

A critical evaluation of the VAT zero rating for funds received under national housing programmes in South Africa

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PREFACE

First and foremost, I want to thank my saviour, Jesus Christ, Who has blessed me with the ability and strengthened me to complete this course and dissertation.

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ABSTRACT

It is a constitutional right of each citizen of South Africa to have access to adequate housing, with the government providing assistance to ensure this right is realised. Funding is allocated to provincial or local government based on the annual applicable Divisions of Revenue Act. Where government however provides funding and in return receives housing related goods or services, the transaction falls within the ambit of the Value Added Tax Act. In order to diminish the value added tax effect on state funding of housing programmes, sections 8(23) and 11(2)(s) were inserted in the Value Added Tax Act allowing state funding for housing to incur value added tax at a rate of zero percent.

Unfortunately, these sections in the Value Added Tax Act incited confusion as to which programmes the zero rating applied, resulting in amendments, repeals and reinsertions of these sections in the Value Added Tax Act. This yielded the research question of whether the proposed repealing of sections 8(23) and 11(2)(s) of the Value Added Tax Act would align with the objectives and fundamental principles of national housing programmes and value added tax systems respectively. A literature review was conducted on the current housing and Value Added Tax legislation in South Africa, and also in considering the fundamentals of Value Added Tax with regards to government funding.

The study revealed that inserting sections 8(23) and 11(2)(s) in the Value Added Tax Act effectively increased the budget allocated to the Department of Human Settlements for utilisation in the funding of national housing programmes. Section 8(23) and 11(2)(s) therefore represents an additional budget allocation driven by policy. In conclusion it was found that sections 8(23) and 11(2)(s) of the Value Added Tax Act align with the objectives and fundamental principles of the housing legislation and VAT systems owing to the fact that it supports the objective of ensuring an increase in funding available for utilisation in achieving the housing needs of indigents in South Africa.

Keywords

Zero rate, National housing programmes, VAT Act, Deemed supply, Housing Act, Grant, Transfer payment, Public authority

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ACRONYMS

Department of Human Settlements	DHS
The Division of Revenue Act¹	DORA
Housing Subsidy Scheme	HSS
Municipal Finance Management Act 56 of 2003	MFMA
National Housing Programme	NHP
Public Finance Management Act 1 of 1999	PFMA
The Housing Act 107 of 1997	THA
The National Housing Code of 2000	Code 2000
The National Housing Code of 2009	Code 2009
The Value Added Tax Act 89 of 1991	VAT Act
Value Added Tax	VAT

¹ The Division of Revenue Act is published annually and establishes (amongst others) the equitable share and allocation of national revenue raised in the previous financial year to the three spheres of government (national, provincial and local government). Any reference to the Divisions of Revenue Act in this study does not refer to a specific year's act, but to this principle.

CHAPTER 1: INTRODUCTION

1.1 Background to the research area and motivation of actuality

On 4 February 1997 the Constitution of the Republic of South Africa (1996) came in effect as promulgated by President Nelson Mandela on 18 December 1996. Section 26 of the Constitution of the Republic of South Africa (1996) states that “everyone has the right to have access to adequate housing” and that “the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”.

In order to accomplish the above housing rights for citizens, the Housing Act 107 of 1997 (hereafter referred to as “THA”) was drafted and promulgated but was later amended by the Housing Amendment Bill of 2006. These acts introduced the Reconstruction and Development Programme (RDP) which was later replaced by the Breaking New Ground (BNG) Policy (SAHRC, 2015:4). During 2000, and later amended in 2009, the National Housing Code was issued in accordance with the requirements of section 4 of THA. These policies and acts outline the framework and requirements for the responsible parties providing the financing, roles as well as the specified standard of the houses constructed.

With the unemployment rate in South Africa reaching 32.6% in the second quarter of 2021 (Stats SA, 2021) it remains a challenge to ensure that the civil right to housing is adequately met. As a result of economic inefficiencies and social disparity, the government provides assistance to citizens to enable them access to housing (GCIS, 2020:2). In some cases, beneficiaries of the assistance for housing are required to make a contribution (even if it is “in kind”) in order to receive the assistance (DHS, 2009a:54). According to Ganiyu *et al.* (2017:410) beneficiaries receiving government-funded houses have unfortunately been found to abuse the housing subsidy system by, for example, illegally selling the houses they have received.

