The sale of a going concern for Value-Added Tax purposes with specific emphasis on lease agreements

by

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Submitted in fulfilment of the requirements of the degree

(LLM in Tax Law)

In the Faculty of Law,
University of Pretoria

2022 October

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ACKNOWLEDGEMENTS

Hebrews 11:1 "*Now faith is the assurance of things hoped for, the conviction of things not seen"*. I give all the praise and glory to God who sustains me and set my path straight.

This mini dissertation is dedicated to my mother, Francina Mduna whose love knows no boundaries. I want to express my appreciation, but no words will ever be strong enough to express my gratitude to you. I would not be here if it was not for your immense support, your unconditional love and your prayers that continues to sustain me. Thank you, Mama.

To my supervisor, Professor van Zyl, I am grateful for your selfless leadership. Your expertise, guidance, overwhelming support, and advice made all this possible. I am truly grateful to God for blessing me with a teacher like you. Thank you for going beyond the call of duty and for believing in me.

To my lovely son, Kgosi Mpopo, I am grateful for your patience, understanding and unfaltering love.

To my family, thank you for your prayers, love, support and for not giving up on me.

ABSTRACT

The study provides an in-depth analysis of the sale of commercial letting enterprise or a part of it as a going concern for Value-Added Tax ("VAT") purposes with specific emphasis on lease and sub-lease agreements**.** The interpretation of the legislative wording by SARS as contained in Interpretation Note 57("IN 57") regarding the zero-rating of the disposal of an enterprise creates legal uncertainties that compromises the predictability and certainty of the VAT system. The study investigates the inherent uncertain concept of a going concern as well as the requirements that must be met for the zero-rating of the transaction to apply. Importantly, the IN 57 is not law. Moreover, IN 57 provides limited guidance in respect of a 'leasing' enterprise that is disposed of as a going concern. Specifically, neither the VAT Act 89 of 1991 nor IN 57 provides for the VAT treatment of a 'leasing' enterprise where a sub-lease agreement is in place. This study seeks to determine the proper VAT treatment of the disposal of a 'leasing' enterprise as a going concern where lease and sub-lease agreements are in place.

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CHAPTER ONE: RESEARCH OUTLINE AND CONTEXT

1.1 Introduction and Background

Value-added tax ("VAT") is a tax on the amount by which the value of an article has been increased at each stage of its production or distribution and it must be proportional to the amount charged for goods and services.[1] The South African VAT is a destination-based system. This means that VAT is levied on goods and services consumed domestically in accordance with the provisions of the Value-Added Tax Act 89 of 1991("VAT Act"). VAT is an indirect tax that is not directly assessed by the South African Revenue Service ("SARS"). Further, it is indirectly assessed through the taxation of consumption of goods and services.[2] VAT was previously charged at fourteen per cent and subsequently increased to fifteen per cent. With effect from 1 April 2018 VAT is levied at the standard rate of fifteen per cent on the supply of goods and services.[3] The South African VAT legislation is primarily based on the New Zealand Goods and Services Tax Act 141 of 1985 (" New Zealand GST Act").

The levying authority for VAT is found in section 7(1) of the VAT Act. Section 7(1)(a) of the VAT Act provides that:

> *"(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the State Revenue Fund a tax, to be known as the value-added tax-*
>
> (a) *on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him*."[4]

[1]Angus Stevenson & Maurice Waite (eds) *Concise Oxford English Dictionary 12th* ed (2011) 1598; see also other related in *Metcash Trading Ltd v Commissioner, SARS and Another 2001 (1) SA 1109 (CC)* para 12.
[2]Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1032.
[3] Section 9(1)(a) of the *Rates and Monetary Amounts and Amendment of Revenue Laws Act* 21 of 2018.
[4] Section 7(1)(a) of the *Value-Added Tax Act* 89 of 1991; see also section 8(1) of the *Value-Added Tax Act* 89 of 1991.

It is compulsory for an enterprise that is making taxable supplies to register for VAT if the value made or to be made, exceeds the R1 million prescribed threshold in any consecutive twelve-month period.[5]

Section 16 of the VAT Act provides for the calculation of tax payable by the vendor.[6] Output tax, in relation to any vendor, means the tax charged under section 7(1)(a) in respect of the supply of goods and services by that vendor. In other words, output tax is the VAT that the supplier levies on the goods sold and must be paid to SARS by the vendor.[7] The supplies may include services rendered as well as the sale of both capital assets and trading stock. All supplies or transactions are subject to VAT at the standard rate of fifteen per cent unless they are taxed at zero per cent or are specifically exempt.[8]

Input tax is the tax payable by a vendor on supplies made to him, where the goods or services concerned are acquired by him for the purposes of consumption, use or supply in the course of making taxable supplies.[9] Section 17 of the VAT Act deals with permissible deductions in respect of the input tax.[10] Input tax may be deducted from the output tax collected on behalf of SARS on supplies made by the vendor in order to calculate the total VAT payable or refundable to SARS.[11] Where the expenses can be regarded as incurred exclusively for taxable purposes, the vendor will be entitled to claim the full input tax. In a case where the vendor uses the goods or services partly for taxable purposes, only a portion of the input tax can be claimed.[12] Moreover, input tax may not be deducted in instances where VAT is incurred for making exempt supplies or for other non-enterprise purposes.[13]

The VAT Act does not distinguish between capital and revenue transactions. Therefore, if all elements of the VAT Act are met, the vendor would be entitled to claim

[5] Section 11(1A) of the *Rates and Monetary Amounts and Amendment of Revenue Laws Act* 21 of 2018; see also section 23(1)(a) of the *Value-Added Tax Act* 89 of 1991
[6] Section 16(1) of the *Value-Added Tax Act* 89 of 1991.
[7] Section 16(1) read together with section 17 of the *Value-Added Tax Act* 89 of 1991.
[8] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1033.
[9] Section 1 (xxix) of the *Value-Added Tax Act* 89 of 1991; see also Mark Silver & Chris Beneke (eds) *Deloitte VAT Handbook* 12th ed (LexisNexis 2019) 14.
[10] Section 17(1) of the *Value-Added Tax Act* 89 of 1991.
[11]Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1033.
[12] SARS Interpretation Note 70 (Issue 2) 2021 para 3.3.
[13] SARS Interpretation Note 70 (Issue 2) 2021 para 3.3.

input tax.[14] Further, the vendor who acquires an existing enterprise in respect of which no VAT is actually charged because the supply is not taxable, that is to be used wholly or partly in the course of making taxable supplies, is entitled to claim notional input tax. This means that the VAT Act allows vendors to claim notional input tax where second-hand goods are acquired from a non-registered vendor who is a South African resident.[15] It follows that, where both the seller and the purchaser are registered vendors, among other requirements, section 11(1)(e) of the VAT Act makes provisions for zero-rating[16].

If the property is sold as a going concern, the transaction will be zero-rated provided that certain conditions are complied with as per section 11(1)(e) of the VAT Act.[17] A typical example would be the sale of a property subject to an existing lease, provided that the seller leases properties as part of his business (lease enterprise). In circumstances where a leased commercial property is being disposed of as a going concern, the person must take a certain standard of care to ensure that the applicable VAT provisions are applied.[18]

The sale of a business as a going concern is deemed to be a taxable supply of goods.The whole business including any services is deemed to be goods.[19] According to the Concise Oxford English Dictionary, going concern is a business that is operating and making a profit.[20] When disposing of a business, merely selling the assets comprising the business would attract VAT at the standard rate. Therefore, the disposal of an enterprise as a going concern is subject to zero-rate provided that the parties agree in writing that the enterprise, or part thereof, is disposed of as a going

[14] South African Institute of Chartered Accountants 'Payment for early termination of lease', last accessed from https://www.saica.co.za/integritax/1996/376/_Payment_for_early_termination.htm on 24 February 2022.
[15] Section 1(xxix)(b) of the *Value-Added Tax Act* 89 of 1991; see also other related discussion by Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1085.
[15] Section 18A (1) of the *Value-Added Tax Act* 89 of 1991.
[16] Section 1(1)(xxix)(b) of the *Value-Added Tax Act* 89 of 1991; see also other related discussion by Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (2020) 1029 at 1051.
[17] Section 11(1)(e) of the *Value-Added Act Tax* 89 of 1991.
[18]Synmans Inc Attorneys 'The sale of a property as a going concern', last accessed from https://www.snymans.com/advice/sale-property-going-concern/ on 26 February 2022.
[19] Section 8(7) of the *Value-Added Tax Act* 89 of 1991.
[20] Angus Stevenson & Maurice Waite (eds) *Concise Oxford English Dictionary* 12th ed (2011).

concern.[21] The following requirements must be complied with in order for a disposal to qualify for the zero-rate of VAT:

(a) The parties must agree in writing that the enterprise is disposed of as a going concern.
(b) The supplier and the recipient must be registered vendors.
(c) The supply must be of an enterprise or part of an enterprise capable of separate operation.
(d) The supplier and the recipient must, at the time of concluding the agreement, agree in writing that the enterprise, or part thereof, will be an income earning activity on transfer.
(e) The assets necessary for the carrying on of the enterprise must be disposed of.
(f) The supplier and the recipient must agree in writing that the consideration for the supply is inclusive of tax at the rate of zero per cent.[22]

SARS issued an IN 57 that seeks to address the VAT implications of the disposal of an enterprise or a part thereof as a going concern.[23] With reference to what would be required to zero-rate a commercial letting enterprise transaction regarding the transfer of assets that are necessary for carrying on an enterprise, SARS' is of the opinion that the mere transfer of an asset is inadequate to qualify for zero-rating.[24] IN 57 further states that when disposing a fixed property, it must be disposed of together with the lease agreement in order to qualify for the zero-rating.[25] The aforementioned disposals of commercial letting enterprises must also pass the additional test relating to the level of occupancy.[26]

[21] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1029 at 1051.
[22] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[23] SARS Interpretation Note 57 2010 para 1.
[24] SARS Interpretation Note 57 2010 para 4.9; see also Cliffe Dekker Hofmeyr 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm , on 27 February 2022.
[25] SARS Interpretation Note 57 2010 para 4.9.
[26] Cliffe Dekker Hofmeyr 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm , on 27 February 2022.

IN 57 provides guidelines on what will constitute an income-earning activity and it is apparent from these guidelines that the intention should be disposing an income-earning activity. VAT Guide 409 for Fixed Property and Construction list various income activities that would not qualify as the transfer of an income-earning activity.[27] One of the main requirements for the sale of an enterprise to qualify as a going concern is that the income-earning activity of an enterprise must be transferred together with all the assets that are necessary for conducting the enterprise.[28] An example which highlight the issue of concern in this regard, in terms of transactions involving fixed property which would not qualify as going concerns, include tenanted residential properties.

A person carrying on a residential leasing business is making exempt supplies. Such a person is not carrying on an enterprise to that extent, even if is registered as a vendor in respect of other taxable supplies made.[29] The sale of the residential property that is occupied by a tenant cannot be zero-rated in terms of section 11(1)(e) of the VAT Act because the person is not supplying an enterprise as defined in section 1 of the VAT Act.[30] This means that the supply of a residential accommodation will not constitute an income-earning activity. Income-earning activity in this case is, therefore, the making of taxable supplies and must not be confused with income for income tax purposes.[31]

In addition, the position in respect of sale and lease-back agreements is such that no supply of an income-earning activity will have taken place where the seller-occupier of a commercial building will lease it back.[32] A sale and lease back transaction is not zero-rated under section 11(1)(e) of the VAT Act.[33] However, such sale may qualify for the relief under section 8(25) of the VAT Act,[34] in an instance where a fixed property is sold and leased back under section 42 or section 45 of the Income Tax Act.[35]

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[27] SARS VAT 409 Guide for Fixed Property and Construction for Vendors (Issue 6) 2020.
[28] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[29] Section 12(c) of the *Value-Added Tax Act* 89 of 1991; see also other related discussion by SARS Connect (Issue 6) 2017.
[30] Section 1(1) of the *Value-Added Tax Act* 89 of 1991; see also SARS Connect (Issue 6) 2017.
[31] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1052.
[32] Interpretation Note 57 2010 para 4.8.4.
[33] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[34] Section 8(25) of the *Value-Added Tax Act* 89 of 1991.
[35] Section 42 of the *Income Tax Act* 58 of 1962; see also section 45 of the *Income Tax Act* 58 of 1962.

It is a common practice for a tenant to enter into an agreement to purchase a commercial property from its current owner. SARS is of the view that this kind of transaction does not constitute the disposal of a going concern for the purposes of section 11(1)(e) of the VAT Act. Moreover, in a case where the lease agreement is terminated through a commercial property being sold to a tenant, the transaction does not constitute a sale of a going concern. By way of explanation, SARS contends that not all assets, which is fixed property including lease, have been transferred as part of the enterprise disposal.[36] However, in the case where the tenant has entered a sub-lease agreement and subsequently purchases the commercial property from the current owner, the position is not particularly clear. This study seeks to explore the sale of a going concern for VAT purposes with specific emphasis on cases where lease and sub-lease agreements in respect of the enterprise being disposed of are in place.

1.2 Problem Statement

Provided that certain requirements contained in section 11(1)(e) of the VAT Act are met, the sale of the leased commercial property as a going concern can be beneficial to the transacting parties.[37] It is prudent to ensure that a specific clause stating all the requirements is included in an agreement of sale of any going concern in order to bring the transaction within the realm of a zero-rated transaction.[38] Nevertheless, supplies of a going concern generate professional queries and litigation.[39] Jones states that, '*When it comes to tax, fact is often stranger than fiction, none as strange as in the murky world of business -especially when it comes to VAT and the sale of business as a going concern*.'[40]

[36] SARS VAT 409 Guide for Fixed Property and Construction for Vendors (Issue 6) 2020.
[37]Synmans Inc Attorneys 'The sale of a property as a going concern', last accessed from https://www.snymans.com/advice/sale-property-going-concern/ on 27 February 2022.
[38]Fanie Botes 'Selling a business as a going concern- VAT implications', last accessed from https://www.millers.co.za/OurInsights/ArticleDetail.aspx?ArticleID=2843 on 28 February 2022.
[39]Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[40] S Jones, 'Rental property, going concern, and VAT: value-added tax' (2010) 2010(297) *Tax Breaks* 3.

A slightly more complex issue arises where a lessee has entered a sub-letting arrangement with an intention to purchase the commercial property outright from its current owner. Technically, the lessee assumes the role of the owner upon the transfer of the commercial property and will continue the letting enterprise and make taxable supplies subject to VAT at the standard rate. Even though a commercial letting enterprise appears to continue uninterrupted where the lessee now becomes the owner, it is debatable whether the zero-rating will apply to the disposal of the property.[41] An argument counting against zero-rating this kind of transaction is that the lease agreement between two transacting parties terminates on disposal and that the sub-letting agreements, which the lessee has in place with its tenants, do not form part of the assets necessary for the carrying on of the lessor's enterprise. In such case, the standard rate would *'likely'* apply to the disposal and the recipient would be able to claim input tax where the property will be used in the course of making taxable supplies.[42]

In the light of the above, some of the interpretational challenges and uncertainties have been addressed by SARS. Yet, clarity is still needed whether the zero-rating provisions will apply to the disposal of the property in cases where the tenant continues with the enterprise unhindered after acquiring ownership of the property. The guidelines provided by SARS in relation to the 'leasing' enterprise being disposed of as a going concern for VAT purposes, are not set in stone and there is a room for improvement as there are legal gaps that the study wishes to address.

The study is important as it investigates what would be required to zero-rate a transaction with reference to commercial letting enterprises. In addition, SARS is silent regarding the uncertainties surrounding certain scenarios involving main leases and sub-leases. For example, in a case where a sub-lease is already in place and it is subject to the main lease, what happens if the main lease falls away because the tenant becomes the owner? Does that mean that the sub-lease is automatically

[41]South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 27 February 2022.
[42]South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 27 February 2022.

terminated? Therefore, the information above draws attention to the purpose of the study which is to investigate and provide an in-depth analysis of the sale of commercial property as a going concern for VAT purposes with specific emphasis on lease and sub-lease agreements.

1.3 Research Questions

The research seeks to address the following question:

What constitutes a going concern and in particular whether a leased commercial property can be a going concern for the purposes of section 11(1)(e) of the Value-Added Tax Act 89 of 1991.

The study is guided by the following research questions:

(a) What transactions are subjected to VAT in South Africa?
(b) What are the different types of supplies?
(c) What is zero rate, standard rate and exempt supplies?
(d) Does VAT distinguish between capital and revenue transactions?
(e) What is the position with regard to the acquisition of the assets of going concern that will be used to commence an enterprise?
(f) What is the position when a VAT vendor acquires an existing enterprise from a non- VAT vendor?
(g) What is the scope and the application of the zero-rating in respect of a sale of a going concern in section 11(1)(e) of the VAT Act?
(h) What constitute going concern and what are the benefits and shortcomings of disposing a leased commercial property as a sale of going concern?
(i) What is a commercial lease agreement and sub-lease?
(j) What is the international position regarding the transfer of a business as a going concern?
(k) What are the recommendations that can be proposed to improve the current legal framework of the disposal of the leased commercial property as a going concern in South Africa?

