

# Tax

# Alert

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## Let's talk

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## Expiry of existing section 72 rulings for agricultural pools

### In brief

All arrangements or decisions made under the “previous” section 72 rules will expire on 31 December 2021. This includes rulings and reconfirmations thereof issued by the Commissioner relating to the separate VAT registration of agricultural pools.

### In detail

#### Agricultural Pools

Producers in the agricultural sector have been using pooling arrangements for several years for the marketing and distribution of their agricultural produce. An agricultural pool is often formed and managed by a marketing agent, with several producers being members of the same pool. The rationale behind the pooling arrangement is that the pool (comprising multiple producers) will generally be in a better position than an individual producer to negotiate better prices and benefit from economies of scale by the pooling of expenses. The pool sells the produce on behalf of the producers.

#### Pools and the VAT Act

While pooling arrangements are common in the agricultural sector, for VAT purposes, approval from the Commissioner for SARS by way of written application is required to operate a pool separate from its members. This approval is granted subject to section 17 of the Marketing of Agricultural Products Act No. 45 of 1996 (MAP Act).

Generally, in terms of section 54 of the Value-Added Tax Act (“VAT Act”), when the agricultural pool sells the produce on behalf of the producers, the supply is deemed to be made by the producers and not the agricultural pool.

The producers would therefore be required to declare the VAT applicable to those supplies in their VAT returns.

Special provision is, however, made in the case of agricultural pools. In terms of section 52(1) of the VAT Act, any pool created and managed for the sale of, amongst others, agricultural and farming products, being a pool as contemplated in section 17 of the ("MAP Act"), may apply in writing to the Commissioner for the pool to be treated as an enterprise carried on by the pool separately from its members. The effect of this election is that, notwithstanding section 54(1) and (2), the pool will be regarded as the principal and not an agent of its members. As such, the pool will be selling the produce as principal and therefore be liable to account for VAT on the sale thereof. The pool will also be allowed to deduct any VAT incurred on the expenses relating to the pool's activities.

The producer, as a VAT registered member of the pool will only account for VAT on the net proceeds received for the produce in its own VAT return.

## Issue at hand

In order to qualify for the aforementioned pooling arrangement under the VAT Act, the pool must be one contemplated in section 17 of the MAP Act.

Section 17(1) of the MAP Act provides for the Minister of Agriculture, Land Reform and Rural Development to arrange that a pool be conducted by a particular body, at a particular location for the purchase and sale of a particular agricultural product or a class thereof. These arrangements are to be published by notice in the *Gazette*. To date, we are unaware of any such pooling arrangements made under the aforementioned section of the MAP Act and subsequently published in the *Gazette*.

Having regard to the above, a difficulty therefore arises as section 52(1) of the VAT Act refers to agricultural pools approved by the aforementioned Minister, which do not exist.

Historically, section 72 of the VAT Act was used to overcome this anomaly. This section made provision for the Commissioner to make an arrangement or decision for a vendor or class of vendors to overcome difficulties, anomalies or incongruities that

have arisen in regard to the application of any of the provisions of the VAT Act.

A number of marketing agents applied to the Commissioner to issue a ruling, in terms of section 72, allowing the marketing agent to have a separate branch VAT registration for the pool, in terms of section 52(1) of the VAT Act.

Section 72 of the VAT Act was used by many taxpayers to overcome administrative difficulties and anomalies presented by the legislation.

Following internal policy changes in SARS and National Treasury, it was decided that administrative difficulties and anomalies should be dealt with by legislative changes and not by the issuing of section 72 rulings.

As a result, amendments were brought into effect on 21 July 2019 intended to narrow the extent of the Commissioner's discretion and to clarify the circumstances under which the provision can be invoked

The main differences between the new and the old wording of the section is that:

- It will only be considered if the matter impacts other vendors or classes of vendors making similar supplies as the applicant; *and*
- If it is in line with the construct and policy intent of the legislator and provisions of the VAT Act.

The amended wording of section 72 applies to all new applications made on or after 21 July 2019. Any arrangement or decision made by the Commissioner before that date remains valid until the stated expiry date of the decision or 31 December 2021, whichever is earliest.

To date, the VAT Act has been updated periodically to make provision for situations where difficulties or anomalies are experienced that were previously dealt with in terms of section 72 rulings. No such amendment was, however, made for agricultural pools in light of the abovementioned difficulty. It is unclear at this stage, whether due to the absence of any such legislative amendments catering for the Agricultural pooling industry, SARS will be extending the section 72 arrangements previously approved.

## Conclusion

In the agricultural sector and specifically in respect of pooling operations, on the basis that the application includes a class of vendors (i.e. all the participating

producers and also similar pools) it is expected that meeting the first requirement to the updated section 72 should not be difficult.

Proving compliance with the second requirement, that is the request being in line with the policy intent, may be onerous. While SARS has not explicitly indicated any policy changes in respect of agricultural pools, it is not clear whether such arrangements continue to remain its policy.

## Takeaway

It is important to note that ALL rulings currently in place that allow for agricultural pools to be regarded as separate enterprises from their members in terms of section 52(1) of the VAT Act will expire automatically on 31 December 2021, even if the expiration date stated in the ruling issued by the Commissioner is a later date.

It is recommended that all marketing agents who are managing pools under separate branch registrations re-apply to the Commissioner for SARS to obtain approval to continue operating the pools in this manner. Such application will have to comply with the updated provisions of section 72 and should be made through the Advance Tax Rulings process.



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