Funding for housing programmes is annually allocated by the Minister of Finance, who transfers these funds to the provincial government (based on the provisions of the prevailing DORA and the Integrated Housing and Human Settlement Redevelopment Grant). The provincial department will then make the grants available to municipalities to utilise (Moraba, 2013:14, 15).

During 1991 the Value Added Tax Act 89 of 1991 (hereafter referred to as “the VAT Act”) came in effect. Section 7(a) of the VAT Act imposes VAT on any goods and services supplied by a vendor in the furtherance of his enterprise. Taxable supplies include both standard rated supplies as well as zero rated supplies. A vendor is allowed to claim VAT on all qualifying expenditure incurred in the furtherance of his enterprise. Paragraph (b)(i) of the definition of an enterprise in the VAT Act specifically includes supplies made by public authorities (which includes municipalities).

To allow provincial government adequate time to amend their budgets to include VAT, the definition of transfer payment as well as section 11(2)(p) was inserted in the VAT Act (SARS, 2017a:4). Section 11(2)(p) of the VAT Act allowed for transfer payments received from public authorities to be deemed supplies incurring VAT at a zero rate provided that the payment related to taxable supplies being made (SARS, 2017a:4). During 2001 the definition of transfer payment was however amended to signify a “transfer payment as contemplated in regulation 8.4 of the Treasury Regulations published in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999)” (National Treasury, 2001:212).

Due to uncertainties and interpretational difficulties relating to the definition of transfer payments an investigation was undertaken by National Treasury and SARS. Evidence obtained during the investigation resulted in legislative amendments to clarify identified VAT issues as explained in the Explanatory Memorandum on the Revenue Laws Amendment Bill of 2003 (National Treasury, 2003a:31-35). These amendments included the deletion of the definition of transfer payment, section 11(2)(p) as well as including new deeming provisions and amending or including new definitions (SARS, 2017a:5). As part of aforementioned amendments section 8(23) and section 11(2)(s) were inserted in the VAT Act (National Treasury, 2003b:251, 256). The inserted section 8(23) stipulated that a vendor will be deemed to supply services to any public authority when funds received represent a payment in terms of the Housing Subsidy Scheme. Section 11(2)(s) further allowed for the funds received as contemplated in section 8(23) to be subject to VAT at a rate of zero percent. The most recent amendment to section 8(23) during 2017 saw the requirement of payments received to be in accordance with the Housing Subsidy Scheme be replaced with payments made “in terms of a national housing programme contemplated in the Housing Act, 1997” (National Treasury, 2017b:100).

In order to explain above mentioned sections of the VAT Act, it will be applied to a simple hypothetical scenario. A municipality receiving funding to erect houses under a national housing programme (hereafter referred to as “NHP”) will be entitled to claim VAT on all expenses incurred in the process of constructing the houses, while the revenue received will carry VAT at zero rate.

It seems that the saying “the road to hell is paved with good intentions” was crafted bearing in mind sections 11(2)(s) and 8(23) of the VAT Act. In explaining the saying in his blog, Francis Berger noted “...although most projects, directives, initiatives, and action begin with good intentions, the good intentions ultimately end up creating bad outcomes, usually in the form of unintended consequences, unforeseen side effects, or incompetence in performance of said good intentions” (Berger, 2020).

Section 8(23) of the VAT Act applies to deemed services rendered in terms of a “national housing programme contemplated in the Housing Act, 1997”. Amongst others, the Housing Subsidy Scheme is included as a national housing programme in section 3(5) of THA. In order for payments received for the construction of housing to be considered as a zero rated supply for VAT purposes, the project should be considered a NHP.

In his verdict in the case of AB CC and The Commissioner for the South African Revenue Service (2014), acting Judge NP Mali declared the following: “*In casu*, the VAT Act refers to the Housing Subsidy Scheme mentioned in the Housing Act but not defined. In neither of these Acts is the term Housing Subsidy Scheme defined. A taxpayer is then required to seek the terms of reference from further official documentation.” Where the VAT treatment of a transaction is dependent on a term not defined in legislation, it causes tremendous uncertainty and room for error.