1.4 Research methodology and design

The research methodology of the study comprises of the critical textual analysis of the relevant South African literature contained in the primary sources such as legislation together with case law as well as the secondary sources such as the use relevant textbooks and published journal articles, also the use of applicable electronic sources. The study will adopt a qualitative methodology involving the collection and analysis of non-numerical data to understand concepts, opinions and experiences.

The study does not formally incorporate a full comparative study, but it refers to foreign jurisdictions to distil learning points for the purposes of the study. The study gives a brief exposition to the case law and legislation of foreign jurisdictions on the treatment of a sale of a going concern. Accordingly, the study refers to the foreign jurisdictions such as New Zealand, Poland, Australia, and Canada. Notably, the selected jurisdictions have similar legislative provisions substantively. As such, it is significant to consider how these jurisdictions treat a sale of a leasing enterprise as a going concern.

1.5 Chapter Exposition

The study consists of four chapters to meet the objectives of analysing the sale of going concern for VAT purposes with specific emphasis on lease and sub-lease agreements.

Chapter one is a general introduction and orientation to establish firm basis for the application of the VAT Act 89 of 1991. The chapter also includes a brief literature review, problem statement, research question, objectives as well as research methodology and design.

Chapter two sets out the principles of VAT contained in the South African VAT Act, the meaning of going concern and the zero-rating of the sale of a going concern.

Chapter three seeks to identify and explore the requirements of disposing the commercial property as a going concern in terms of the VAT Act comprehensively.

Chapter four deals with the recommendations of the steps that would be needed to address the legal gaps identified. In addition, the chapter provides the general conclusion of the research conducted. It also, concludes whether the objectives have been met to address the research questions.

1.6 Terminology

The study uses technical terms. For the sake of convenience, the definitions of the terms are provided below:

Enterprise means- " 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."[43]

VAT vendor means an enterprise that is registered or required to register for VAT and levies VAT on the selling price of its goods and/or services.[44]

Supply includes "all forms of supply, irrespective of where the supply is made, and any derivative of supply shall be construed accordingly."[45]

Taxable supplies means "any supply of goods or services which is chargeable with tax under the provisions of section 7(1) (a) of the Vat Act, including tax chargeable at the rate of zero per cent under section 11 of the Vat Act."[46]

Goods means "corporeal movable things, fixed property and any real right in any such thing or fixed property."[47]

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[43] Section 1(xvii) of the *Value-Added Tax Act* 89 of 1991.
[44] Section 1(lxiv) of the *Value-Added Tax Act* 89 of 1991; see also other related discussion by South African Revenue Service 'Value Added Tax', last accessed from https://www.sars.gov.co.za/types-of-tax/value-added-tax/8 on 22 February 2022.
[45] Section 1(lv) of the *Value-Added Tax Act* 89 of 1991.
[46] Section 1(lvii) of the *Value-Added Tax* Act 89 of 1991.
[47] Section 1(lii) of the *Value-Added Tax Act* 89 of 1991.

Services means "anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods or money."[48]

Lessor persons who lease or lets a property to another.[49]

Lessee/ Tenant persons who holds a lease of a property.[50]

Second-hand goods are goods which were previously owned and used.[51]

Supplier, **"**in relation to any supply of goods or services, means a person supplying the goods or services."[52]

Recipient, "in relation to any supply of goods or services, means a person to whom a supply is made."[53]

Consideration means, "in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax), whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as an unconditional gift to any association not for gain: Provided that a deposit (other than a deposit on a returnable container), whether refundable or not, given in respect of a supply of goods or services shall not be considered as payment made for the supply unless and until the supplier applies the deposit as consideration for the supply or such deposit is forfeited."[54]

Invoice means "a document notifying an obligation to make payment."[55]

Contract of lease "is a reciprocal agreement in terms of which one party, the lessor, undertakes to confer upon another party, the lessee, the temporary use and enjoyment of a particular thing (*res*) in exchange for a counter-performance."[56]

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[48] Section 1 (lii) of the *Value-Added Tax Act* 89 of 1991.
[49] Angus Stevenson & Maurice Waite (eds) *Concise Oxford English Dictionary* 12th ed (2011).
[50] Angus Stevenson & Maurice Waite (eds) *Concise Oxford English Dictionary* 12th ed (2011).
[51] Section 1(li) of the *Value-Added Tax Act* 89 of 1991.
[52] Section 1(1)(liv) of the *Value-Added Tax Act* 89 of 1991.
[53] Section 1(1)(xliii) of the *Value-Added Tax Act* 89 of 1991.
[54] Section 1(xi) of the *Value-Added Tax Act* 89 of 1991.
[55] Section 1(1)(xxxiii) of the *Value-Added Tax Act* 89 of 1991.
[56] KM Kern 'Letting and Hiring' in Nagel *et al Commercial Law* (2018) 249.

Lease means "an agreement in terms of which – at the end of the term of the agreement, ownership of the property either passes to the consumer absolutely or passes to the consumer upon satisfaction of specific conditions set out in the agreement."[57]

Sublease/sublet is a lease of a property by a tenant to a subtenant.[58]

Cession is the transfer of rights from one person to another.[59]

[57] Section 1(d)(i) of the *National Credit Act* 34 of 2005.
[58] Angus Stevenson & Maurice Waite (eds) *Concise Oxford English Dictionary* 12th ed (2011).
[59] CJ Nagel *et al Commercial Law* 5th ed (LexisNexis 2018) 108.

CHAPTER TWO: THE PRINCIPLES OF VAT IN SOUTH AFRICA, THE MEANING OF GOING CONCERN AND ZERO-RATING OF THE SALE OF A GOING CONCERN

2.1 Introduction

This chapter deals with the principles of VAT in South Africa. It also elaborates further on what constitutes the transfer of a going concern.

2.2 The principles of VAT in South Africa

The South African VAT is based on the destination principle, which means that it is a tax that is charged on goods and services consumed within the borders of South Africa.[60] VAT is collected by registered VAT vendors on the value added by such vendors in course or furtherance of any enterprise carried on by them. It is a tax on the value added by each vendor, which must be determined and paid over to SARS.[61] Put differently, it is imperative to understand different definitions to determine whether a specific transaction attracts VAT either at fifteen per cent or zero per cent. Therefore, VAT is levied if any of the following transactions are made:[62]

(a) the supply of goods or services supplied by the vendor on or after the commencement date in the course of any enterprise carried on by such vendor;[63]
(b) on the importation of any goods into South Africa;[64]
(c) on the supply of any imported services by any person;[65]

[60] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1032.
[61]Section 16(1) of the *Value-Added Tax Act* 89 of 1991*;* see also Mark Silver & Chris Beneke (eds) *Deloitte VAT Handbook* 11th ed (LexisNexis 2017) 13.
[62] Mark Silver & Chris Beneke (eds) *Deloitte VAT Handbook* 11th ed at (LexisNexis 2017) 15.
[63] Section 7(1)(a) of the *Value-Added Tax Act* 89 of 1991.
[64] Section 7(1)(b) of the *Value-Added Tax Act* 89 of 1991.
[65] Section 7(1)(c) of the *Value-Added Tax Act* 89 of 1991.

(d) goods manufactured in South Africa which are subject to excise duty or environmental levy supplied at a price excluding the excise duty or environmental duty and it is subject to VAT, VAT must be levied on the notional excise duty and environmental levy;[66]

(e) deemed supplies of goods and services by the vendor.[67]

For a transaction to be subject to VAT, it should constitute a supply for VAT purposes which is a critical precondition for liability.[68] For a transaction to constitute a supply, there must be at least two persons involved which is the supplier and the recipient of the goods or services.[69] This is supported by the case of *C & E Commissioners v Oliver*,[70] where the court ruled that the essence of the supply is the passing of possession of goods, pursuant to an agreement under which the supplier agrees to part with and the recipient to take possession.[71]

In *Shell's Annandale Farm (Pty) Ltd v C: SARS*,[72] the court had to decide whether VAT was payable in respect of the compensation received on the expropriation of the vendor's land.[73] The court held that *'supply'* as it was previously defined in the VAT Act, suggest a positive act. Some form of act is required for there to be a supply, and, as such, the act of expropriation did not constitute a supply because no act was performed by the person whose land has been expropriated.[74] The court noted that if SARS' interpretation of the term '*supply*' included circumstances where the vendor has not acted, there would be a genuine ambiguity in the definition of supply.[75]

[66] Section 7(3)(a) of the *Value-Added Tax Act* 89 of 1991.
[67] Section 8(1) of the *Value-Added Tax Act* 89 of 1991; see also section 18(3) of the *Value-Added Tax Act* 89 of 1991.
[68] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[69] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[70] *C & E Commissioners v Oliver* [1980] STC 73.
[71] *C & E Commissioners v Oliver* [1980] STC 73 para 353- 354.
[72] *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (62 SATC 97).
[73] *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (62 SATC 97).
[74] As the *contra fiscum* applies where ambiguity is reasonably implied from the wording of the legislation and the legislation imposes a burden upon the subject to, the court held that the interpretation must be adopted which is in favour of the taxpayer: see *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (62 SATC 97) para 17.
[75] *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (62 SATC 97).

As a result, the court applied the *contra fiscum*[76] rule and concluded that the vendor was not liable to account for VAT on the expropriation.[77]

Moreover, the court in *Du Toit v Minister of Transport*,[78] relied on *Shell's Annandale* judgment,[79] and held that no VAT was payable in respect of the expropriation of land for the purposes of constructing a national road and in respect of gravel and stone on the ground that an expropriation did not constitute an act by the vendor for VAT purposes.[80]

The judgment of the case brought about the statutory amendment to the definition of supply.[81] The definition now ensures that a supply does not necessarily require some positive act by the supplier; a mere performance under expropriation is enough to constitute a supply.[82] The term supply is currently defined in the VAT Act to include performance under any sale, rental agreement and an installment credit agreement.[83] Additionally, it includes all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is made.[84]

However, there are certain transactions that are deemed to be a supply for VAT purposes even though they do not meet the requirements of the general definition of supply.[85] Nevertheless, the VAT Act makes provisions for two types of supplies, namely the taxable supplies consisting of supplies at the standard rate or at the zero-rate and exempt supplies.[86]

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[76] Means when in doubt, do not tax: see PWC 'Tax Controversy & Dispute Resolution (TCDR) series **Rules of Statutory Interpretation'** (Issue 1) at 16, last accessed from https://www.pwc.com/ng/en/assets/pdf/tax-controversy-dispute-resolution-issue1, on 21 September 2022.
[77] *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (62 SATC 97).
[78] *Du Toit v Minister of Transport* 2003 (1) SA 586 (C).
[79] *Shell's Annandale Farm (Pty) Ltd v Commissioner for the South African Revenue Service* (62 SATC 97).
[80] *Du Toit v Minister of Transport* 2003 (1) SA 586 (C).
[81] M Botes *Juta's Value-Added Tax,* (Juta 2016) 1-1, 1-2.
[82] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[83] Section 1(1)(lv) of the *Value-Added Tax Act* 89 of 1991.
[84] Section 1(1)(lv) of the *Value-Added Tax Act* 89 of 1991. *The Oxford English Dictionary* defines the verb supply as to furnish or to provide; essentially, the making available to another person of an identifiable asset or service. See other related discussions in *Virginia Land and Estate Co Ltd v Virginia Village Bd of Management* (1961) 1 SA 171 (O).
[85] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1037.
[86] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1032.

Standard rate supplies are taxable supplies on which VAT is levied at fifteen per cent. The general rule is that all taxable supplies or transactions attract VAT at the rate of fifteen per cent unless they are taxed at zero per cent as per section 11 of the VAT Act[87] or are specifically exempt in terms of section 12 of the VAT Act.[88] The standard rated supplies include the long list of land and buildings (fixed property) which is commercial or residential property bought from property developers, capital assets such as furniture production machinery etc. It also includes rental of goods and commercial property such as office space, amongst others.[89]

Zero-rate supplies are taxable supplies on which VAT is charged at zero per cent. Zero-rating is the most beneficial form of VAT treatment to a limited number of transactions in the VAT system.[90] This is because the VAT registered vendors making zero-rated supplies are allowed to claim full input tax credit on the acquisition of all goods and services.[91] In addition, the zero-rated supplies involve the exportation of goods or services or both that are aimed at promoting exports. Zero-rated supplies are aimed at also increasing competitiveness in the international marketplace.[92] However, the application of zero-rate must be accompanied by documentary proof acceptable to the Commissioner of SARS.[93] For example, section 11(1) of the VAT Act list all the goods that are zero-rated including, among others:

> (a) the supply that is made to a registered vendor of an enterprise as a going concern or of a part of an enterprise where that part is capable of separation.[94]

[87] Section 11 of the *Value-Added Tax Act* 89 of 1991.
[88] Section 12 of the *Value-Added Tax Act* 89 of 1991.
[89] SARS VAT 404-Guide for Vendors 2019.
[90] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.1.
[91] Mark Silver & Chris Beneke (eds) *Deloitte VAT Handbook* 12th ed (LexisNexis 2019) 16.
[92] It follows that if VAT on these supplies is levied at the standard rate, South African commodities would become uncompetitive. Moreover, zero-rating also applies to certain non-export transactions, which for socio-economic or political considerations should not bear VAT, but for which exemptions would be inappropriate (mainly because exemption would result in partial or total denial of the input tax deduction): Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.1.
[93] Section 11 (3) of the *Value-Added Tax Act* 89 of 1991; see also Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1047.
[94] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.

(b) Some examples of the zero-rated supplies include certain basic foodstuffs such as the brown bread, dried beans, maize meal, pilchards in tins or cans etcetera. [95]

Further, section 11(2) of the VAT Act list all the zero-rated services. It is noteworthy that goods exported are not consumed in South Africa. Therefore, both goods and services that are exported are zero-rated.[96] This conforms to the basic principle in VAT systems that VAT is levied at the place of consumption.[97]

An exempt supply is a supply on which no VAT is levied, and input tax may not be deducted in connection to the expenditure incurred in respect of these supplies.[98] Therefore, a business that only makes exempt supplies does not carry an enterprise for VAT purposes and such business is unable to register as a vendor irrespective of the number or value of the supplies made.[99] Section 12 of the VAT Act list all supplies that are exempt from VAT. These include:

(a) the supply of any financial services[100] such as the exchange of currency,[101] the issue or transfer of tradable liability or loan, for example a government bond;[102]

(b) the supply by any association not for gain of any donated goods or services or any other goods made or manufactured by such association if at least 80 per cent of the value of the materials used in making or manufacturing such other goods consists of donated goods such as religious and welfare organisations.[103]

It is significant to note that the zero-rate provisions are applicable if the financial services are physically rendered outside South Africa despite being an exempt supply.

[95] Section 11(1)(j) of the *Value-Added Tax Act* 89 of 1991.
[96] Section 11(2) of the *Value-Added Tax Act* 89 of 1991.
[97]SP Van Zyl, 'Determining the place of supply or the place of use and consumption of imported services for Value-Added Tax purposes: Some lessons for South Africa from the European Union' (2013) 25(4) *SA Mercantile Law Journal* 534.
[98] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1054.
[99] SARS VAT 404-Guide for Vendors 2019.
[100] Section 12(a) of the *Value-Added Tax Act* 89 of 1991.
[101] Section 2(1)(a) of the *Value-Added Tax Act* 89 of 1991.
[102] Section 2(1)(c) of the *Value-Added Tax Act* 89 of 1991.
[103] Section 12(b) of the *Value -Added Tax Act* 89 of 1991.

