20 March 2021 GST Guide provides a guide on how the change in use adjustments must be calculated, explaining the variables in the adjustment. It also provides guidance on how the GST return must be filled. It is clear that GST provisions for property developers are not easy to follow, just as it is complicated to interpret or apply the VAT provisions when dealing with change in use adjustments on property developers in South Africa.

3.2 VAT rules in Australia

3.2.1 Introduction

It was discovered that in respect of VAT or residential properties developed by property developers, some countries including the United Kingdom, Canada and Australia have special rebates or concessions (Julyan (2004:130)). Australia has one of the lowest GST rates in the world at a maximum of 10% on most goods, services and other items sold or consumed in Australia (World tax rates (2021)). This Tax is legislated in A new tax system (Goods and Services Tax) Act 1999. The Australian Tax Office (ATO) collects the GST in Australia.

According to ATO, GST is only applicable to a sale of certain properties if the seller is registered for GST purposes. Section 9.5 of the GST Act requires that a supply be made for a consideration, in the course of furtherance of an enterprise, the supply is connected with the indirect tax zone and the supplier must be registered or required to be registered for GST purposes. Australia allows property developers to choose to apply the margin scheme. Developers registered for GST may elect to pay GST based on margin (ATO (2020).) The margin is explained in section 75.10 as the difference between the consideration and the valuation of the interest, unit or lease. The GST amount is calculated as 1/11 of the margin of the supply. Section 75.20 states that there is no input tax credit that may be claimed back if the margin scheme is selected. There is no GST credit for those who are not registered for GST, for purchases that do not have GST, where the sale is input-taxed such as residential accommodation (ATO (2020).) Input-Taxed supplies are financial supplies, such as lending money and renting out residential premises are transactions that are called input-taxed sales. There is no inclusion of GST in the price of input-taxed sales and you cannot claim GST credits for the GST included in the price of purchases, the person selling would have to make their own input-taxed sales.

A creditable Acquisition is a transaction where input tax may be claimed. This credit may only be claimed if something is attained to uses solely or partly in an enterprise, the acquisition price includes GST, there is liability for the item purchased and there is a tax invoice from the supplier (ATO (2020).)

In the *Saga Holidays Limited v FC of T*, Federal Court of Australia, 22 December 2005 case where Saga Holidays Limited, a company in the UK, registered for GST in in Australia supplied a packaged tour of Australia to non-residents and the question was whether the supply constituted a taxable supply. The issues was whether supply of real property, whether the accommodation supply was connected to Australia and whether the supply of accommodation was a component incidental to other components of the tour. The tour package was called “A taste of Australia”, conducted during the year 2004. The “Taste of Australia” was an all-inclusive package which included travel insurance, return flights, Transportation within the UK and Australia, a tour guide in Australia, various excursions in Australia and accommodation and hotels in Australia.

According to section 7.1 of the GST Act, GST is payable on taxable supplies.

A supply is defined in section 9.10(2) as

‘(a) a supply of goods;

(b) a supply of services;

(c) a provision of advice or information;

(d) a grant, assignment or surrender of *real property;

(e) a creation, grant, transfer, assignment or surrender of any right;

(f) a *financial supply;

(g) an entry into, or release from, an obligation:

(i) to do anything; or

(ii) to refrain from an act; or

(iii) to tolerate an act or situation’

The supply of real property is included in the definition. A Taxable supply is defined in section 9.5 as a supply for a consideration, made in the furtherance of enterprise, connected with Australia and made someone register for GST in Australia. The supply of real property is connected to

Australia if it in the real property is in Australia (Section 9.25(4) and (5)). For a supply to be taxable, it must also be made for a consideration (Section 9.5 (a)). Saga Limited argued that the supply was that of rights or service and not the supply of real property but the court held that the accommodation component of the package was that of real property. The court's decision was in agreement with the commissioner. It was held that the supply was a supply of rights to accommodation, which meant that it was a supply of real property.

3.2.2 VAT treatment of residential property developed for sale versus the development residential property for letting.

'Commercial accommodation is defined in Section 87.5 and it means:

> ' the right to occupy the whole or any part of commercial residential premises , including, if it is provided as part of the right so to occupy, the supply of:
>
> (a) cleaning and maintenance; or
>
> (b) electricity, gas, air-conditioning or heating; or
>
> (c) telephone, television, radio or any other similar thing.'