Essentially, the zero-rating of financial services takes precedence over exemptions.[104] In addition, there are cases where a service, on face value, qualify to be both exempt and zero-rated if the service is supplied to a non-resident even if physically rendered in South Africa. Such service may be zero-rated only if it is supplied directly to non-resident, or any other person and both these persons are not present in the Republic at the time the services are supplied.[105]

The VAT Act does not distinguish between capital and revenue transactions. It has become a common practice for the landlords to offer incentives to the lessee with the intention of enticing them into entering into long lease agreements. Generally, such incentives do not take the form of a rent reduction because this has the potential to affect the capital value of the property, which in turn, could result in a lower purchase price if the property were to be sold.[106]

The incentive can take the form of a landlord paying an initial lump sum to a prospective lessee as an inducement to enter a long lease. For income tax purposes, the question that arises in such cases is whether or not the amount received by the lessee constitutes a receipt of a revenue or of a capital nature.[107] However, for VAT purposes, it is apparent that the lump sum paid by the landlord to the lessee will constitute a payment of services rendered and is subject to VAT provided that the lessee is a registered vendor.[108]A tax invoice reflecting the lump sum as well as the VAT charged would have been issued by the lessee. Further, the landlord as a registered vendor would be entitled to claim the VAT paid as an input credit against other amounts of VAT due to SARS.[109]

Furthermore, another example of capital and revenue inputs with VAT implications is where the lessee agrees to terminate the lease prematurely and is paid an amount by the landlord to compensate for the loss of rights.[110] In such case, the lessee is

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[104] Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1055.
[105] Section 11(2)(l) of the *Value-Added Tax Act* 89 of 1991.
[106]South African Institute of Chartered Accountants 'Lease Inducement payment', last accessed from https://www.saica.co.za/integritax/2000/814_Lease_inducement_payments.htm on 24 February 2022.
[107] Beric Croome 'The fiscal considerations in lease inducements' (2021) 25 4.
[108] Beric Croome 'The fiscal considerations in lease inducements' (2021) 25 4.
[109] Beric Croome 'The fiscal considerations in lease inducements' (2021) 25 4.
[110] South African Institute of Chartered Accountants 'Payment for early termination of lease', last accessed from https://www.saica.co.za/integritax/1996/376/_Payment_for_early_termination.htm on 24 February 2022.

providing a service as defined in the Vat Act and receiving a consideration. It follows that, the consideration is deemed to be inclusive of VAT regardless of whether the parties involved mentioned VAT.[111] Accordingly, the lessee who is liable for the output tax, will find that the inducement fee is less than anticipated. Thus, if all the elements of the VAT Act are met, including that the vendor is making taxable supplies, and he is in possession of a tax invoice, the landlord would be entitled to claim input tax.[112]

There are circumstances such as the acquisition of second-hand goods, in which a vendor may be allowed to claim a notional input tax credit even though he may not have incurred the amount of tax directly.[113] For instance, a vendor who acquires an existing enterprise in respect of which no VAT is actually charged because the supply is not taxable, that is to be used wholly or partly in the course of making taxable supplies, is entitled to claim notional input tax that is equal to the tax fraction,[114] of the cash price paid for those goods.[115] This means that the VAT Act allows vendors to claim notional input tax where second-hand goods situated in the Republic and are acquired from a non-registered vendor who is a South African resident.[116] The goods are situated in the Republic at the time the sale is concluded, the time the supply is deemed to have taken place or the time the VAT vendor becomes entitled to claim the input tax deduction.[117]

The requirement of the second-hand goods require that goods must have been previously owned and used.[118] For example, the fixed property which was owned and

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[111] South African Institute of Chartered Accountants 'Payment for early termination of lease', last accessed from https://www.saica.co.za/integritax/1996/376/_Payment_for_early_termination.htm on 24 February 2022.
[112]South African Institute of Chartered Accountants 'Payment for early termination of lease', last accessed from https://www.saica.co.za/integritax/1996/376/_Payment_for_early_termination.htm on 24 February 2022.
[113] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019). Although referred to as 'notional', the deduction is not notional in that sense, but in fact it falls within the ambit of the definition of input tax in section 1 of the VAT Act and therefore, constitutes input tax. The deduction is notional in the sense that it is determined by reference to the notional amount of VAT; see Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[114] Tax fraction $[{}^{15}/_{115}$, being the rate of tax ÷ (100+ rate of tax)].
[115]Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019).
[116] Section 1(1)(xxix)(b) of the *Value-Added Tax Act* 89 of 1991; see also other related discussion by Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (LexisNexis 2020) 1085.
[116] Section 18A(1) of the *Value-Added Tax Act* 89 of 1991.
[117] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[118] Section 1(1) of the *Value-Added Tax Act* 89 of 1991.

used by the seller before the disposal qualifies as second-hand goods since it complies with the said requirement. In essence, all land qualifies as second-hand goods, presumably on the basis that the land, while presently unoccupied, would have been used at some point in the past.[119] *In LR McLean Co Ltd v CIR*,[120] decided in New Zealand, the court noted that:

> "There is some difficulty in describing land as second-hand goods. Land is a good as defined. It is not normally thought of as second-hand, but it is never new. Land has always belonged to someone else and like an heirloom or some piece of antique furniture is the very essence of second-hand."[121]

This court decision support the fact that it is not necessary for the seller to have previously used the goods, merely that they must have been used by someone else.[122] Moreover, primary produce and newly manufactured goods do not qualify to be second-hands goods as they cannot have been '*used*' merely by reason of the goods having been handled by the seller before they are sold. Therefore, '*used*' in this context indicates that the goods have at least been applied or utilised by the seller in his operations in some way.[123] It is important to note that, the VAT vendor is only entitled to an input tax deduction on the acquisition of second-hand goods on the lessor of any consideration in money given by the vendor for the supply or the open market value of the supply.[124] In addition, the payment concerned must have been made during the relevant tax period before the appropriate input tax deduction in respect of second-hand goods can be claimed in that period. The payment must be one that reduces or discharges any obligation irrespective whether it is an existing obligation or an

[119] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019).
[120] *LR McLean Co Ltd v CIR* (1993) 15 NZTC 10,100; and on appeal to the Court of Appeal (1994) 16 NZTC 11,370.
[121] *LR McLean Co Ltd v CIR* (1993) 15 NZTC 10,100; and on appeal to the Court of Appeal (1994) 16 NZTC 11,370.
[122] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[123] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8.
[124] Section 1(1)(xxix)(b) of the Value-Added Tax Act 89 of 1991; see also other related discussion by Varusha Moodaley 'Binding General Ruling 57: SARS clarifies whether the transfer duty is included in the calculation of notional input tax credits claimed on second hand fixed property', last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Tax/tax-alert-28-october-Binding-General-Ruling-57-SARS-clarifies-whether-transfer-duty-is-included-in-the-calculation-of-notional-input-tax-credits-claimed-on-second-hand-fixed-property.html on 26 February 2022.

obligation that will arise in the future relating to the purchase price of the second-hand goods.[125]

In an event where the vendor repossesses goods or where goods are surrendered under an instalment credit agreement from a debtor who is not a registered vendor; a deduction of input tax is also available. The input tax that may be deducted is an amount equal to the tax fraction of the consideration in money deemed to be payable on the deemed supply by the debtor to the vendor.[126]

In respect to the acquisition of the fixed property, the condition relating to the deduction of notional input tax is that the claim is limited to the amount of the transfer duty actually paid.[127] In the case of *ABC PTY (LTD) v The Commissioner for the South African Revenue Service,*[128] the court had to decide whether the words 'any consideration in money given by the vendor' includes the payment of transfer duty.[129] The court in this case ruled in favour of the taxpayer and concluded that transfer duty must be included in the *'*consideration*'* paid for fixed property and stated that its conclusion was based on the clear language of the legislation, and that the conclusion was sensible and not unbusiness-like. Moreover, the court held that this decision was supported by the purpose of the notional input tax deduction allowed in respect of second-hand goods, the purpose being that it was introduced to eliminate double VAT charges on the same value added by allowing notional input relief in the absence of actual inputs.[130]

Further, SARS issued Binding General Ruling ("BGR") in which it clarifies whether the term '*consideration*' includes an amount of transfer duty paid or payable on the acquisition of second-hand fixed property for the purposes of calculating a notional input tax deduction available to vendors who acquire fixed property from non-vendors for taxable purposes.[131] Interpretation Note 70 ("IN 70") explains the definition of

[125] Section 16(3)(*a*)(ii)(*aa*) of the *Value-Added Tax Act* 89 of 1991
[126] Section 16(3)(c) of the *Value-Added Tax Act* 89 of 1991.
[127] Varusha Moodaley 'Binding General Ruling 57: SARS clarifies whether the transfer duty is included in the calculation of notional input tax credits claimed on second hand fixed property' last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Tax/tax-alert-28-october-Binding-General-Ruling-57-SARS-clarifies-whether-transfer-duty-is-included-in-the-calculation-of-notional-input-tax-credits-claimed-on-second-hand-fixed-property.html on 26 February 2022.
[128] *ABC PTY (LTD) v The Commissioner for the South African Revenue Service* 2020 83 SATC 396.
[129] *ABC PTY (LTD) v The Commissioner for the South African Revenue Service* 2020 83 SATC 396 para 11.
[130] *ABC PTY (LTD) v The Commissioner for the South African Revenue Service* 2020 83 SATC 396 paras 21-23.
[131] SARS Binding General Ruling (VAT) 57 2021.

consideration as the purchase price that must be paid to the supplier of goods or services by the recipient.[132] The ruling states that the term 'consideration' as defined in section 1(1) of the VAT Act does not include any transfer duty imposed in section 2 of the Transfer Duty Act.[133] Consequently, the amount of transfer duty paid or payable by a vendor to acquire second-hand fixed property for taxable purposes cannot be included in the calculation of any notional input tax deduction which may be available to that vendor under section 16(3)(a)(ii)(aa) and (bb) or 16(3)(b)(i).[134]

2.3 The meaning of a going concern and the zero-rating of the sale of a going concern

Rental property, going concern and VAT provisions are primary sources of legal uncertainty in commercial property transactions resulting from ambiguity in the law.[135] Van Oordt and Krever accurately submit that the supply of a going concern gives rise to professional queries and litigation.[136] In order to remove cash-flow problems and provide relief to the purchasers of operating businesses, it is common practice to zero-rate the sale of a going concern.[137]The question of what constitutes a going concern and whether a commercial letting enterprise can be going concern for the purposes of section 11(1)(e) of the VAT Act, is a question that has been raised in many jurisdictions.[138] SARS is increasingly auditing taxpayers who have zero-rated the sale of a fixed property as a going concern in terms of section 11(1)(e) of the VAT Act.[139] Buttrick contends that one particular concern is how SARS is rigorously attempting to find arguments that are set to unravel the application of section 11(1)(e) of the VAT Act.[140] Put differently, Buttrick is of the view that such act can be described as a desperate attempt to increase tax collection through imposing penalties and

[132] SARS Interpretation Note 70 (Issue 2) 2021.
[133] *Transfer Duty Act* 40 of 1949.
[134] SARS Binding General Ruling (VAT) 57 2021.
[135] Jones, S 'Rental property, going concern, and VAT: value-added tax' (2010) 2010 *Tax Breaks* 3.
[136] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[137] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) 159-176.
[138] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[139] D Buttrick, 'Zero-rated property sales under scrutiny: value-added tax' (2010) 2010(294) *Tax Breaks* 7.
[140] D Buttrick,'Zero-rated property sales under scrutiny: value-added tax' (2010) 2010 (294) *Tax Breaks* 7.

interest.[141] It appears that the increase in SARS' revenue collection does not challenge the formal procedures required for the application of section 11(1)(e), but rather the underlying requirement that there was a sale of a going concern.[142]

Evidently, the absence of the statutory definition of the concept of going concern brings about legal uncertainty particularly in the VAT treatment of the leasing enterprise. It is important to note that devising a statutory meaning to a transfer of a business as a going concern could create an inflexibility problem and may, in certain circumstances, potentially lead to tax avoidance.[143] Nonetheless, one can obtain guidance from IN 57 on the definition of going concern.

IN 57 defines the sale of a business as a going concern as the circumstances in which a person sells all or a part of an enterprise which is capable of separate operation and constitutes an income-earning activity in its own right at the date of the sale.[144] Another interrelated description of the concept of going concern appears in the case of *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others*.[145] The court described the concept of going concern in the context of the Labour Relations Act 66 of 1995 as:

> "What is meant by "going concern" is a "business in operation" and whether transfer has occurred is a factual matter, to be determined objectively by reference to all relevant factors considered cumulatively, the list not being exhaustive and none of the factors being individually decisive."[146]

Comparably, section 2(1) of the New Zealand GST defines going concern:

> " *in relation to a supplier and a recipient, means the situation where-*

[141]D Buttrick,'Zero-rated property sales under scrutiny: value-added tax' (2010) 2010 (294) *Tax Breaks* 7.
[142] D Buttrick,'Zero-rated property sales under scrutiny: value-added tax' (2010) 2010 (294) *Tax Breaks* 7.
[143] South Africa *Report of the Value-added Tax Committee (VATCOM)* (1991) 92.
[144] SARS Interpretation Note 57 2010 para 4.11.
[145] *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011(3) SA 148 (SCA).
[146] *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011(3) SA 148 (SCA) para 33.

(a) there is a supply of a taxable activity, or of a part of a taxable activity where that part is capable of separate operation; and

(b) all of the goods and services that are necessary for the continued operation of that taxable activity or that part of a taxable activity is supplied to the recipient; and

(c) *the supplier carries on, or is to carry on, that taxable activity or that part of a taxable activity up to the time of its transfer to the recipient*."[147]

Thus, a supply of an enterprise or part of an enterprise which is capable of separate operation to a registered vendor is subject to zero-rate provided that the requirements contained in section 11(1)(e) of the VAT Act are fulfilled.[148]

The acquisition by a vendor of an enterprise or a part of it as a going concern capable of separate operation from another vendor is zero-rated provided that all the requirements in section 11(1)(e) of the VAT Act are met.[149] Accordingly, the supply is zero-rated regardless that the purchaser intends to use the enterprise or part of it for non-taxable purposes.[150] In such an event, section 18A (1) states that:

"*Subject to the provisions of section 8(2), where-*

(c) goods or services were deemed by subsection (4) to have been supplied to him,

(not being goods or services in respect of the acquisition of which by the vendor a deduction of input tax was denied by section 17(2) or would have been denied if this Act had been applicable prior to the commencement date) and such goods or services were acquired, manufactured, assembled, constructed or produced by such vendor wholly or partly for the purpose of consumption, use or supply in the course of making taxable supplies, such goods or services shall, if they are subsequently applied by him (otherwise than in the circumstances contemplated in section 8(9)) wholly for a purpose other than the said purpose be deemed to have been supplied by him by way of a taxable supply by him in the course of his enterprise."[151]

[147] Section 2(1) of the *Goods and Services Tax Act* 141 of 1985.
[148] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[149] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[150] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 7.8A-7-30.
[151] Section 18A(1)(c) of the *Value-Added Tax Act 89* of 1991.

It follows that, the practical implication of this provision is that since the supply would have been zero-rated, the vendor becomes liable for output tax to the extent of the non-taxable use of the enterprise although, the purchasing vendor would have not been liable for any tax on the acquisition of the enterprise or part of it.[152]

Further, section 17(1) of the VAT Act makes provisions for the vendor's deduction of input tax or notional input tax for goods or services that are acquired for mixed-use purposes.[153] When the seller applies the assets of a going concern mainly for the making of taxable supplies that is more than 50 per cent, but also partly for other non-taxable purposes, all of these assets are deemed to be part of the going concern disposed of and the full selling price is zero-rated.[154] Section 11(1)(e)(ii) of the VAT Act provides that:

> *"(ii) where the enterprise or part, as the case may be, disposed of as a going concern has been carried on in, on or in relation to goods or services applied mainly for purpose of such enterprise or part, as the case may be, and partly for other purposes, such goods or services shall, where disposed of to such recipient, for the purposes of this paragraph and section 18A be deemed to form part of such enterprise or part, as the case may be, notwithstanding the provisions of paragraph (v) of the proviso to the definition of "enterprise" in section 1."*[155]
>
> *[Para. (e) substituted by s.17(a) of Act No 136 of 1992 and by s.13(1) of Act No 20 of 1994.]*

Furthermore, the vendor acquiring an enterprise or part of it as a zero-rated supply of a going concern must account for output tax on any goods and services that are part of the enterprise to be used for non-taxable purposes.[156] However, if the intended use of the enterprise or part of it, in the course of making taxable supplies is equal to not less than 95 per cent of the total intended use, the enterprise or part of it is considered as having been acquired wholly for the purpose of consumption, use or supply in the course of making taxable supplies.[157]As a result, the purchasing vendor is not required

[152] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 7.8A-7-30 – 7-31.
[153] Section 17(1) of the *Value-Added Tax Act* 89 of 1991.
[154] Section 8(16)(a) of the *Value-Added Tax Act* 89 of 1991; see also section 11(1)(e)(ii) of the *Value-Added Tax Act* 89 of 1991.
[155] Section 11(1)(e)(ii) of the *Value-Added Tax Act* 89 of 1991.
[156] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 7.9-7-31.
[157] Section 18A of the *Value-Added Tax Act* 89 of 1991; see also Interpretation Note 57 2010 para 4.14.

to account for output tax in these circumstances or make an adjustment contemplated in section 18A of the VAT Act.[158]

Moreover, section 18A (2) of the VAT Act provides that:

> *"Notwithstanding anything in this Act, the value of the supply deemed by subsection (1) to have been made by the vendor, shall be the full cost to such vendor of acquiring such enterprise, part, goods or services, as the case may be, reduced by an amount which bears to the amount of such full cost the same ratio as the intended use or application of the enterprise, part, goods or services in the course of making taxable supplies bears to the total intended use or application of the enterprise, part, goods or services: Provided that –*
>
> *(a) the cost to such vendor of acquiring such enterprise, part, goods or services may be reduced by any amount which represents an appropriate allocation of such full cost to the acquisition of any goods or services which form part of such enterprise or part of an enterprise and in respect of the acquisition of which by the vendor a deduction of input tax would be denied in terms of section 17(2)".*[159]

Put differently, the effect of section 18A of the VAT Act is that the vendor may claim an additional input tax credit that was previously denied in respect of the non-taxable portion of the supply. In an instance where the partial input tax was initially claimed, an additional input tax credits adjustment is provided for, with the aim of allowing the deduction for the unclaimed portion of the input tax.[160] The input tax credit relate to the change in use in respect of the portion of going concern goods acquired partly for non-taxable purposes that are, in due course, wholly applied for making taxable supplies of a going concern.[161]

Section 18A, therefore, creates a consistent VAT treatment on the aforementioned transaction. After the transfer of an enterprise as a going concern, the purchasing vendor is required to account for output VAT on the portion of the purchase price of a

[158] SARS Interpretation Note 57 2010 4.14; see also section 18A (1) of the *Value-Added Tax Act* 89 of 1991.
[159] Section 18A (2) of the *Value-Added Tax Act* 89 of 1991.
[160] Section 16(3)(h) of the Value-Added Tax Act 89 of 1991; see also other related discussion by Madeleine Stiglingh 'Value-added tax (VAT)' in Alta Koekemoer, Linda van Heerden & Jolani S Wilcocks et al *SILKE: South African Income Tax* (2020) 1029 at 1099.
[161] Section 18A (1) of the *Value-Added Tax Act* 89 of 1991.

zero-rated supply.[162] This output tax adjustment is equivalent to the amount of input VAT.[163] In other words, a contract for the sale of an enterprise concluded in circumstances where the entire enterprise is not disposed of as a going concern will require an apportionment to be made between the activities which are disposed of as a going concern section 11(1)(e) and the portion which is not a going concern section 7(1)(a).[164]

However, the position is still not clear in a case where a vendor acquires a building consisting of shops for letting purposes and there are multiple lease agreements in place. Subsequently, the vendor decides to dispose of one property however, this property or an asset is dependent on the main enterprise and cannot operate without it. This raises an issue of whether the enterprise is capable of separate operation for the purpose of constituting a going concern or does it require an apportionment as stipulated in section 18A of the VAT Act.

Nevertheless, it is crucial to note that IN 57 is not law. In the case of the *Commissioner for SARS v Marshall NO*,[165] the court ruled that that interpretation notes are not binding either on the courts or taxpayers. However, they have a persuasion explanation in relation to the interpretation and application of the statutory provisions in question.[166] Suffice to say, when interpreting the law, the courts should have no regard to SARS interpretation notes. Therefore, both SARS and the taxpayers must be cautious when relying on interpretation notes.

2.4 Conclusion

The main findings of this chapter indicates that the VAT Act does not differentiate between capital and revenue transactions as such, a sale of a capital asset in the form of an enterprise disposed of as a going concern qualify for zero-rating provisions. Further, the absence of the statutory definition of the concept of a going concern give

[162] SARS Interpretation Note 57(issue 2) 2010 para 4.13.1.
[163] SARS Interpretation Note 57(Issue 2) 2010 para 4.13.1.
[164] SARS Interpretation Note 57(issue 2) 2010 para 4.13.1.
[165] *Commissioner for the South African Revenue Service v Marshall NO* 2017 (1) (SA) 114 (SCA.
[166] *Commissioner for the South African Revenue Service v Marshall NO* 2017 (1) (SA) 114 (SCA) para 33.

rise to legal uncertainty particularly where a 'leasing' enterprise is concerned. Furthermore, the chapter shows that the question of an apportionment of input tax is one of the most problematic areas under any VAT system. The submission is that SARS should provide a clear explanation and guidance as to what happens if a vendor disposes of a part of property that relies on the main enterprise to be active and operating; does the transaction constitute a sale of a going concern or must an apportionment apply. The following chapter deals with the requirements of the supply of an enterprise or part of it as a going concern.

CHAPTER THREE: THE REQUIREMENTS OF THE SUPPLY OF AN ENTERPRISE AS A GOING CONCERN IN TERMS OF THE VAT ACT

3.1 Introduction

The disposal of an enterprise as a going concern may be subject to VAT at the rate of zero per cent provided that the requirements of section 11(1)(e) of the VAT Act are met. As such, in a case where a commercial letting enterprise is being disposed of as a going concern, particular care must be taken by the person making the supply to ensure that the correct VAT rate is applied. Therefore, this chapter seeks to identify and explore the requirements which must be fulfilled before a supply of an enterprise or a part of it that is capable of separate operation as a going concern may be zero-rated. The study compares the South African position in relation to the sale of a going concern with the position in the New Zealand. The reason being that the South African VAT broadly follows the New Zealand model, and it is a modern VAT system.[167] Section 11(1)(m) of the New Zealand GST Act governs the supply of a going concern.[168] Accordingly, the study shall refer to the interpretation of the New Zealand GST Act and case law where such interpretation assists in understanding the requirements for the zero-rating to apply. For example, the New Zealand courts dealt with the requirement that the supply must be an income-earning activity at the time of the transfer extensively. For the purposes of this discussion, the words *'transfer'* and *'disposed of'* are used interchangeably.

[167] Alain Charlet & Jeffrey Owens 'An International Perspective on VAT' (2010) 59(12) Tax Notes International 943 at 945. See also Davis Tax Committee 'First Interim Report on VAT to the Minister of Finance' (December 2014) at 75 (fn 173): Andrew Maples & Adrian J Sawyer 'The New Zealand GST and its Global Impact:30 Years On', last accessed from:https://www.researchgate.net/publication/315782694_The_New_Zealand_GST_and_its_Global_Impact_30_Years_On on 10 January 2023.

[168] Section 11(1)(m) of the *Goods and Services Tax Act* 141 of 1985.

3.2 Requirements for the supply of an enterprise as a going concern

In order for the contracting parties to lawfully zero-rate the disposal of fixed property as a going concern,[169] it is necessary to comply strictly with the provisions contained in section 11(1)(e) of the VAT Act. These requirements are similar to the requirements incorporated in section 11(1)(m) of the New Zealand GST Act. Where the transfer of an enterprise as a going concern qualifies for the relief contained in subsection 42,44,45 or 47 of the Income Tax Act,[170] the sale will, effectively, be a non-event for VAT purposes on the basis that the seller and the purchaser are deemed to be one and the same person.[171] In such an instance, the supply will not be zero-rated and will therefore, not attract VAT at all.[172]

The following requirements must be complied with in order for a disposal of an enterprise or a part of it to qualify for zero-rate. Section 11(1)(e) of the VAT Act provides that:

> *"Where, but for this section, a supply of goods would be charged with tax at the rate referred to in section 7(1), such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where-*
>
> *(e) the supply is to a registered vendor of an enterprise or part of an enterprise which is capable of separate operation, where the supplier and the recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern: Provided that-*
>
> *(i) such enterprise or part, as the case may be, shall not be disposed of as a going concern unless-*
>
> *(aa) such supplier and such recipient have, at the time of the conclusion of the agreement for the disposal of the enterprise or part, as the case may be, agreed in*

[169] The sale of a going concern is not limited to the sale of a fixed property as an enterprise, it may consist both of movable and immovable property. For the purposes of the subject of this study, reference is made to the disposal of fixed property only.
[170] *Income Tax Act* 58 of 1962.
[171] Section 8(25) of the *Value-Added Tax Act* 89 of 1991.
[172] M Botes *Juta's Value-Added Tax* (Juta 2016) 11-11.

writing that such enterprise or part, as the case may be, will be an income earning activity on the date of transfer thereof; and

(bb) the assets which are necessary for carrying on such enterprise or part, as the case may be, are disposed of by such supplier to such recipient; and

[Sub-para. (bb) amended by s.85 (1) (b) of Act No. 53 of 1999.]

(cc) in respect of supplies on or after 1 January 200, such supplier and such recipient have at the time of the conclusion of the agreement for the disposal of such enterprise or part, as the case may be, agreed in writing that the consideration upon for that supply is inclusive often at the rate of zero per cent;"[173]

[Sub-para. (cc) inserted by s 85(1)(c) of Act No.53 of 1999.]

3.2.1 Supply of an enterprise or a part of it must be capable of separate operation

The first requirement provides that the enterprise or part of it that is capable of separate operation should, without any further action on the part of the recipient be capable of uninterrupted action by the recipient. [174] Thus, the transfer of stand-alone divisions of business or some of the outlets of a business which operated at more than one geographical location, could qualify for zero-rating.[175] A mere separation alone is inadequate; separate operation is necessary. In addition, section 11(1)(e) of the VAT Act deals with a single supply of an enterprise as a going concern, and not the supply of assets of the enterprise, for example fixed property.[176] Therefore, a part of an enterprise that is separated must be capable of making taxable supplies in the course and/or furtherance of an enterprise.[177] Accordingly, the taxable supplies of the separated enterprise must exceed the minimum VAT threshold.[178] Section 8(15) of the VAT Act states that:

[173] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[174] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[175] SARS Interpretation Note 57 2010 para 4.11; see also New Zealand *Goods and Services Tax Guide* para 13-460/ 36.
[176] M Botes *Juta's Value-Added Tax* (Juta 2016) 11-11.
[177] SARS Interpretation Note 57 2010 para 4.11.
[178]Section 23(1) of the *Value-Added Tax Act* 89 of 1991.

> "*where a single supply of goods or services or of goods and services would, if separate considerations had been payable, have been charged with tax in part at the rate applicable under section 7(1)(a) and in part at the rate applicable under section 11, each part of the supply concerned shall be deemed to be a separate supply*."[179]

Section 8(15) of the VAT Act is triggered in cases where a vendor makes a single supply of goods and only one consideration is payable for the single supply[180]. This means that a single supply would be subject to tax partly at the standard rate and partly at zero-rate. In other words, the section deems each part of the supply as a separate part from other parts.[181] Such apportionment requires a sufficient distinction between the parts of the supply to make it reasonable to sever them and apportion accordingly. Therefore, a contract for the sale of an enterprise concluded in circumstances where the entire enterprise is not disposed of as a going concern will require an apportionment to be made between the activities which are disposed of as a going concern as per section 11(1)(e) of the VAT Act and the portion which is not a going concern as per section 7(1)(a) of the VAT Act.[182]

In *Diageo South Africa (Pty) v CSARS*,[183] the court dealt with the proper interpretation and application of section 8(15) of the VAT Act,[184] in the context of the single supply of advertising and promotional goods and services ("A&P' services") to non-resident entities.[185] In the case, a South African resident made supplies of the A&P services to a non-resident. The A&P services included advertising in different media, events etcetera. In addition, the taxpayer supplied the promotional products such as branded glasses, towels and keyrings, to the consumers to enhance the services, distributed

[179] Section 8(15) of the *Value-Added Tax Act* 89 of 1991; see also other related discussion by M Ngidi 'A critical analysis of the South African vat single and composite supply rules' University of Pretoria, 2020 .
[180] Section 8(15) of the Value-Added Tax Act 89 of 1991; see other related discussion by Samuel Mariens 'Taking an interpretative approach on the deeming provision of s 15(8) of the VAT Act', last accessed from https://www.derebus.org.za/taking-an-interpretative-approach-on-the-deeming-provision-of-s-815-of-the-vat-act/, on 22 September 2022.
[181] M Ngidi 'A critical analysis of the South African vat single and composite supply rules' University of Pretoria, 2020.
[182] SARS Interpretation Note 57 2010 para 4.11.
[183] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020).
[184] Section 8(15) of the *Value-Added Tax Act* 89 of 1991.
[185] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 1.

and consumed within the Republic.[186] The taxpayer issued an invoice in which he did not differentiate between A&P services rendered and goods such as promotional merchandise consumed within Republic and levied a fee for the supplies.[187] Accordingly, he levied VAT on the fee at the rate of zero per cent because the service constituted an exported service that is zero-rated for VAT purposes .[188]

Further, the court had to decide whether the taxpayer supplies composite service or independent supplies. The court ruled in favour of SARS and stated that the supply constituted two separate supplies as, on one hand, the taxpayer distributed the promotional merchandise in the Republic, and on the other hand, the advertising and promotional service were zero-rated as exported services supplied to a non-resident, not present in the republic at the time the services were rendered and related to the movables in the Republic.[189] Furthermore, the court stated that:

> "Simply put, the purpose of s 8(15) is to provide, by way of a deeming provision, for a situation where the provisions of ss 7(1)(a) and 11(2)(l) of the Act are implicated in a single supply of goods, or services, or goods and services so that the appropriate rate of VAT is charged in respect of the particular goods or services, or goods and services supplied."[190]

In reaching this judgment, the court stated that for section 8(15) of the VAT Act to find application, it must be determined whether '*each part of a single supply*' falls within the scope of section 8(15) of the VAT Act.[191] The court relied on its own findings in the *CSARS v British Airways plc*,[192] case where the meaning of section 8(15) of the VAT Act was described as follows:

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[186] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 2-7.
[187] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 2.
[188] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 2; see section 11(2)(l) of the *Value-Added Tax Act* 89 of 1991.
[189] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 18.
[190] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 14; see detailed discussion by M Ngidi 'A critical analysis of the South African vat single and composite supply rules' University of Pretoria, 2020.
[191] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 17.
[192] *Commissioner for the South African Revenue Service v British Airways plc* 2005 (4) SA 231 (SCA).

> "The section applies to a single supply of goods or services comprising parts that would each, if they had been supplied separately, have attracted a different rate of tax. In such cases, each part of the single service is deemed to be a separate supply of goods or services – although, in truth, they are not – with the result that the separate parts each attract the tax that is levied by s 7 but at different rates (0% for that part of the service that, had it been separately supplied, would have fallen within s 11, and 14% for the remainder)."[193]

In *Diageo South Africa (Pty) v CSARS*, the court held that the section does no more than apportion the rate at which the vendor is required to pay the tax that is levied by section 7 when the vendor has supplied different goods or services as a composite whole.[194] In essence, if a part of a taxable activity is supplied as a going concern, that part must also be a taxable activity in its own right.

3.2.2 The agreement in writing between the parties

The second requirement is that the disposal of an enterprise is zero-rated if the parties agree in writing that the enterprise, or part of it is disposed of as a going concern.[195] The zero-rating may not apply in instances where the parties expressly states that an enterprise is being disposed of as a going concern whereas fails to express this aspect in writing.[196] This requirement seeks to prevent any disputes that may arise between the parties after the conclusion of the lease agreement in relation to the proper VAT

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[193] *Commissioner for the South African Revenue Service v British Airways plc* 2005 (4) SA 231 (SCA).
[194] *Diageo South Africa (Pty) v Commissioner for the South African Revenue Service* (330/2019) ZASCA 34 (03 April 2020) para 17.
[195] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[196] SARS Interpretation Note 57 2010 para 4.10; see also Mark Silver & Chris Beneke (eds) *Deloitte VAT Handbook* 11th ed (LexisNexis 2017) 89. Where an agreement for the sale of an enterprise as a going concern was concluded before, on or after 25 November 1994, but the parties did not agree in writing that the enterprise is being disposed of as a going concern (as they were unaware of the amendment to section 11(1)(e)) they may enter into a separate agreement – based on the original contract).The written agreement must, together with any other written agreements or documents relating to the sale, be retained for the purposes of 11(3) of the VAT Act 89 of 1991.This is according to the Practice Note 14 which is withdrawn and replaced by IN 57: see SARS VAT Practice Note No 14. The concession is not carried forward to IN 57 because SARS has reported cases where vendors have abused and manipulated the concession that a separate agreement could be entered into, for the purposes of obtaining undue VAT benefits. Consequently, from November 2000, parties entering into new contracts are required to strictly comply with the requirements of zero-rating the sale of a going concern: see VATNEWS No 15 and VAT 404 Guide para 6.3.3.

treatment. It is also to ensure that the parties do not request SARS to mediate in such disputes.[197] Therefore, if there is no such agreement, then the sale cannot be zero-rated even if the enterprise is indeed disposed of as a going concern.[198]

In addition, in terms section 11(3) of the VAT Act, the vendor disposing of the property as a sale of a going concern must retain the written agreement(s) and other written documents relating to the sale.[199] The documents will serve as documentary proof that supports the vendor's entitlement to apply for zero-rating.[200] Further, section 30 of the Tax Administration Act ("TAA")[201] provides taxpayers with ways in which the documentary evidence must be retained. It states that the documents must be retained in an original form, in an orderly fashion and in a safe place;[202] in a form prescribed by the Commissioner in a public notice, which may include an electronic form;[203] or in a form specifically authorised by a senior SARS official that is acceptable to the official.[204] Furthermore, the documents must be in the possession of the vendor within 90 days calculated from the earlier of the time an invoice issued or any time the payment is received by the vendor in respect of the supply.[205] A vendor who fails to provide the documentary evidence within the 90-day period, is required to account for output VAT by applying the tax fraction to the consideration for the supply.[206]

3.2.3 The seller must be a VAT vendor

The third requirement is that the seller must be a registered VAT vendor.[207] Section 7(1) of the VAT Act entails that taxable supplies must be made by the vendor. The