The sale of commercial accommodation is generally a taxable sale. GST is paid and there is an entitlement to claim GST credit. Rental of commercial accommodation is subject to GST, the property developer is also entitled to a GST credit claim (ATO).

Residential premises definition, according to section 195.1 is land or building which is occupied as a residence or residential accommodation or intended to be occupied as a residence or a residential accommodation. A residential property is said to include flats, units and more and can be occupied or is occupied as a residence for residential accommodation regardless of occupation or length. It is the provision of shelter and continuous living facilities but excludes land.

The sale of existing residential accommodation is not subject to GST, but it is input-taxed. There is not GST liability and there is no GST credit (ATO). A residential property is existing (not new anymore) if it has been 5 years since it became a residential property, it has been 5 years since it was last renovated or it has been 5 years since it was built to replace demolished premises. The selling of new residential premises generally means making a taxable sale, this means you are liable for GST and you are entitled to a GST credit. A new residential premise is one that has not been previously sold, was last substantially renovated or was built to replace demolished property (ATO (2020).)

3.2.3 Change in use adjustment

Residential properties rented out for residential accommodation are input taxed, meaning there is no GST included in the rental charge. There is also no entitlement of any GST credit on any costs relating to rentals. According to section 19.10, in the event where a property is temporarily let by a property developer, an adjustment needs to be made. This is when a taxable supply stops being a taxable supply or a creditable supply for a period. The property developer may need to repay the previously claimed GST to the ATO. The property developer needs to calculate whether the adjustment is an increase or a decrease, this is calculated in terms section 129.40 of the new tax system (GST Act 1999).

According to this section, there are 5 steps to determine whether there should be an adjustment or not. The first step is to work out whether the thing is acquired for a creditable use starting from the acquisition date to the end of the adjustment period. Step 2 is work out if you had not had an adjustment previously, for the thing which was acquired for a creditable purpose or if there was previously had an adjustment for the acquisition of the thing in respect of the last adjustment. Step 3 you will have an increasing adjustment if the Actual application of the thing is less than its intended application. Step 4; you will have a decreasing adjustment if the Actual application of the thing is greater than its intended application. Step 5; there is neither a decreasing nor increasing adjustment if the Actual application of the thing is the same as the intended or former application for the acquisition for the adjustment period. Application of the thing means supply the thing, consume, destroy or dispose the thing or allow another entity to consume, dispose or destroy the thing. A "thing" is defined in 195.1 dictionary in the GST Act as anything that can be supplied or imported.

This adjustment amount is also determined by whether or not the property developer is marketing the property (du Preez and Klein (2014, 39)). If the leasing price is substantially higher than the market value for the particular property, ATO will not accept it as being actively marketed.

3.2.4 Sale of a dwelling following a change in use.

A supplier of residential property is liable of GST on the sale of residential property. The Australian Tax office requires that all records must be kept to show that the property is rented out while waiting to be sold and is actively marketed. A final adjustment is made when the residential property that was temporarily let is finally sold. For this final GST adjustment calculation, the consideration and the total rent received are used.

3.2.5 Conclusion

A supplier of residential property is liable for GST on the sale of property in Australia and can claim GST credits for any purchases for the supply of new residential or commercial property. The change in use of residential property from that of sale to leasing results in an adjustment according to section 19.10. The adjustment is done in the reporting period.

3.3 VAT rules in Estonia

3.3.1 Introduction

Estonia uses a standard VAT rate of 20%. There are some exceptions to the 20% standard rate (Estonia VAT Act, Section 15(1)). Accommodation or accommodation services are one of the exceptions to the 20% rate. VAT is levied at 9% on accommodation or accommodation services with breakfast in Estonia (Estonia VAT Act, Section 15(4).) The 9% rate excludes goods or services accompanying such accommodation services (Estonia VAT Act, Section 15(2)(4).)

Generally, according to section 29(1), input tax can be deducted from goods and services used for a taxable turnover. Input tax cannot be deducted if the goods and services are used exclusively for a tax free turnover. This was evident in the *TlnRnKo 09.01.2017, 1-15-9051*, a case in the Tallin circuit court in Estonia where an individual named Henry Kallas and OÜ Y, the company he was a director of, were accused of, amongst other accusations, incorrectly claiming VAT for a property that was not purchased for taxable use.

Looking at only the facts relating to the VAT on property, the court argued that false information was submitted to the tax and customs board, citing that the apartment was bought by the company (OÜ Y) for an individual (Henry Kallas), who is a board member of the company, for personal use. This property was argued that it was incorrectly declared by the company as an asset bought for the business and for taxable turnover purposes. It was argued that the business incorrectly claimed for input tax on this property even though it was actually bought for personal use as a residence, and this should have been a fringe benefit.

On appeal, the counsel proved that the property was actually bought by the company for taxable turnover, the property had a room furnished as an office in the apartment from the beginning. The apartment was used by the individual for free, long after it was purchased. The court found that the fringe benefit could be the market price of renting the property, the transfer of the property to the individual was not recognized in the court. It was argued that the opinion of the country court the purchase of the property was not connected to OÜ Y's business and the rent invoices were incorrect. The prosecutor withdrew his statement regarding the purchase of the property. It was assumed that the economic substance and the formal substance of the transaction were both aligned. The accused testified that the apartment was used also by foreign visitors and business partners. It was said that the court failed to prove that there were subjective elements to these transactions. The apartment was purchased as real estate investment on behalf of Y OÜ, which specializes in investment property, with the purpose of reselling it after a period of time having added to its worth. It was intended to include perimeter security, access control, and security solutions, surveillance, remote control, and heating automation, control of the security system and other comparable aspects to add to the originality of the flat. The county court has not rejected this explanation since it has not been proven that the apartment was sold for less than its market value.

The Tax authority took the position that the company became the owners of the property and according to the case law of the European Court of Justice, input tax was found to be immediately deductible. This was followed by non-obligation to pay VAT to the state for the use of company assets for personal use. This was done by a company connected to the accused who offset the VAT in one of the transactions and the VAT was later paid to the state. It was also proven that the property was non-residential property according the use and occupancy permit, but rather a guest apartment.

Section 2(3)(1) describes goods as:

> 'things, livestock, gas, electric power, heat and refrigeration, immovables, as defined in the General Part of the Civil Code Act, right of superficies, utility networks and utility works, as defined in the Law of Property Act, structures as movables, as defined in the Law of Property Act Implementation Act, and apartment ownership and right of superficies in apartments, as defined in the Apartment Ownership Act and the Apartment Associations Act are deemed to be immovable. Building land is deemed to be such immovables within the meaning of the General Part of the Civil Code Act, that does not contain any construction works, except utility networks or utility works, and which is designed for building pursuant to the design specifications, a detailed spatial plan or special spatial plan of the state or local government or for which a building notice has been submitted or the intended purpose of the cadastral unit of which is over 50 per cent residential land or commercial land or these jointly. Data media that are freely available to all purchasers and which carry standard software or standard information intended to perform the same functions are also deemed to be goods'

Immovable is defined in the section 50 of the general part of the civil code Act as a delimited part of land. According to the Estonian VAT rules, if input tax has been deducted upon acquisition of the immovable property and is taken into use for tax-free turnover at some point in time, the obligation to adjust the deducted input VAT arises'.

3.3.2 VAT treatment of residential property developed for sale versus the development residential property for letting.

According to section 15, VAT is levied and 9% on the supply of accommodation services or accommodation services with breakfast in Estonia, excluding any goods or services accompanying such services. The Estonian VAT Act does not distinguish between commercial and residential accommodation. The VAT treatment of real estate is established based on the purpose for the property also referred to as immovable in the Act. If a property is developed for the purpose of sale, VAT will be levied at 9%. If a residential property developer constructed residential property for the purpose of a short-term lease, the rent on the short-term lease will be subjects to VAT at the rate of 9%. The Taxpayer is also entitled to deduct input VAT. If the lease term is longer than 3 months, the lease will be VAT exempt.