[197] Interpretation Note 57 2010 para 4.10; see also Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8- 5.18-20.
[198] SARS Interpretation Note 57 2010 para 4.10.
[199] A copy of the contract of sale between the seller and the purchaser confirming all the requirements for the disposal as a going concern, the supplier's copy of zero-rated tax invoice and the recipient's Notice of Registration or evidence that the purchaser has applied for registration prior to concluding the agreement: see Interpretation Note 31 (Issue 4) 2016 para 5.1 and IN 57.
[200] Section 11(3) of the *Value-Added Tax Act* 89 of 1991; see also Interpretation Note 31 (Issue 4) 2016 para 5.1.
[201] Section 30(1) of the *Tax Administration Act* 28 of 2011.
[202] Section 30(1)(a) of the *Tax Administration Act* 28 of 2011.
[203] Section 30(1)(b) of the *Tax Administration Act* 28 of 2011.
[204] Section 30(1)(c) of the *Tax Administration Act* 28 of 2011.
[205] SARS Interpretation Note No 31(Issue 4) 2016 para 8.
[206] SARS Interpretation Note No 31(Issue 4) 2016 para 8.
[207] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991; see also SARS Interpretation Note 57 2010 para 4.2.

vendor is required to levy VAT on its taxable supplies.[208] A vendor is defined in section 1 of the VAT Act as any person who is registered or is required to be registered as a vendor for VAT purposes but has not applied for registration.[209] Broadly speaking, a vendor is a compulsory registrant that carries on an enterprise and whose total value of taxable supplies exceed or is expected to exceed R1 million per annum.[210] As such, in order for a person to dispose of any enterprise or a part of it which is capable of separate operation at zero-rate, the seller must be a registered VAT vendor.[211]

3.2.4 The purchaser must be a registered VAT vendor

The fourth requirement is that the purchaser must be a registered vendor. Only a taxable supply to a registered person of a taxable activity or a part of it that is capable of a separate operation may qualify for zero-rating.[212] IN 57 provides that if the purchaser is not registered as a vendor at the time the agreement is concluded, the supply cannot be zero-rated and will attract VAT at the rate of fifteen per cent.[213] It is noteworthy, that form VAT 103 is no longer issued by SARS upon registration, it issues a standard Notice of Registration for all kinds of tax.[214] Section 23(1) of the VAT Act provides that:

> *"Every person who, on or after the commencement date, carries on any enterprise and is not registered, becomes liable to be registered—*
>
> *(a) at the end of any month where the total value of taxable supplies made by that person in the period of 12 months ending at the end of that month in the course of carrying on all enterprises has exceeded R1 million.*

[208] Section 7(1)(a) of the *Value-Added Tax Act* 89 of 1991.
[209] Section 1(1) of the *Value-Added Tax Act* 89 of 1991; see also SARS Interpretation Note 57 2010 para 4.2. The meaning of a vendor also referred to as a supplier is not only limited to registered VAT vendors. A vendor is a general term for a person or company that sells goods or renders services: Angus Stevenson & Maurice Waite (eds) *Concise Oxford English Dictionary* 12th ed (2011).
[210] Section 23(1) of the *Value-Added Tax Act* 89 of 1991.
[211] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991; see also SARS Interpretation Note 57 2010 para 4.2.
[212] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[213] SARS Interpretation Note 57 2010 para 4.3-4.5.
[214] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-22.

[Para.(a) amended by s. 92 (a) of Act No. 53 of 1999 and substituted by s. 113 (1) (a) of Act No. 60 of 2008 with effect from 1 March, 2009.]'.[215]

(3) Notwithstanding the provisions of subsections (1) and (2), every person who satisfies the Commissioner that on, or after the commencement date –

(c) that person intends to carry on an enterprise from a specified date, where that enterprise will be supplied to him as a going concern and the total value of taxable supplies made by the supplier of the going concern from carrying on that enterprise or part of the enterprise which will be supplied has exceeded R50 000 in the preceding period of 12 months, may apply to the Commissioner for registration."[216]

[Para. (c) substituted by s. 93 (1) (b) of Act No. 17 of 2009 with effect from 1 March, 2010 and applicable in respect of any tax period commencing on or after that date.]

Section 23 of the VAT Act implies there is a room to argue that, a person who expect that the taxable supplies he will make over the next twelve-month period will be in excess of R1 million is '*liable to be registered'* as a vendor.[217] However, since the said person is not actually registered for VAT, the acquisition of an enterprise by such person will not qualify for zero-rating.[218] It is accepted in New Zealand that if a person's turnover exceeds the VAT registration threshold and he is accordingly, *'liable to be registered'* for VAT purposes, such person is considered registered.[219] The South African position is very similar to the New Zealand position because where the taxable supplies of a going concern exceeds the VAT registration threshold, the purchaser will be deemed to be a registered vendor however, [220] the South African VAT Act does not offer the same exception as New Zealand. According to the current wording of the

[215] Section 23(1)(a) of the *Value Added Tax Act* 89 of 1991.
[216] Section 23(3(c) of the *Value-Added Tax Act 89* of 1991.
[217] Section 23(1) of the *Value-Added Tax Act* 89 of 1991.
[218] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5-21. In terms of a ruling by SARS and para 2.2(*a*) of Practice Note 14 (withdrawn), when SARS was satisfied that the going concern of a registered vendor has been purchased by a purchaser who was not registered due to ignorance or oversight, the date of the purchaser's registration could be backdated to the date at which the going concern was purchased. The purchaser must, however, have been qualified to be registered on that date even though not actually registered. The acquisition of the business concerned could then qualify for zero-rating as the supply of a going concern. This concession has not been carried forward into Interpretation Note 57: SARS VAT Practice Note No 14 para 2.2(a).
[219] New Zealand GST Technical Rulings para 107.9.1.
[220] Section 8(4)(b) of the *Value-Added Tax Act 89* of 1991.

TAA, SARS is obliged to impose an understatement penalty due to the failure of a person to register for VAT, unless such person can prove that the failure to register results from a *bona fide*[221] inadvertent error.[222]

In addition, in *Case N1* (1991) 13 NZTC 3,010, the court applied the latter in a case that concerned the acquisition of a video-hire business by a person who was not registered for VAT at the date of purchase.[223] Moreover, the court in an *obiter dictum*[224] held that:

> "The zero-rating of the supplies could not be merely avoided because the purchaser was not formerly registered under the Act. (The purchaser had a liability to register…In the circumstances the zero-rating provisions …apply."[225]

Further, IN 57 contends that if, at the time of the conclusion of an agreement, the purchaser is not yet registered as a vendor; it is advisable that the agreement provide for the application of the zero-rate being subject to the purchaser being a registered vendor prior then conclusion of the agreement, and to furnish the copy of VAT 103 form (now Notice of Registration) as soon as it is available to the seller.[226]

In the light of the above, de Koker and Badenhorst submit that the suggestion in IN 57 that the purchaser must be a registered vendor at the time of concluding the agreement is incorrect.[227] The reason being that the supply must be to a registered person and therefore, it is crucial that the purchaser must be registered at the time the supply is made, being the earlier of the date which an invoice is issued or any payment is made.[228] At present, SARS does not accept the application of the purchaser who wishes to acquire an enterprise as a going concern to register for VAT, unless the

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[221] Means in good faith.
[222] Section 222(1) of the *Tax Administration Act* 28 of 2011.
[223] *Case N1* (1991) NZTC 3,010.
[224] Something said in passing.
[225] *Case N1* (1991) NZTC 3,001.
[226] SARS Interpretation Note 57 2010 para 4.5. The time when the purchaser should be registered is the date when the supply takes place for VAT purposes. This is generally the earlier of when an invoice is issued or when the supplier receives any payment of consideration. According to IN 57, a purchase agreement will only constitute an invoice if it does not consist of suspensive conditions in relation to the payment. In the event that it does contain suspensive conditions, the subsequent fulfilment will not *'convert'* the document to an invoice. see also other related discussions by Mark Silver & Chris Beneke (eds) 'Deloitte VAT Handbook' 12th ed (LexisNexis 2019) 87.
[227] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5-22.
[228] Section 9(1) of the *Value-Added Tax Act* 89 of 1991; see also Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5-22.

purchaser furnishes SARS with a written signed agreement.[229] The purchaser can only apply for registration after the agreement has been concluded and will also have to ensure that the effective date of the registration matches with the date of supply of an enterprise.[230]

Section 11(1)(e) read together with section 9(1) of the VAT Act provides that for zero-rate to apply, the supply must be to a registered vendor of an enterprise or part of it which is capable of separate operation.[231] It further provides that the time of supply is the earlier of the time which an invoice is issued or the payment is received.[232] However, IN 57 deviates from this requirement and provides that in the event that the purchaser is not yet registered at the time of concluding the agreement, the proof that the purchaser has applied for VAT registration is sufficient for the transaction of fixed property to qualify for zero-rating.[233] But when must the purchaser register for VAT? It is notable, that section 23 of the VAT Act is clear that when a person's total value of the taxable supplies is in excess of R1 million preceding the period of twelve months, such person is obliged to register for VAT at the end of the month of carrying on the enterprise.[234] Thus, where, after the transfer of the property in the name of the purchaser, the taxable supplies in that month exceeds or is likely to exceed R1 million in a twelve month period, the purchaser must register at the end of that month[235]

It follows that we sit with a VAT conundrum that as a non-vendor, the purchaser will not be allowed to register for VAT if he wishes to acquire an enterprise as a going concern unless the purchaser provides SARS with a written agreement that he is a vendor or will become one after the disposal of the property.[236]This raises the question of what happens after the transfer of the property if the purchaser's taxable supplies fall below the R50 000 registration threshold for reasons out of the purchaser's control.[237] For example, the purchaser acquires a restaurant as a going concern and the circumstances change between the transfer of the enterprise and the registration process due to reasons such as COVID-19 measures. Under COVID-19 regulations

[229] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5-22.
[230] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5-22.
[231] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[232] Section 9(1) of the *Value-Added Tax Act* 89 of 1991.
[233] Interpretation Note 57 2010 para 4.3.
[234] Section 23(1) of the *Value-Added Tax Act* 89 of 1991.
[235] Section 23(1)(a) of the *Value-Added Tax Act* 89 of 1991.
[236] Interpretation Note 57 2010 para 4.3.
[237] Section 23(1) of the *Value-Added Tax Act* 89 of 1991.

promulgated in South Africa such as the hard lockdown, restaurants were prohibited from operating. Where, as a result, the purchaser makes no sales and the taxable supplies fall below R50 000, the purchaser in such an event does not meet the requirements of carrying on an enterprise as a VAT vendor. As such, registration may not be possible.

However, where the taxable supplies fall below R1 million but still exceed R50 000, the purchaser will be allowed to register as a VAT vendor in terms of section 23(3) of the VAT Act.[238] In this case, neither the VAT Act nor IN 57 provide for the time-period in which the purchaser must register. I argue that the purchaser must register at the end of the month in which transfer of the property (enterprise) has been made and the purchaser conducts an enterprise.

Section 23(7) of the VAT Act states that, SARS may refuse to register the purchaser on the basis that it does not meet the minimum VAT registration threshold.[239] The purchaser may object to SARS' refusal to register it as a vendor on the grounds that the reasons for not meeting the minimum VAT registration threshold are due to circumstances beyond his control, and that the circumstances are temporary.[240]

Section 23(7) read together with section 32(a)(i) of the VAT Act essentially means that SARS has a discretion to register a purchaser as a VAT vendor. In the event that SARS refuses to register the purchaser, this decision is subject to objection and appeal by the aggrieved person and this decision cannot be taken on review. However, in the case of *ABSA Bank Limited and Another v Commissioner for the South African Revenue Service*,[241] the court held that where the grounds for the decision lacks legality, the decision can be taken on review. What the legality grounds for the exercise of a discretion in terms of section 23(7) entails is unknown. That said, where SARS completely fails to exercise this discretion, the applicant may lodge an application to the High Court for judicial review under the Promotion of Administrative Justice Act[242] ("PAJA"). This is on the basis of SARS's failure to exercise its discretion. Does that mean that SARS has a discretion to grant the purchaser a grace period to register as

[238] Section 23(3) of the *Value-Added Tax Act 89* of 1991.
[239] Section 23(7) of the *Value-Added Tax Act* 89 of 1991.
[240] Section 32(a)(i) of the *Value-Added Tax Act* 89 of 1991.
[241] *ABSA Bank Limited and Another v Commissioner for the South African Revenue Service* (2019/21825) [2021] ZAGPPHC 127; 2021 (3) SA 513 (11 March 2021).
[242] *Promotion of Administrative Justice Act* 3 of 2000.

a VAT vendor under circumstances where the minimum VAT threshold is not met due to circumstances beyond the control of the purchaser? I believe so.

The sale of an enterprise may attract VAT on the selling price at the standard-rate. There are specific requirements set out in section 11(1)(e) of the VAT Act that allows a transaction to be zero-rated where it is disposed of as a going concern. One of the requirements is that the purchaser must be a registered vendor or become one after the transfer of the enterprise. However, for example, the purchaser may choose to acquire an enterprise at the standard-rate to avoid the registration process. After the acquisition of the enterprise, SARS registers the purchaser in terms of section 23(4)(b) of the VAT Act,[243] as the total value of his taxable supplies is in excess of R1 million. In such an event, will or should zero-rating apply where SARS registers the vendor under the deeming provisions and impose penalties for failure to register?[244] Section 16(1) of the VAT Act clearly provide that the vendor is required to account for tax for the period which he has carried on an enterprise in respect of which he is required to be registered.[245] In essence, the vendor is required to account for output VAT on the transaction and it appears that the transaction will not qualify for zero-rate.

3.2.5 Supply of an income-earning activity

The fifth requirement states that for the enterprise to be transferred as a going concern, the contracting parties must agree in writing, at the conclusion of the agreement that the enterprise or part of it will be an income-earning activity at the date of the transfer.[246] Determining the time of the conclusion of the agreement must be considered on a case-by-case basis.[247] While there is no statutory definition of an

[243] Section 24(4)(b) of the *Value-Added Tax Act* 89 of 1991.
[244] Section 222 of the *Tax Administration Act* 28 of 2011.
[245] Section 16(1) of the *Value-Added Tax Act* 89 of 1991.
[246]Section 11(1)(e)(i)(aa) of the *Value-Added Tax Act* 89 of 1991. It is clear that the requirement indicates that there must be a specific clause in the contract that provide that the enterprise or part thereof will constitute an income-earning activity on the date of the transfer. Prior to IN 57, It is noteworthy that the Practice Note 14 provided for an exception that in an event that the contracting parties are not aware of the amendment to section 11(1)(e) and proceed to conclude the contract without inserting the specific required clause; the fact that an income-earning activity will be transferred must be evident from such contract and documents: SARS VAT Practice Note No 14.
[247] M Botes *Juta's Value-Added Tax* (Juta 2016) 11-13. "As a general proposition, an agreement is reached when each party is aware that the other is in agreement with him, which will be when and

income-earning activity, IN 57 provides the taxpayers and practitioners with guidelines on what constitute an income-earning activity.[248] The agreement must provide for the sale of an income-earning activity, not merely the sale of a business structure.[249] The enterprise does not necessarily have to earn profits at the time of the transfer. The intention of the contracting parties must be as such that the enterprise will be an activity which is still operating and producing taxable supplies at the time of transfer.[250] It is for this reason, that the agreement to dispose a business that is yet to commence, or a dormant business is not a going concern.[251] However, where, at the time of conclusion of the agreement, the enterprise is yet to commence, but at the time of transfer, an income-earning activity is transferred, the zero-rating may apply.[252]

In *ITC 1622* case,[253] the court had to decide whether a particular fixed property was sold as a going concern. It crucial to note that before the case was decided the law did not require the contracting parties to specifically agree that the fixed property was disposed of as a going concern. [254] As such, the agreement did not make provisions that the fixed property was to be sold as a going concern. The vendor concerned argued that the transaction did not constitute the transfer of a going concern and it was entitled to claim for input tax.[255] The court held that:

> "The phrase 'as a going concern' is not defined in the Act, and in given cases the question whether the disposition concerned was as a going concern will doubtless give rise to considerable difficulty. It is however a question of fact, as I have already said, and each case must be determined on its own facts. In the absence of anything more, and on the facts of the instant case at any rate, we hold the view that where the only relevant features are that a property is leased and is sold subject to the lease, the

where the offerer receives communication of the offeree's acceptance from him. However, these general prepositions are not of universal application": see RH Christie & GB Bradfield *Christie's Law of Contract in South Africa* 7th ed (LexisNexis 2016).
[248]Interpretation Note 57 2010 para 4.8;see also S Jones, 'Selling your business as a going concern-how SARS sees it: value-added tax' (2009) 2009(281) *Tax Breaks* 1.
[249] Interpretation Note 57 2010 para 4.8; see also Mark Silver & Chris Beneke (eds) *Deloitte VAT Handbook* 12th ed (LexisNexis 2019) 87.
[250] Interpretation Note 57 2010 para 4.8; see other related discussion by Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-18-20.
[251] SARS Interpretation Note 57 2010 para 4.8.2.
[252] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-18-20.
[253] *ITC* 1622 (59 SATC 334).
[254] *ITC* 1622 (59 SATC 334) at 335.
[255] I*TC* 1622 (59 SATC 334) at 335.