3.3.3 Change in use adjustment

The procedure for the recognition of partially deducted input tax refund in VAT return and procedure for adjusting VAT on input of fixed assets and good and services acquired for it (RTL 2004, 39,654) sets out the rules to be followed when a change in use adjustment arises. Section 3 of these procedures deal with the adjustment of input tax on immovables. Again, there is no distinction between residential and commercial accommodation, they are both included in the same procedure as they are part of 'Goods' as defined. Section 3(1) states that there should be an adjustment of input tax on immovable and goods and services at the end of each calendar year. The section also states that if there is no difference in the Actual share of the use in a calendar year, there should be no adjustment. Section 3(2) provides that the adjustment of input tax shall be made only in respect of goods and services acquired for the use of an immovable which increase the book value of the immovable. Section 3(3) states that if the purpose changes, there shall be an adjustment to the extent of 1/10 of the amount of input VAT in each calendar year. This means that if a property developer has deducted 100% of the input Tax on the purchase or construction of residential property, and the property is let or rented tax-free, the deducted input tax must be adjusted by 1/10 at the end of each calendar year (December) within 10 years (Estonia, RTL 2004, 39, 654.)

3.3.4 Sale of a dwelling following a change in use.

When an immovable property is transferred by a taxable person, and has been used in business for a period less than 10 calendar years, the input tax shall be adjusted in the month of transfer. Where input tax has been deducted on an immovable or goods or services acquired and fully disposed of before the end of the 10 calendar years from the acquisition date, the use of the immovable and the goods or services acquired for the remaining period including in the year of transfer of the immovable property, as use for tax free turnover. Where the transfer of an immovable property is together with VAT, the use of the immovable and the goods or services acquired for that purpose during the remaining period, including the year of transfer of the immovable, shall be considered as fully for taxable use. If input tax is fully deducted and an immovable is transferred tax free before being used for business purposes or during the 1st calendar year, the input tax on the entire immovable and the goods or services acquired for that purpose shall be deducted (Estonia, RTL 2004, 39, 654.)

3.3.5 Conclusion

Estonia appears to have a neutrality when dealing with VAT. There is no distinction between commercial and residential property. VAT treatment depends on the purpose of the property. VAT is levied at 9% making it the lowest of the 3 countries. Generally, input tax can be deducted from goods and services used for a taxable turnover. Input tax cannot be deducted if the goods and services are used exclusively for a tax free turnover.

If 100% of the input tax has been deducted on the purchase or construction of real estate and the property is let or rented tax-free, the deducted input tax must be adjusted by 1/10 at the end of each calendar year (December) within 10 years. This approach will result in output tax being proportional to the input tax deduction in the end. Input tax may be deducted on construction costs or other costs or on the purchase of a building only if it is used for taxable turnover.

1.6.3 CHAPTER 4

The VAT/ GST rules comparison between South Africa, New Zealand, Australia and Estonia

In this chapter, the VAT rules for each jurisdiction will be compared in relation to the rate charged, the change in use adjustment and the VAT treatment on the eventual sale of the property.

Scenario	South Africa (VAT)	New Zealand (GST)	Australia (GST)	Estonia (VAT)	Conclusion
VAT/GST rate on residential accommodation/dwelling levied by a property developer and claimed on development costs incurred by the property developer.	15%	15%	10% Or a choice of Margin scheme.	9%	South Africa and New Zealand are still compatible with the same VAT rate, Estonia and Australia are fairly low with Estonia being the lowest.
Change is use adjustment provisions according to the VAT/ GST Act for each country.	S18(1): Deemed supply resulting from a change from taxable to non-taxable supply. 16(3): Value of the supply for 18(1) is the open market value of the supply	S21A: Adjustment provisions where there is a change in Actual use. S21FB: 21C:First and subsequent	S19.10: The cessation of being a taxable or creditable supply is an adjusting event. 129.40 for working out whether there	Set out in the procedure for recognition of partially deducted input VAT refund in VAT return and procedures for adjusting VAT on input of fixed assets and	South Africa appears to have complicated provisions which would be difficult for an average tax payer to understand, and expert on the subject would be

	18(B): old section which allowed property developers not to declare deemed VAT for a period of 36 moths. 18(D): New section dealing with the change in use adjustments to be made by property developers when there is a change in use of the developed properties.	periods adjustment provisions 21D: Calculating the adjustment amount	is an increase or decrease adjustment or not, using the 5 steps. S195.1	goods and services acquired for it. S3(1) VAT adjustment shall be adjusted if the share of use is different from the estimated share of use, there shall be an adjustment. S3(2) Adjustment made only if the change results in an increase in book value of the immovable. S3(3) Adjustment must be made to the extent of 1/10 of the input VAT amount each year.	needed to clarify Estonia appears to have the easiest provision of the four countries.

Scenario	South Africa	New Zealand	Australia	Estonia	Conclusion

Eventual sale A residential dwelling is eventually sold after having been temporarily let out and being Actively marketed.	VAT levied on consideration at standard rate. Vendor entitled to a deemed input tax deduction equalling the consideration, if the residential dwelling is sold with 12 months after change in use.				

Comparisons

Supply in South Africa, New Zealand, Australia and Estonia.

In Section 1 of the South African VAT Act, the term ‘supply’ includes any performance under a sale, rental, or instalment credit agreement, whether it is voluntary, required by law, or both. The VAT Act stipulates specific events in addition to supplies that meet this description (also known as "deemed supplies") should be taken into account as supplies. In section 5 of the New Zealand GST Act, a supply is defined to include all forms of supply including the supply of accommodation. Section 9.10 of the Australian GST Act describes a supply to include a supply of goods and services. Estonia describes a supply in section 4 of the VAT Act and it includes the transfer of goods and provisions of services in the course of business activities.

Time of supply

South Africa

To establish the date that a supply is made for VAT purposes, the time of supply for goods or services must be established. This date establishes the tax period during which the supplier must report the output tax and the tax period during which the recipient may be allowed to claim an input tax deduction for purchases of goods or services. A vendor must disclose and subtract input and output taxes on a VAT 201 return for the tax period that includes the time of the supply (VAT 409:28.) Section 9 states that the general rule is South Africa is the time of supply is the earlier of the date the invoice is issues or the date when the payment of the consideration is made. Section 9(3)d provides for the time of supply of fixed to be the date of registration of transfer of the goods or the date where the consideration of the supply is made. Where there is a change in use of residential property, where a property developer lets out residential dwellings while waiting for a buyer, the time of supply is determined in terms of section 9(13). Under section 9(13), the time of supply for any supply for goods or services deemed made in accordance to section 18D(2) is deemed to be the tax period in where the agreement for the letting and renting of lodging in a residence comes into effect.

New Zealand

The time of supply in New Zealand in terms of section 9(1) is deemed to be the earlier of the time when an invoice is issued by the recipient or the supplier, or the time when any payment for the supply is received by the supplier or recipient. The time of supply for property transactions is the date where the contract becomes unconditional when a deposit for the disposal of a property is received. Where a property developer temporarily changes the use from taxable to non-taxable, adjustment periods are allocated based on the value of goods excluding GST (21(G)4(a)).

Australia

The term "Time of supply" is not used in Australian GST (Millar and McCarthy (2012, 83)).

Where there is a change in use adjustment, the adjustment period is a period that starts at least 12 months after the end of the tax period of acquisition and ends on 30 June in any year or a period closer to 30 June.

Estonia

The time of supply is outlined in section 11 of the Estonian VAT Act and it includes the date on which one of the following acts is performed; the good are made available or dispatched to the purchaser or the service is provided, partial or full payment for the goods or services is received or made. In a case where there is a change in use adjustment on immovable with goods and services relating to it, the period of input tax shall be 10 calendar years. The period shall be 5 calendar years in case of other fixed assets including goods and services relating to those fixed assets. The first calendar year is considered to be the period from the date that fixed assets, products acquired, or services obtained for the fixed assets are registered in the accounting records to the final day of the current calendar year.

Value of supply

South Africa

Generally, in South Africa, the value of supply is determined according to section 10 of the VAT Act. Section 10 states that the value of supply of goods and services is the amount of consideration for such a supply unless otherwise provided for in the subsections of section 10.