> disposal is one as a going concern. This must certainly be so where, as in the instant case, the intention of the purchaser is to acquire it subject to such lease."[256]

In essence, the court held that the enterprise will be an income - earning activity, on the date of the transfer, not on the date of the supply.[257] As such, where a property is leased and sold subject to the lease, then the disposal constitutes a going concern.[258] Furthermore, the enterprise or part of it that is capable of separate operation should without any further action on the part of the recipient be capable of uninterrupted operation by the recipient. Essentially, parties ought to agree that the enterprise will remain active and operating until the recipient becomes the owner.[259] However, it is not necessary that the purchaser intends to carry on that particular activity of an enterprise after the transfer. The contract must merely create the '*capacity to continue'*.[260] Yet, where the purchaser does not make taxable supplies of at least 95 per cent, section 18A requires an adjustment in that the purchaser must account for output VAT on that portion of the enterprise not used for making taxable supplies.[261]

It must be borne in mind that, although the enterprise or part of it will be an income-earning activity at the time of transfer, it is not necessary that the purchaser continues with the activity after the acquisition.[262] Therefore, neither the specific requirements of para (i) of the provisions of section 11(1)(e) of the VAT Act nor the general requirements that what must be supplied be a going concern, indicate that the enterprise must be continued by the purchaser.[263] The '*capacity to continue'* test has been established in New Zealand cases where the courts have confirmed that it is not necessary for the purchaser to carry on with the same enterprise after the acquisition of the fixed property, the contract must only create the '*capacity to continue'*.[264] Nevertheless, in the event that purchaser at any point after the disposal of the enterprise discontinues with the activity and ceases to be a vendor due to the taxable

[256] ITC 1622 (59 SATC 334) at 340.
[257] ITC 1622 (59 SATC 334) at 341.
[258] ITC 1622 (59 SATC 334) at 340.
[259] SARS Interpretation Note 57 2010 para 4.8.
[260] SARS Interpretation Note 57 2010 para 4.8.
[261] Section 18A of the *Value-Added Tax Act* 89 of 1991.
[262]SARS Interpretation Note 57 2010 para 4.8; see also Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-20-1.
[263] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991; see other related discussion by Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-20-1.
[264] M Botes *Juta's Value-Added Tax* (Juta 2016) 11-13.

supplies being below the VAT registration threshold,[265] the said vendor must account for output tax on the lesser of the cost of the assets or open market value at the time it ceases to be a vendor.[266] Put differently, the vendor must continue to make taxable supplies after the acquisition of the enterprise even if it is not in the same form.

In *Case M98* (1990) 12 NZTC 2,599,[267] the court had to decide whether the sale of land used for grazing and growing of kiwifruit to a vendor who had no intention to carry on the enterprise after the acquisition constituted the supply of a going concern.[268] The court held that the supply of kiwifruit-growing constituted a sale of a going concern even though the vendor did not continue with the enterprise after acquisition because the enterprise was carried on at the same time of the supply.[269] Moreover, on appeal to the High Court in the case of the *Commissioner of Inland Revenue v Smiths City Group Ltd*,[270] the court confirmed this principle and held that:

> "the activity must be one which is handed over to the transferee in such a state that it may be carried on by the transferee if he so wishes."[271]

The United Kingdom has a contrasting view regarding this principle. The position in the United Kingdom states that the supply of an enterprise will not be zero-rated unless that particular activity concerned is actually carried on by the purchaser in the same form after the acquisition.[272]

In *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd*,[273] the court had to decide whether the transaction between the parties complied with section 11(1)(e) of the VAT Act as amended, so as to qualify for zero-rating.[274] The case deals with the requirement that the parties must agree in writing that the enterprise is being transferred as a going concern and that it will be an income-earning activity at the time of transfer. The transacting parties at the time of the conclusion of the sale of the property were oblivious to the fact that section 11(1)(e) of the VAT Act had been

[265] Section 24(3) of the *Value-Added Tax Act* 89 of 1991.
[266] Section 16) (3)(j)(i)(aa) of the *Value-Added Tax Act* 89 of 1991.
[267] *Case M98* (1990) 12 NZTC 2,599.
[268] *Case M98* (1990) 12 NZTC 2,599.
[269] *Case M98* (1990) 12 NZTC 2,599.
[270] *Commissioner of Inland Revenue v Smiths City Group Ltd (*1992) 14 NZTC 9,140.
[271] *Commissioner of Inland Revenue v Smiths City Group Ltd (*1992) 14 NZTC 9,140 at 9,143.
[272] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-20-2.
[273] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 64* SATC 60.
[274] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 64* SATC 60 at 61.

amended and was in full force and effect. [275] The appellant's argued that the contract did not comply with the strict requirements introduced by the amended legislation and as such the transaction does not qualify for zero-rate. The respondent contended that it was entitled to have the original agreement rectified by adding the necessary words as per section 11(1)(e) of the VAT Act.[276]

The court ordered for the rectification of the written agreement so that the sale could be zero-rated. It held that:

> "There are accordingly in my opinion no obstacles, legal or factual, to allowing the respondent to meet the appellant's case by a plea of rectification. Rectification, once granted, operates *ex tunc,* as if the document at its inception read as it has now been reconstructed to read. Rectification does not alter the terms of the agreement; it perfects the written memorial so as to accord with what the parties actually had in mind."[277]

In other words, the court decided that the parties share a common intention that the tenanted property be sold at the zero-rate. The parties' mutual mistake was that they believed that it is not necessary to incorporate this intention in the written agreement.[278] On appeal, the court was therefore satisfied that the communication between the parties made it clear that the parties agreed that the transaction would be zero-rated at the time of the conclusion of the agreement.[279]

IN 57 provides, several examples of what constitutes an income-earning activity in relation to leasing activities.[280] It is apparent that the intention of the disposal of a going concern should be the selling of an income-earning activity, not merely a business structure. In an instance where a seller of a fixed property carries on a taxable leasing activity, the agreement must make provisions for the leasing activity to be transferred together with the fixed property in order to constitute an income-earning activity.[281]

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[275] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 64* SATC 60 at 61.
[276] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 64* SATC 60 at 62.
[277] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 64* SATC 60 para 33.
[278] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd 64* SATC 60 para 33.
[279] *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA), 2002 (2) JTLR 41.
[280] SARS Interpretation Note 57 2010 para 4.8.2; see also other related discussion by Steven Jones 'Selling your business as a going concern – how SARS sees it: value-added tax' (2009) 2009 EJC 1 at 3.
[281] SARS Interpretation Note 57 2010 para 4.8.2

Failure to do so will mean that only an asset is sold, and the transaction will not qualify for zero-rating.[282]

In the light of the above, the question arises regarding the occupancy level required to give rise to the supply of a going concern.[283] Initially, Practice Note 14, that was replaced by IN 57, indicated that the property could be regarded as an income-earning activity where the occupancy level is 80 per cent or more.[284] However, in a later version of Practice Note 14, an occupancy level of 50 per cent or more is required. This compares with the New Zealand position.[285] The level of occupancy required for the leasing activity to constitute a going concern is not included in IN 57. However, it appears that SARS still applies the 50 per cent occupancy level.[286] Therefore, vendors disposing of mixed-use property or partially tenanted property need to properly consider their entitlement to apply for VAT at zero-rate on the disposal of such properties.[287]

Mixed-use property

Mixed-use properties are properties that are used partly for making taxable supplies and exempt supplies.[288] For example, a building that has a commercial or retail space on the ground floor and a residential accommodation on the top floors.[289] Section 8(16)(a) of the VAT Act provides that, the supply of goods or services which are used

[282] SARS Interpretation Note 57 2010 para 4.8.2.
[283]SARS VAT Practice Note No 14.; see also other related discussion by the South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 27 February 2022.
[284] SARS VAT Practice Note No 14.
[285] Inland Revenue 'GST Plus Working out specific GST issues' (IR546) 2022 7.
[286] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-20.
[287] Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap", last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 07 January 2023.
[288] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 7.1.
[289] Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap", last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 07 January 2023.

partly for taxable and for non-taxable purposes, notwithstanding that part of the property that is used for non-taxable purposes, is deemed to be made wholly in the course of an enterprise and is therefore, fully taxable.[290] Further, section 11(1)(e)(ii) of the VAT Act states that, where the enterprise or part of it is disposed of as a going concern has been carried on in relation to goods mainly for purposes of such enterprise or part of it and partly for other purposes, such goods shall be deemed to form part of the enterprise, notwithstanding the proviso to the definition of "*enterprise*", which excludes VAT exempt activities.[291] As such, it is crucial to establish whether a vendor can prove that the property is utilised mainly for commercial enterprise. This is done in order to determine whether the whole transaction qualifies for zero-rate as per section 11(1)(e) of the VAT Act.[292]

The reason upon which the use of the goods for making taxable supplies is to be determined is not clear.[293] While section 11(1)(e) of the VAT Act does not prescribe the basis for the deemed taxable supply of the whole enterprise, IN 57 does shed some light in this regard.[294] In the context of the supply of an enterprise as a going concern, IN 57 indicates that '*mainly*' means more than 50 per cent.[295] IN 57 provides an example which refers to '*the area*' of a property. It appears that from reading IN 57 that SARS is of the opinion that where more than 50 per cent of the floor space is used for commercial purposes, this indicates that a property is used mainly for taxable purposes.[296] However, it is important to note that IN 57 is not law.[297] The fact remains that the legislation is silent regarding the method of determination of whether the goods are mainly used for the purposes of the enterprise.[298] Currently, SARS applies

[290] Section 8(16)(a)(i) of the *Value-Added Tax Act* 89 of 1991.
[291] Section 11(1)(e)(ii) of the *Value-Added Tax Act* 89 of 1991.
[292] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[293] D Clegg 'Mixed-use and VAT' (1995)1995 (09) Tax Planning Corporate and Personal 1.
[294] D Clegg 'Mixed-use and VAT' (1995)1995 (09) Tax Planning Corporate and Personal 1.
[295] SARS Interpretation Note 57 2010 para 4.12.2.
[296] SARS Interpretation Note 57 2010 para 4.12.2.
[297] *Commissioner for the South African Revenue Service v Marshall NO* 2017 (1) (SA) 114 (SCA) para 33.
[298] Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap', last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 09 January 2023.

the principles set in IN 57 and it generally considers the floor space or the area of the property, not the income derived from it, for the purposes of determining its use.[299]

IN 57 provides that if goods or services are not used mainly for purposes of an enterprise, the supply cannot be a going concern as contemplated in section 11(1)(e) and will be subject to VAT at the standard rate.[300] To reduce non-compliance, in instances where the vendor can sufficiently distinguish between the parts of the supply to make it reasonable to sever them and apportion accordingly, the portion of the selling price which relates to the going concern may be zero-rated. The remainder of the portion which is not a going concern must be charged with VAT at the standard rate as per section 8(15) of the VAT Act.[301] Where, the apportionment cannot be made in accordance with section 8(15) of the VAT Act, the supply of the enterprise will be standard rated.[302]

Partially tenanted property

IN 57 states that the leasing activities must consist of an underlying asset that is subject to a lease and the contract of lease.[303] The occupancy level give rise to legal ambiguity in a sense that it is not clear whether the partially tenanted commercial property can be zero-rated. A partially tenanted property is a fully commercial property in which a part of the property is vacant.[304] It is noteworthy that section 11(1)(e) of the VAT Act does not prescribe the occupancy levels of a partially tenanted property as a

[299] It follows that any alternative method of measurement, for instance, a measurement based on the extent of taxable versus exempt income derived from the property, is not excluded. However, SARS simply applies the IN 57 principles: Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap', last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 09 January 2023.
[300] SARS Interpretation Note 57 2010 para 4.12.3.
[301] Section 8(15) of the *Value-Added Tax Act* 89 of 1991.
[302] SARS Interpretation Note 57 2010 para 4.12.3.
[303] SARS Interpretation Note 57 2010 para 4.8.2.
[304] Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap', last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 09 January 2023.

method of determination for the purposes of its application.[305] However, it remains the current SARS practice that where a property is less than 50 per cent tenanted, SARS may view that only the sale of the portion of the property that is tenanted constitutes a going concern.[306] Therefore, a vendor is advised to apportion the consideration in terms of section 8(15) of the VAT Act and account for VAT at zero-rate for the tenanted part of the property and standard rate on the consideration of untenanted part of the property.[307] It follows that vendors seeking to dispose of mixed-use properties or partially tenanted properties should carefully consider their entitlement to apply the zero-rate under section 11(1)(e) to the sale of the entire property.[308] The vendor who fails to apply the correct VAT treatment bears the risk of penalties and interest that may be imposed by SARS.[309]

In consideration of the above, the COVID-19 pandemic has undoubtedly resulted in a stressed economic environment on an unprecedented scale in recent history. Pervasive lockdown regulations have substantively affected the economic activities. This has resulted in enterprises experiencing loss of revenue and profitability which raises questions about their ability to continue as a going concern.[310] The property industry has been navigating through uncertain times with fluctuating market conditions which are largely being determined by the prevalence of COVID-19.[311] The number of vacant properties has increased by 50 per cent in South Africa since 2020

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[305] Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap', last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 09 January 2023.
[306] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-20.
[307] Section 8(15) of the *Value-Added Tax Act* 89 of 1991.
[308] Varusha Moodaley 'VAT on the sale of mixed-use and partially tenanted buildings as going concerns: a recap', last accessed from https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Tax/tax-and-exchange-control-alert-13-october-2022-vat-on-the-sale-of-mixed-use-and-partially-tenanted-buildings-as-going-concerns.html#:~:text=Exchange%20Control%20Alert-,VAT%20on%20the%20sale%20of%20mixed%2Duse%20and%20partially%20tenanted,furtherance%20of%20the%20vendor's%20enterprise on 09 January 2023.
[309] Section 222 of the *Tax Administration Act 28* of 2011.
[310] BDO New Zealand 'Going concern-what disclosure is required in financial statements?', last accessed from https://www.bdo.nz/en-nz/accounting-alert-february-2021/going-concern on 11 January 2023.
[311] Private Property 'Rent-to-own properties: How does it work in South Africa?', last accessed from https://www.privateproperty.co.za/advice/property/articles/rent-to-own-properties-how-does-it-work-in-south-africa/7872 on 09 June 2022.

due to COVID-19.[312] It is for this purpose that it is crucial to illustrate the legal uncertainty that SARS creates in this regard. For example, Big Five Property Developers enters into an agreement to sell a shopping complex in respect of which multiple lease agreements are in place. The sale agreement is concluded during COVID-19 pandemic while the hard lockdown regulations are in place. At the time of the sale, the building has only a few tenants physically occupying it. Thus, because it is tenanted less than 50 per cent, the sale may not be zero-rated.

However, in this example, the developers engage leasing agent that will actively market the vacant space. The leasing enterprise is an income-earning activity that can operate at the time of the transfer and is active. In other words, it has the potential to earn income. It is not necessary that the activity must be generating profits. The question arises whether the supply of the whole building together with assets which are necessary for the continuation of the leasing enterprise has been transferred. Upon the proper reading of IN 57, the assets necessary for a leasing enterprise to be disposed of are the lease agreements. Therefore, in the absence of lease agreements, what is being disposed of is a building not a leasing enterprise.