In South Africa, the value of supply for residential property developers in relation to short term letting or temporary letting of a dwelling was previously set out in section 18(1) where the vendor was deemed to have supplied the goods or services at their market value in the tax period in which they are first used wholly for non-enterprise Activities. Currently the value of supply is set out in the new section 10(29) which states that supply shall be deemed to be made for a consideration in money equivalent to the adjusted cost to the vendor of the construction, expansion, or improvement of the fixed property or a portion of the fixed property that is supplied. This value applies to section 18D(2) temporary letting of dwellings.

New Zealand

The value of supply in New Zealand is determined in terms of section 10. This section provides for the value of supply to be the value of supply of goods and services with the addition of tax charged, is equal to the aggregate of the amount of money is the consideration of the supply is a consideration in money. If the consideration is not a consideration in money, the consideration shall be the aggregate the open market value of the consideration or consideration value agreed to by the supplier and the recipient. Where there is a change in use adjustment, the land Market value at the time of making at adjustment and the amount of all rental income for the supply of the dwelling (21E (4).)

Australia

Section 9.75 of the GST Act of Australia provides for a value of taxable supply to be the price multiplied by ten divided by eleven. The price is the amount in money for the consideration of the supply including GST, if the consideration is not expressed in money, the price will be equal to the market value of the consideration including GST.

Estonia

Generally, in Estonia, the value of supply is the sales price of the goods or services received as well as any other amounts that are deemed to be the fees that the transferor of goods or provider of the services has received or will receive from the buyer of the goods or the recipient of the services, or a third party for goods or services make up the taxable value of the supply (S12). According to Section 3(3) if the purpose changes, there shall be an adjustment to the extent of 1/10 of the amount of input VAT in each calendar year. This is how the value of the adjustment is calculated when the property developers temporarily let their dwellings while waiting for a buyer.

Conclusion on the comparisons

These three elements (Supply, time of supply and value of supply) are essential to the correct calculation and the application of the provisions of VAT/GST and they are applied differently in each country. All of these have proper guidelines to be followed and applied with the exception of Australia on 'time of supply'. All four countries have an inclusion of the supply of goods and services in the furtherance of an enterprise in the supply definitions. The definitions are not the same but the principle remains the same.

South Africa and New Zealand generally have the same rules when it comes to the time of supply. They both explain it to be the earlier of invoicing and date of payment for the consideration. Australia takes a different approach when it comes to the time of supply, it is the only country which does not explain the general provisions of 'Time of supply' in the ATO or the GST Act, this may be because the timing and VAT periods in Australia are clearly set out in the AOT website and the GST Act. Estonia's time for supply is slightly different from that of South Africa and New Zealand, the date on which the goods are available for or dispatched to the purchaser is the time of supply.

Where there is a change in use adjustment in the supply of residential property, the time of supply is deemed to be the date when the leasing agreement for the temporarily let residential property takes effect. New Zealand allocates different periods for the temporary letting of residential property based on the value of the properties. Australia's time of supply where there is a change in use of residential property is the end of the tax period of acquisition which starts at least 12 months after the tax period of acquisition. Estonia has a period of 10 years and 5 years where there is a change in use adjustment, making it the simplest way of calculating an adjustment.

Value of supply in South Africa is equal to the amount consideration. In New Zealand, the value of supply is also equal to the consideration amount. In Australia, the value of supply is also equal to the consideration amount. Estonia values the supply to be the fees received by the transferor. When there is a change in use, these countries do not apply them the same way because of the different laws and provisions in each country.

South Africa and New Zealand have a similar general rule but the rules applicable when there is a change in use in case of a temporary letting of a dwelling by a property developer are very different. In South Africa, the value of supply when there is a temporary letting of residential property by property developers is now dependent on the length of the lease. If the lease is for 12 months or less, the value is based on the adjusted cost. The value is determined using the Market value if the adjustment does not fall in the ambit of section 18D(2). Australia's value of supply is based on the consideration or the market value where the consideration is not expressed in money. Finally, Estonia bases the value of supply on the sales prices of the goods or service, dividing it by 10 for each year for an adjustment.

1.6.4 CHAPTER 5

Recommendations and Conclusion

Although South Africa has recognised the shortcoming on the VAT rules on temporary letting of dwelling and promulgated new section to address them, the new rules still need to be reworked in order to cover all scenarios that may result in from this temporary letting. Industry experts are also of the opinion that the new section 18D needs to be revisited. Van Schalkwyk and Moodaley closed their discussion of the new section 18D by saying:

> 'While section 18D seems to have been developed with the correct objective in mind and does indeed provide some clarity on the VAT treatment of the temporary letting of residential property by developers and some cash flow relief, the provision is still in need of further 'construction, extension or improvement' to provide further clarification'

The new section 18D also appears to assume temporary leasing is for a period less than 12 months. This is evident because it clearly sets out the VAT rules to be followed when the temporarily let residential property is sold within 12 months. Temporary may mean longer periods in some instances where it might be a struggle to sell even after a few years, considering the economic status that South Africa is in. The section needs to be amended to clearly address what needs to be done for such periods exceeding 12 months before selling the residential property.

Section 18D(5) entitles the developer to a deduction for deemed input tax equalling the adjusted cost for the construction, extension or improvement of such a property if the property is sold within 12 months. This adjusted cost will be much higher than the output tax, which would have been only a fraction of the adjusted cost, not the full-adjusted cost. This might put SARS at a disadvantage. For this, the recommendation is to relook at the wording of the section and may be change the deemed input tax to be VAT (the tax fraction) on the adjusted costs not the full adjusted cost. Regardless of the shortcoming realised on the new section 18D, it is welcomed because it offers some form of relief for property developers who temporarily let their residential dwellings developed for sale, which has not been available for years. There is hope that the section will be clarified in the near future.

Australia seems to have made means to address and clarify any issues that may result from accounting for VAT of residential properties. This is clear with the explanation on the ATO which appears to deal with the different scenarios that could result from transactions involving residential dwellings followed by practical examples with corresponding calculation. This could be useful if South Africa adopted the same approach because of the complexity that could result from such transactions. It is recommended that more research should be done on this topic. The property developers, tax experts and law makers need to hold meeting to discuss the solutions which would be suitable for all those that are affected.

SARS also needs engage Taxpayers to see where the challenges may be. This new section is challenging to the industry experts, it may be worse for the taxpayer who find themselves having to do the complex calculations and having to figure out how all this is shown in the VAT return.

South Africa is a developing country, burdening the business community with the stress of consulting fees in trying to interpret tax laws that are vague and unclear could result in added and unwanted cost. These costs could lead to liquidity problems for companies. The complexity of the VAT laws and SARS systems may contribute to failure to comply, which can also have an adverse result to the South African economy.

Property developers should be in a position to be allowed to make profits, that would mean more tax revenue for South Africa (du Preez and Klein (2014, 64).) Some of the new laws could result in decreased revenue for SARS, this will add to the economic crisis faced by South Africans where the country does not have enough to fulfil the needs for a better South Africa.

The Organization for Economic Co-operation and Development (OECD) recommends that there should be neutrality in VAT regulations. This means that there should not be any discrimination in the VAT treatment on any similar businesses (Charlet A and Buydens (2011).) Tax treatment should be equitable and business decisions should be motivated by economic decisions and not tax considerations according to OECD.

Estonia appears to have neutral VAT rules, which appear not to be at the disadvantage of the taxpayer because there is no distinction between residential and commercial property. Property

VAT rules appear to be same and only the purpose determines the VAT rules to be applicable. This may be because the good economy status in Estonia, being ranked in the top 10 countries in the European Union. The country may not be facing challenges like South Africa where a property might be difficult to sell due to the economic status of the buyer, this may also be the reason for the less stringent VAT rules for property developer.

Australia's GST rate of 10% is lower than average. It is the 2nd lowest of the four countries that are discussed. Australian property developers are also entitled to a concession and the developers may elect to use the margin scheme and not the value of the sale to calculate GST.

The GST rate in New Zealand is equal to the South African VAT rate at 15%, making the two countries even more comparable. New Zealand considers the rent income when calculating the value of supply where there was a temporary lease while South Africa bases its value of supply on the adjusted cost or market value in some instances where there is a change in use resulting in an adjustment for property developers. The rental income could also be considered in the VAT calculation in South Africa to avoid any unfairness where some property developers earn more rental than others for dwellings of more or less the same market value.

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