The Australian Taxation Office ("ATO") issued a Goods and Services Tax Ruling,[313] which explains what a supply of a going concern for the purposes of Subdivision 38-J is, of the *A New Tax System (Goods and Services Tax) Act* 1999 ("GST Act"). The issue that is of fundamental importance is the ATO approach on the GST treatment of a partially tenanted building as a going concern which can be contrasted with the South African approach. I am of the view that it is important to consider these Australian principles as a lesson for South Africa. Nevertheless, it is accepted in Australia that a property purchase may be GST exempt if it is part of a sale that is being disposed of as a going concern.[314] This may arise where the vacant units in a partially tenanted building are actively marketed or temporarily closed for repairs or maintenance.[315] It is, therefore, submitted that the 50 per cent occupancy requirement in South Africa is

[312] Private Property 'Rent-to-own properties: How does it work in South Africa?', last accessed from https://www.privateproperty.co.za/advice/property/articles/rent-to-own-properties-how-does-it-work-in-south-africa/7872 on 09 June 2022.
[313] Australia Taxation Office GSTR 2002/5 'Goods and Services Tax: when is a 'supply of a going concern' GST-free'.
[314] Jasmine Murray 'GST on Property purchases and the "Going Concern" exemption', last accessed from https://www.jenkinslegal.com.au/post/gst-on-property-purchases on 02 August 2022.
[315] Australia Taxation Office GSTR 2002/5 'Goods and Services Tax: when is a 'supply of a going concern' GST-free'.

limiting because it is out of touch with the economic outlook in the rental market. Whether a leasing enterprise is transferred as a sale of a going concern is a question of fact.[316] A flexible approach may be adopted in a sense that a lower occupancy level at the date of the transfer could also qualify as a leasing enterprise as one may need to consider the current market conditions under which the disposal is made.[317] An instance in which the drop in occupancy level could be substantiated is if an unfortunate event such as when the rate of economic growth is slow or if there is a pandemic such as COVID-19, or a part of the building has been destroyed immediately prior to transfer and that part is being repaired.[318]

Another compelling issue to be considered is the scope of occupancy. The question that comes to mind is whether occupancy means the actual occupation of the property or simply having active lease agreements in place? With reference to *Case No.: VAT 889*,[319] the court had to decide whether a fictitious transaction constituted a supply which triggers VAT. The vendor issued three tax invoices in order to acquire a loan from the bank, without having made supplies.[320] Further, the vendor received payments of the amounts invoiced when the bank deposited the amounts to the vendor in respect of the fictitious invoices.[321] In its judgment, the court held that section 15(1) of the VAT Act states that a vendor must account for VAT upon the issuing an invoice.[322] However, it should be noted that, a fictitious transaction can attract VAT only if a time of supply has occurred.[323]

Further, in *Case No.: VAT 847*,[324] the fictitious invoices were generated in respect of the letting of commercial property, for the purposes of opposing a liquidation application. The court in this case confirmed the judgment in *Case No.: VAT 889*,[325]

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[316] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis2019) 5.8-5-20.
[317] South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 02 August 2022.
[318] South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 02 August 2022.
[319] *ITC 1861*, 74 SATC 383.
[320] *ITC 1861*, 74 SATC 383 para 4-6.
[321] *ITC 1861*, 74 SATC 383 para 8.
[322] *ITC 1861*, 74 SATC 383 para 14.
[323] M Botes *Juta's Value-Added Tax* (Juta 2016) 1-1.
[324] *ITC 1865 (*75 SATC 250).
[325] *ITC 1861*,74 SATC 383.

and held that the vendor was liable for the output VAT assessed. The vendor rented out a commercial property to B (Pty) Ltd and further concluded lease agreements with two more companies.[326] Company B had employees whilst the other two companies did not have any employees and thereby not occupying the premises. As such, the vendor decided not to enforce these lease agreements.[327] The court held that section 9(1) of the VAT Act states that the supply of goods or services by the vendor is deemed to occur at the time the invoice is issued.[328] Therefore, the vendor was liable for output VAT on the rentals irrespective of whether or not it had enforced performance by the lessee and whether or not the lessee had claimed any input tax on the strength of such tax invoices.[329]

The case indicates that for the purposes of determining whether the supply is made, a lease agreement is sufficient, and that the actual occupation of the premises is not necessary. Although, the interpretation of *Case No.: VAT 847* is extremely limited, it implies that the existence of the lease agreement is sufficient to show that taxable supplies are being made.

In addition, in lease, two *essentialia* exist. The landlord must make available the temporary use and enjoyment of the property to the lessee against the payment of rent by the lessee.[330] The landlord must make available the temporary use and enjoyment of the lease property only. It is not necessary for the lessee to physically occupy the property as long as the lessee takes possession of the use and enjoyment. As such, the lessee can use and enjoy the property by not occupying it. This would be, for example, where the lessee enters a lease agreement to prevent a rival from occupying the same building. It should be noted that the VAT Act does not expressly state that occupancy is a requirement for the zero-rating to apply. Yet, what does the 50 per cent occupancy level requirement by SARS mean? Does it mean occupying the premises of the property or taking control of the use and enjoyment of the property? Moreover, does taking control over use and enjoyment of the leased property mean that the lessee must physically move into the property or conduct an enterprise from the premises? What happens in a case where the lessee simply leaves the property

[326] *ITC 1865 (*75 SATC 250).
[327] *ITC 1865 (*75 SATC 250).
[328] *ITC 1865 (*75 SATC 250); see also section 9(1) of the *Value-Added Tax Act* 89 of 1991.
[329] *ITC 1865 (*75 SATC 250).
[330] Graham Glover *Kerr's Law of Sale and Lease* 4th ed (LexisNexis 2014) 329.

vacant but still pays the rent? In all these cases, the assets (lease agreements) to continue with the leasing enterprise can be (and are) transferred. Accordingly, physical occupancy is, in my view, not a requirement. Rather, the existence of lease agreements for 50 per cent or more of the floor space is required.

To surmise, while the level of occupancy test is crucial in determining whether the disposal of the leased commercial property qualifies for zero-rating, the absence of the clear rules of the scope of occupancy poses a difficulty. It is submitted that de Koker and Badenhorst's view that the occupancy level should merely be considered as a guideline must be cautioned.[331] This is because treating the potential enterprise as an enterprise paves a way for abuse of the zero-rating provisions. Yet, as pointed out above, a strict 50 per cent occupancy requirement is debilitating. An amendment of section 18A to allow for an extended timing provision may be required to grant the purchaser temporary relief. For example, where a leasing enterprise is not 50 per cent tenanted at the time of transfer, but it is marketed actively, or the vacant floor space is under renovation, the purchaser may be allowed temporary relief to meet the 50 per cent tenancy requirement within three months of the transfer. Where, after three months, the tenancy levels are still below 50 per cent, the purchaser must account for output VAT on the untenanted portion of the floor space. Therefore, the purchaser will be liable to account for VAT if the zero-rate does not apply.

3.2.6 Disposal of assets necessary to conduct the enterprise

The sixth requirement states that the assets which are necessary for the carrying on of the enterprise, or the part of it being sold, must be disposed of by the supplier to the recipient.[332] According to IN 57, in the context of disposing of a commercial letting enterprise, in order for such transaction to qualify for zero-rate , the fixed property must be disposed of, together with the contract(s) of lease.[333] However, not all the assets of the enterprise must be transferred; only the assets which are necessary for the

[331] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-20.
[332] Section 11(1)(e) (bb) of the *Value-Added Tax Act* 89 of 1991.
[333] Interpretation Note 57 (Issue 2) 2010 para 4.9; see also South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 19 May 2022.

purchaser to carry on the income-earning activity without further action on the part of the purchaser must be transferred. For example, the seller can decide to keep certain assets and the recipient can choose not to purchase old stock or book debts.[334]

Further, IN 57 acknowledges that the phrase '*disposed of*' can be interpreted in the context of section 11(1)(e) of the VAT Act, to include an outright sale as well as a lease or rental of the assets necessary for the carrying on of the enterprise.[335] Moreover, IN 57 notes that where the purchaser is placed in possession of the necessary assets by way of a lease or rental, then 'while the sale of the enterprise as a going concern can be a zero-rated supply, the lease or rental of the assets necessary for the carrying on of the enterprise will be a standard-rated supply'.[336]

The cornerstone of a functioning tax system is predictability and certainty. Similarly, while it is an undeniable fact that IN 57 does not supersede the section 11(1)(e) provisions; it offers a good indication to taxpayers and practitioners of how SARS is likely to treat certain VAT transactions.[337] In principle, this means that if the vendor follows the guidelines contained in IN 57; SARS will be inclined to see things from the same angle. This then, brings a certain degree of certainty to the tax treatment of certain transactions.[338] The inconsistencies between IN 57 and VAT Act compromises certainty of the VAT system and puts the vendor at a risk of being issued with an additional assessment by SARS and subject to the applicable penalties and interest imposed by the VAT Act and TAA.

The test to determine whether – it was the intention of the parties that the enterprise would be active and operating, is subjective. The requirement of intention provides a certain level of certainty in relation to the time when the test as to whether a going concern is being supplied.[339]

Furthermore, a slightly more complex issue arises where there is a fully tenanted shopping complex in which the lessee has entered a sub-letting arrangement with an intention to purchase the commercial property outright from its current owner.

[334] SARS Interpretation Note 57 2010 para 4.9.
[335] SARS Interpretation Note 57 2010 para 4.9.
[336] SARS Interpretation Note 57 2010 para 4.9.
[337] Steven Jones 'Selling your business as a going concern – how SARS sees it: value-added tax' (2009) 2009 EJC 1 at 3.
[338] Steven Jones 'Selling your business as a going concern – how SARS sees it: value-added tax' (2009) 2009 EJC 1 at 3.
[339] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019) 5.8-5-19.

Technically, the lessee assumes the role of the owner upon the transfer of the commercial property and will continue with the leasing enterprise and make taxable supplies subject to VAT at the standard rate.[340] Even though a commercial letting enterprise appears to continue uninterrupted where the lessee now becomes the outright owner, it is debatable whether the zero-rating will apply to the disposal of the property.[341]

According to SARS, an argument counting against zero-rating this kind of transaction is that the lease agreement between two transacting parties terminates on disposal and that the sub-letting agreements, which the lessee has in place with its tenants, do not form part of the assets necessary for the carrying on of the lessor's enterprise.[342] In such case, the standard rate would *'likely'* apply to the disposal and the recipient would be able to claim input tax where the property will be used in the course of making taxable supplies.[343] This line of argument bring into effect again the Roman Law position that in the lack of a separate agreement by the purchaser to allow the lease to run its course, the purchaser was entitled to evict a lessee even if the purchaser was aware of the existing lease upon the sale and that the lessee was in occupation.[344] This is no longer the legal position.[345]

Further, the term '*likely'* denotes that there could possibly be an argument that the sub-lease is not automatically terminated in such circumstances because only the status of the tenant changes to ownership and is carrying on the enterprise of leasing activities without further action. Moreover, the effect of the sublease is to form a new

[340] South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 27 February 2022.
[341] South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 26 September 2022.
[342] South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 26 September 2022.
[343]South African Institute of Chartered Accountants 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm on 26 September 2022.
[344] AJ Kerr *The Law of Sale and Lease* (Butterworth 1984) 186.
[345] AJ Kerr *The Law of Sale and Lease* (Butterworth 1984) 186.

contract between the lessee and the sub-lessee.[346] *In Green v Griffiths*,[347] the court held that a sub-lease does not create contractual obligations between the landlord and the sublessee.[348] The purchasers are now bound to recognise and continue the lease as the Roman-Dutch Law principle *huur gaat voor koop*,[349] which means lease takes precedence over sale has been adopted by van Leeuwen which deals with the purchasers and donees.[350] De Groot contends that the contract of hire does not become void by the sale of the leased property, as the rule, hire goes before sale, prevails in the law.[351] In addition, Voet states that the purchase gives place to lease (*dat Huer voor Koop gaat*),[352] unless the lessor and the lessee expressly arranges for something different.[353] The principle entitles the lessee to enjoy a right of retention if he chooses to continue with the hiring.[354] Accordingly, the *huur gaat voor koop* rule is accepted and still applies in the South African law.

The court in *Rolfes, Nebel & Co v Zweigenhaft*,[355] stated that the rule means:

> "that if a vendor sold his property, the purchaser was obliged to recognise leases not in *longus tempus*,[356] and according to good authority short leases were those for periods under ten years".[357]

The rule essentially means that a lessee in terms of a short lease is protected if he is in occupation of the leased property.[358] The legitimacy of the rule was confirmed in the case of *Canavan and Rivas v New Transvaal Gold Farms Ltd.*[359] The court held that:

> "The rule that 'hire goes before sale' applies only to leases actually in existence, and not to a mere right of renewal. Further, the leases actually in existence at the time

[346] *Latsky v Burger* 1976 1 (SA) 667 (NC).
[347] *Green v Griffiths* 4 SG 346.
[348] *Green v Griffiths* 4 SG 346.
[349] Lease goes before sale.
[350] AJ Kerr *The Law of Sale and Lease* (Butterworth 1984) 186.
[351] Johannes van der Linden *Institutes of Holland* (J.C Juta 1904) 145.
[352] Original name of the principle.
[353] Percival Gane *The Selective Voet being the Commentary on the Pandects* [Paris Edition of 1829] By Johannes Voet and the supplement to that work by Johannes van der Linden [1756-1835] at 3 (Butterworth 1956) 424; see also AJ Kerr *The Law of Sale and Lease* (Butterworth 1984) 186.
[354] Percival Gane *The Selective Voet being the Commentary on the Pandects* [Paris Edition of 1829] By Johannes Voet and the supplement to that work by Johannes van der Linden [1756-1835] at 3 (Butterworth 1956) 425.
[355] *Rolfes, Nebel & Co v Zweigenhaft* 1903 TS 193.
[356] Means long time and long use.
[357] *Rolfes, Nebel & Co v Zweigenhaft* 1903 TS 193.
[358] KM Kern 'Letting and Hiring' in C Nagel *et al* (eds) *Commercial Law* 6th ed (2020) 245 at 268.
[359] *Canavan and Rivas v New Transvaal Gold Farms Ltd* 1904 TS 141 para 153.

> when the land under lease is purchased, the rule giving a real right to the lessee, as a right against the purchaser, does not extend to terms exceeding ten years…"[360]

It is submitted that the rule that the lease takes precedence over sale means that after the acquisition of the enterprise, the purchaser is obligated to endure the subtenants until the lease terminates. This, by implication, supports the argument that the sub-lease does not automatically fall away when the tenant becomes the owner of the leased commercial property. Therefore, in the absence of any statutory prohibition, the zero-rating should apply where the lessee now becomes the outright owner of the leased property as the sublease will remain in place until it terminates. To reduce the legal ambiguity, SARS must provide guidance.

There would still seem to be considerable scope for uncertainty in relation to the true nature of the enterprise being disposed of. This is in terms of what assets are necessary and as to how to show that the true intention of the parties was to transfer an income-earning activity if, as events transpired, the activity had in fact ceased by the time the transaction was made.[361]

[360] *Hite's Exor v Jones* 19 SC 244.
[361] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (LexisNexis 2019).

3.2.7 Parties must agree in writing that the consideration for the supply is zero-rated

The last requirement provides that the seller and the purchaser must agree in writing that the consideration for the supply of an enterprise is inclusive of tax at the zero-rate.[362]

3.3 Time of supply

This is one of the VAT provisions affecting the supply of an enterprise or part of it, as a sale of a going concern. IN 57 states that, as the disposal of an enterprise as a going concern is deemed to be a supply of goods, the time of supply is, subject to section 9(2), determined in section 9(1), that is, the earlier of the time an invoice is issued for the supply, or any payment of consideration is received by the seller.[363] This time of supply rule applies even when fixed property forms part of the disposal of the enterprise.[364] Further, an 'invoice' is defined in section 1 of the VAT Act as a document notifying an obligation to make payment.[365] With regard to payment of consideration, any deposit (not being a deposit for a returnable container) received in respect of the purchase price is not regarded as consideration received until such time that the deposit is applied as payment for the supply of goods or services. As a result, the time of supply is not triggered when payment of a deposit is received.[366]

Nevertheless, de Koker and Badenhorst contend that they are not convinced of the IN 57 argument. They argue that while the supply of a going concern as stipulated in section 11(1)(*e*) is deemed to be a supply of goods, it does not necessarily follow that such goods are deemed to constitute '*movable* goods', as opposed to fixed property.[367] To the extent the goods constitute 'fixed property' (being goods) as defined in section 1 of the VAT Act, the time of supply provided for in section 9(3)(d) of

[362] Section 11(1)(e)(cc) of the *Value-Added Tax Act* 89 of 1991.
[363] Section 9 of the *Value-Added Tax Act 89* of 1991.
[364] SARS Interpretation Note 57 (Issue 2) 2010 para.
[365] Section 1 (1)(xxxiii) of the *Value-Added Tax Act* 89 of 1991.
[366] SARS Interpretation Note 57 2010.
[367] Alwyn de Koker & Gerhard Badenhorst 'VAT in South Africa' (LexisNexis 2019)

the VAT Act applies, namely the earlier of the date of registration of transfer or the date on which any payment is made in respect of the consideration for the supply.[368]

The court dealt with the concept of a transfer of a going concern for VAT purposes in the Polish case C-729/121.[369] The question before the court was whether the sale of the building, together with other elements such as the contract of lease is subject to VAT or whether it can qualify as a transfer of a going concern.[370] *In casu*,[371] the seller, as per the terms of the agreement transferred a shopping centre together with movable property, the lease agreements for individual premises, documents securing lease agreements, unexpired construction warranties, intellectual property agreements and an agreement regarding power connection.[372] Both the seller and the purchaser agreed in writing that the immovable property and the associated rights are not part of the company or an independent part and that the transaction concerned does not constitute the sale or other transfer of the seller's company or an independent part.[373] The main component was the retail space in the shopping centre, on which the seller carried on an economic activity by leasing the commercial premises of which the leasing activity became the only activity of the purchaser after the transfer.[374]

The justification for selecting this particular country is that the Polish authorities and the Court of first instance agreed that the transferred elements are adequate to put the purchaser in the position to operate an independent activity. As a result, the court held that the transaction should be treated as a transfer of a going concern.[375] However, the purchaser lodged an appeal against the judgment. Subsequently, a preliminary

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[368] Section 9(3)(d) of the *Value-Added Tax* Act 89 of 1991.
[369] C-729/21.
[370] C-729/21.
[371] Means in the case.
[372] C-729/21; see also other related discussion by Helen Bourlean & Bert Gevers 'Can the transfer of the building be treated as a "Transfer of Going Concern" for VAT?', last accessed from https://www.loyensloeff.com/insights/news--events/news/can-the-transfer-of-a-building-be-treated-as-a-transfer-of-going-concern-for-vat/ on 05 August 2022.
[373] C-729/21; see also other related discussion by Helen Bourlean & Bert Gevers 'Can the transfer of the building be treated as a "Transfer of Going Concern" for VAT?', last accessed from https://www.loyensloeff.com/insights/news--events/news/can-the-transfer-of-a-building-be-treated-as-a-transfer-of-going-concern-for-vat/ on 05 August 2022.
[374] C-729/21; see also other related discussion by Helen Bourlean & Bert Gevers 'Can the transfer of the building be treated as a "Transfer of Going Concern" for VAT?', last accessed from https://www.loyensloeff.com/insights/news--events/news/can-the-transfer-of-a-building-be-treated-as-a-transfer-of-going-concern-for-vat/ on 08 August 2022.
[375] C-729/21; see also other related discussion by Helen Bourlean & Bert Gevers 'Can the transfer of the building be treated as a "Transfer of Going Concern" for VAT?', last accessed from https://www.loyensloeff.com/insights/news--events/news/can-the-transfer-of-a-building-be-treated-as-a-transfer-of-going-concern-for-vat/ on 08 August 2022.

ruling was submitted to the Court of Justice to clarify the scope of the concept of the transfer of a going concern for VAT purposes.[376]

3.4 Conclusion

In closing, the key question of the chapter is whether the leased commercial property can be disposed of as a sale of a going concern. The chapter has successfully identified all the requirements that the vendors must comply with when concluding the transfer of a leased commercial property as a going concern. The chapter further, identified some of the interpretational uncertainties in relation to the scope of the requirements of section 11(1)(e) of the VAT Act. One may argue that the narrow interpretation compromises the certainty and predictability of the tax system particularly where sub-leases are concerned. Further, in formulating and developing the appropriate tax policies, section 39(1)(c) of the Constitution provides that a court or forum may consider foreign law.[377] The chapter gleaned from foreign jurisdictions such as New Zealand, Australia and Poland on how they treat the leased commercial property as a transfer of a going concern. The laws, policies, case law and legislation of these countries may contribute constructively in solving the challenges in South Africa.

[376] C-729/21; see also other related discussion by Helen Bourlean & Bert Gevers 'Can the transfer of the building be treated as a "Transfer of Going Concern" for VAT?', last accessed from https://www.loyensloeff.com/insights/news--events/news/can-the-transfer-of-a-building-be-treated-as-a-transfer-of-going-concern-for-vat/ on 08 August 2022.
[377] Section 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION

4.1 Introduction

The study investigated and provided a comprehensive and thorough analysis of what constitutes a going concern and what would be required to zero-rate the disposal of a commercial letting enterprise as a going concern in terms of section 11(1)(e) of the VAT Act.[378] The study further identified problem areas that are created by SARS in relation to the interpretation of some of the provisions of section 11(1)(e) of the VAT Act. The research indicated some solutions to be considered in solving these interpretational challenges that result in legal uncertainties. As indicated throughout the study, where a leased commercial property is being transferred as a going concern, a person must exercise a particular care to ensure that the correct VAT rate is applied.[379] The study investigated the section 11(1)(e) requirements to be applied for a leased commercial property to constitute a sale of a going concern. Therefore, the chapter seeks to provide a summary of chapter two and three and link the findings of both chapters to the research objectives.

4.2 Summary of the findings

It is argued that the legal uncertainty in relation to zero-rating the sale of a going concern lies in the interpretation of the legislative wording by SARS as contained in IN 57. It is important to bear in mind that IN 57 is not law but has a persuasive value in courts and serves as an interpretational possibility. Chapter two of the study involved an in-depth analysis of the meaning of a going concern. The guidelines of what constitutes the sale of a going concern were obtained from IN 57 of which the focus was on an enterprise or a part of it which is capable of separate operation and must

[378]Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[379]Cliffe Dekker Hofmeyr 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm , on 06 September 2022.

be an income-earning activity.[380] The findings from this analysis indicates that the absence of the statutory definition of the concept of going concern brings about legal uncertainty particularly in the VAT treatment of the leasing enterprise.

Further, VATCOM is of the view that formulating a statutory meaning of the transfer of a going concern could lead to inflexibility and pave a way for tax avoidance.[381] This view is further supported by van Oordt and Krever in which they assert that devising a clear statutory meaning of the inherently uncertain concept of a going concern may be impossible.[382] The research shows that the vendors disposing commercial letting enterprise as a sale of a going concern do not have clear guidelines on what is meant by a '*going concern'*. As a result, the supply of a going concern causes professional queries and litigation.[383] The implementation of administrative guidance that will provide safe harbours for businesses will most likely reduce the risk of taxpayers having to pay penalties and interest arising from the incorrect application of section 11(1)(e) of the VAT Act.[384]

Upon comparing the IN 57 guidelines with similar guidelines from foreign jurisdictions that have progressive VAT systems like New Zealand, it appears that both the VAT Act and IN 57 are on the same standard in relation to the meaning of the uncertain concept of a going concern although New Zealand has a statutory definition of the concept.[385]

Further, the study has identified that the question of an apportionment of input tax is one of the most problematic areas under any VAT system.[386] The submission is that SARS should provide a clear explanation and guidance as to what happens if a vendor disposes of a part of property that relies on the main enterprise to be active and

[380] SARS Interpretation Note 57 2010.
[381]South Africa. Value-Added Tax Committee *Report of the Value-added Tax Committee (VATCOM)*(1991); see also other related discussion by Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (2019).
[382] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[383] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[384] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[385] Section 2(1) of the *Goods and Services Tax Act* 141 of 1985.
[386] Alwyn de Koker & Gerhard Badenhorst *VAT in South Africa* (2019).

operating; does the transaction constitute a sale of a going concern or must an apportionment apply.[387]

Chapter three identified the requirements that must be met for a disposal to qualify for zero-rating. The chapter identified the shortcomings specifically in two instances where the vendor transfers fixed property together with lease agreements and the transfer of the commercial property in a case where there is a sub-lease agreement in place.

It follows that the supply of an enterprise or part of it which is capable of separate operation can be disposed of as a going concern to a registered vendor, provided that the requirements of section 11(1)(e) of the VAT Act are met.[388] However, the requirements and the guidelines in IN 57 are not as clear-cut as they appear; as the discussion identified the interpretational challenges from IN 57 that are likely to increase the compliance risk of the vendors disposing of the commercial letting enterprise as a going concern. It is an indisputable fact that a significant cause of non-compliance for vendors is legal uncertainty that emanates from the vagueness in the law.[389] On that account, the self-assessment principles that the South African taxation system is based on, require a vendor to interpret the law, with the risk of penalties and interest if their assessment does not reflect the correct application of the VAT Act.[390]

In consideration of the above, chapter three findings show that, in respect of the suggestion made in IN 57 that a purchaser must be a registered vendor at the time the parties involved conclude the agreement is incorrect on the basis that it deviates from the section 11(1)(e) read together with section 9(1) of the VAT Act.[391] However, it can be argued that where it is practically impossible to implement the legislative guidelines, such deviation can be justified. The IN 57 guidelines regarding the period of the purchaser's registration creates uncertainty in the sense that, it not clear when the vendor must register after the transfer of the property. Further, the study shows that that the legislation is also lacking regarding the period of registration. Furthermore, the study illustrated the difficulty of IN 57 in terms of the registration of a purchaser failing

[387] Chapter two.
[388] Section 11(1)(e) of the *Value-Added Tax Act* 89 of 1991.
[389] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[390] Marius van Oordt & Richard Krever 'Legal uncertainty in South Africa VAT' in Chris Evans, Riël Franszen & Elizabeth (Lilla) Stack (eds) *Tax Simplification: An African Perspective* (2019) at 159-176.
[391] Section 11(1)(e) and section 9(1) of the *Value-Added Tax Act 89* of 1991.

to reach the minimum VAT registration threshold after the transfer of an enterprise due to circumstances beyond his control. As things stand, SARS may refuse to register the purchaser as a VAT vendor. Such refusal is subject to objection and appeal. SARS has the discretion to revisit its decisions in terms of section 9 of the TAA. SARS may allow the purchaser to meet the registration threshold and grant the purchaser with a grace period. The grace period will be granted on case-by-case basis.

The research demonstrated the problems created by the occupancy level of 50 per cent. Notwithstanding the fact that the 50 per cent occupancy level is not expressed in IN 57, it is apparent that it is still applied.[392] It has been established that according to IN 57, a partially tenanted commercial property that is being disposed of in which the vacant space is being actively marketed may attract VAT at fifteen per cent. The research indicates that SARS' interpretation in this regard is narrow and illogical, the reason being that it does not cater for a commercial letting property that is acquired under unprecedented times like COVID-19, the slow economic growth or in a case where the part of the building is being repaired.[393]

Further, the scope of the application of the occupancy level test presents difficulties such as does it mean physically occupying the leased premises or is simply having active leases agreements in place enough? Both cases of *ITC 1865*[394] and *ITC 1861*,[395] prove that a lease agreement is sufficient to show that taxable supplies are made by the vendor. Accordingly, the essence of the matter is that actual occupancy is not a requirement, and this is supplemented by the essentialia of the contract of lease in which the right of use and enjoyment does not encompass the actual occupancy.[396] The judgment in *ITC 1865* clearly states that the vendor was liable for output VAT even though the vendor elected not to enforce the lease agreements in respect of two lessees. It is noteworthy that the two lessees did not occupy the premises however, the existence of lease agreements was sufficient to trigger VAT consequences.[397]

[392] Alwyn de Koker & Gerhard Badenhorst 'VAT in South Africa' (2019).
[393] Chapter three.
[394] *ITC 1865* (75 SATC 250).
[395] *ITC 1861* (74 SATC 383).
[396] Graham Glover *Kerr's Law of Sale and Lease* 4th ed (LexisNexis 2014) 329.
[397] *ITC 1865* (75 SATC 250).

Moreover, if actual occupancy is a requirement -what does it entail?[398] Whatever the case may be, the primary consideration remains that the lessor is making taxable supplies. It is, therefore, evident from these findings that official guidance is needed as SARS' narrow interpretation exacerbates legal uncertainty, which leads to an increased compliance risk for taxpayers. In addition, in *Canada Trustco Mortgage Company v The Queen*,[399] the court held that a person must interpret the tax laws in a way that will promote constancy, predictability, and fairness to allow the taxpayer to manage their tax affairs intelligently.[400] The principle hold true for South Africa.

Conceivably, South African VAT system may adopt the approach applied in other modern VAT systems such as Australia where property purchase may be GST exempt if it is part of a sale that is being disposed of as a going concern particularly if the vacant units in a partially tenanted building are actively marketed.[401] The viewpoint that occupancy level should merely serve as a guideline and not be a determinative factor is conjectural on the basis that one may ask that would treating a potential enterprise as an enterprise not pave a way for abuse? Therefore, I recommend temporary relief for the purchaser.[402] This requires an amendment of section 18A to include a timing provision. Where a purchaser fails to meet the tenancy levels, the purchaser will be liable to account for VAT if the zero-rate does not apply.

Chapter three investigated and considered SARS' position regarding the transfer of assets necessary to conduct the enterprise. Of particular concern is the fully tenanted building where a sub-lease is already in place. The scenario involved an instance where a lessee entered a sub-letting arrangement that is subject to the main lease. If the main lease falls away because the tenant becomes the owner, does that mean that the sub-lease is automatically terminated?[403] It is debatable whether such

[398] Chapter three.
[399] *Canada Trustco Mortgage Company v The Queen* (2003) CTC 2009.
[400] *Canada Trustco Mortgage Company v The Queen* (2003) CTC 2009 para 12.
[401] Australia Taxation Office GSTR 2002/5 'Goods and Services Tax: when is a 'supply of a going concern' GST-free', last accessed from https://www.ato.gove.au/law/view/document?Docid=GST/GSTR2002/5/NAT/ATO/00001&PiT=99991231235958 on 12 September 2022.
[402] Chapter three.
[403] Cliffe Dekker Hofmeyr 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm , on 12 September 2022.

transaction will qualify for zero-rating.[404] The reason being that the primary lease terminates on the transfer of the property and that any sub-lease already in place does not form part of the assets necessary for the carrying on the lessor's enterprise.[405] Therefore, in such case, the standard-rate is '*likely'* to apply to the disposal of the property.

In consideration of the above, the chapter's findings indicate that the argument counting against zero-rating this type of transaction is tentative on account of *huur gaat voor koop* principle that finds application when the property is transferred to the purchaser who is the tenant.[406] Essentially, this means that the sub-lease will remain in place when the primary lease terminates because the lessee (new owner) takes over the lease agreement in lieu of the lessor.[407] This means that new owner will have the same rights and obligations against the tenant like the lessor before the sale took place.[408] The lessor is substituted by operation of the law, which means that no formal ceding of rights is required, and the new owner will automatically acquire all the rights and duties of the landlord under the lease.[409] As such, this can be distinguished from the sale and lease-back cases. This is because a lease agreement (the sub-lease) is in place already.

The principle ensures that any lease agreement with the lessee, whose lease has not yet expired must be honoured if and when the property is being disposed of regardless whether the purchaser is aware of lease at the time of the conclusion of the contract.[410]Therefore, it is submitted that SARS need to consider its position regarding standard-rating this type of transaction and provide clarity as the legal ambiguity

[404] Cliffe Dekker Hofmeyr 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm , on 12 September 2022.
[405] Cliffe Dekker Hofmeyr 'Going concern and leased commercial property', last accessed from https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm , on 12 September 2022.
[406] Percival Gane *The Selective Voet being the Commentary on the Pandects* [Paris Edition of 1829] By Johannes Voet and the supplement to that work by Johannes van der Linden [1756-1835] at 3 (Butterworth 1956) 425.
[407]Johannes van der Linden *Institutes of Holland* (J.C Juta 1904) 145; see also AJ Kerr *The Law of Sale and Lease* (Butterworth 1984) 186; see also other related discussion by Schindlers Attorneys 'HUUR GAAT VOOR KOOP' at 1, last accessed from https://www.schindlers.co.za/news/huur-gaat-voor-koop/, on 12 September 2022.
[408]AJ Kerr *The Law of Sale and Lease* (Butterworth 1984) 186; see also Schindlers Attorneys 'HUUR GAAT VOOR KOOP' at 1, last accessed from https://www.schindlers.co.za/news/huur-gaat-voor-koop/, on 12 September 2022
[409] AJ Kerr The *Law of Sale and Lease* (Butterworth 1984) 186-187.
[410] AJ Kerr The *Law of Sale and Lease* (Butterworth 1984).

compromises the predictability and certainty of a functioning taxation system. Considering the fact that IN 57 is not law, a revised IN 57 might not resolve these legal issues because even if SARS does follow the IN 57 strictly, the taxpayer may dispute an assessment if it disagrees with it. Therefore, it is submitted that SARS should issue a Binding General Ruling ("BGR")[411] which will specifically apply to all parties involved in transactions of the commercial letting enterprise.

4.3 Concluding Remarks

In conclusion, the research has established what a going concern is and has further demonstrated that commercial letting enterprise can be a going concern for the purposes of section 11(1)(e) of the VAT Act. Although the case is pending an appeal to clarify the scope of the transfer of a going concern, the Polish judgment indicated that the sale of a building, together with other elements such as the lease agreements qualify as a going concern.[412] This shows that the courts may have a crucial role to play to reduce the legal ambiguity in relation to what can be covered by the concept of the transfer of a going concern. Ordinarily, this is a question of fact in which the individual circumstances of each case are taken into account. The use of the foreign jurisdictions bring light to the legislature and SARS that the need exists to amend and develop the VAT Act and issue official guidance. Suffice to say, it is crucial to comply strictly with both procedural and substantive requirements of zero-rating provisions when a leased commercial property is disposed of as a going concern. The research has suggested recommendations that may address the interpretational uncertainties and challenges associated with the disposal of the commercial letting enterprise as a going concern. Therefore, in my view, the recommendations will improve the efficiency of the VAT system and possibly reduce non-compliance significantly.

[411] BGR generally deals with matters that are of general concern or importance and it also clarifies the Commissioner's application or interpretation of the tax law relating to specific matters.
[412] The study reflects the legal principles and case law as of 31 October 2022. The Polish case that was transferred to the EJC is important as it will establish the guiding principles which will help in clarifying the scope of what can be transferred as a going concern.

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