As a result of this ambiguity, section 8(23) and section 11(2)(s) was pronounced to be repealed in the Tax Law Amendment Act 25 of 2015, effective 1 April 2017 (National Treasury, 2016:154, 158). The repealing of these sections was however retracted by reinserting section 8(23) and 11(2)(s) into legislation in 2017 via the Tax Laws Amendment Act 17 of 2017 (National Treasury, 2017b:100, 104). According to the Explanatory Memorandum of the Taxation Laws Amendment Bill, 2017 (National Treasury, 2017a:106, 107) the above reinsertion of sections 8(23) and 11(2)(s) was only intended for a period of two years. These sections were to cease to apply on 1 April 2019.

As of today, the termination of above sections still needs to be enacted, and the confusion continues. In the Explanatory Memorandum on the Taxation Laws Amendment Bill of 2015, section 6.6 establishes the essence of the confusion as being “...administratively difficult to implement ... due to the variations in the programmes and the legislative interpretation by various role-players involved” (National Treasury, 2015a:61, 62).

1.2 Problem statement and research question

1.2.1 Problem statement

Repealing sections 8(23) and 11(2)(s) from the VAT Act may impede the original intention of legislation to benefit projects classified as NHPs. This impediment can result in some South African housing projects not being economically viable for developers as well as decreasing the number of South African citizens benefitting by receiving low-cost housing due to VAT being payable on monies received.

1.2.2 Research question

The question which bears answering is:

Does the proposed repealing of sections 8(23) and 11(2)(s) of the VAT Act align with the objectives and fundamental principles of the NHP and VAT systems respectively?

1.3 Theoretical research objectives

The following theoretical research objectives were attained in response to the research question.

1.3.1 Main research objective

The main theoretical research objective of this study is determining whether or not the proposed repealing of sections 8(23) and 11(2)(s) of the VAT Act aligns with the objectives and fundamental principles of the NHP and VAT systems respectively.

1.3.2 Secondary research objectives

The following theoretical secondary objectives were addressed in attaining the main theoretical research objective:

- Housing legislation is reviewed and the objective of these laws are determined and NHPs are identified. This objective is addressed in Chapter 2.

- The underlying principles of a VAT system is analysed. Specific consideration is given to the treatment of government transactions and funding of these transactions, as well as identifying which transactions should attract VAT. This objective is addressed in Chapter 3.
- South Africa's VAT legislation relating to dealings with government funding for the achievement of social housing objectives is identified and evaluated. This includes performing a study of the effect of VAT on government funding (giving specific consideration to funding relating to NHPs) from the inception of the VAT Act until the current effective legislation. This objective is addressed in Chapter 4.

1.4 Research methodology

The term research can be explained as a systematic studying to uncover facts (Olivier, 2004:1). Kothari (2004:8) explains research methodology as a technique to solve research problems in a logical way. It is further detailed by Kivunja and Kuyini (2017:28) as conveying the “logic and flow of the systematic processes followed in conducting a research project, so as to gain knowledge about a research problem”. Research methodology therefore explains the phases in which research is conducted.

In order to perform coherent research, a combination of ontology, epistemology and methodology is needed (Cuthbertson *et al.*, 2019:95). These terms and their application to this research will be discussed in more detail below.

1.4.1 Ontological assumptions

When looking at the term ontology etymologically, it can be established to imply the study of being or reality, also ineptly explained as how any person views reality (O’Gorman & MacIntosh, 2014:55). Ontology regards the assumptions a person makes in order to believe that something seems sensible and is therefore considered valid (Kivunja & Kuyini, 2017:27).

This paradigm can be segregated into two opposing categories namely subjective and objective ontology. The term subjective refers to being “influenced by or based on personal beliefs or feelings, rather than based on facts” (Cambridge University Press, 2020b) as opposed to objective which refers to something “based on real facts and not influenced by personal beliefs or feelings” (Cambridge University Press, 2020a). Although both concepts relate to a person’s beliefs, one is

influenced by a person's beliefs (subjective) and the other is not (objective). Expressed differently objective ontology considers reality as being made up of solid, measurable objects existing even if not experienced by an individual versus subjective ontology which considers reality to consist of perceptions and interactions of an individual (O'Gorman & MacIntosh, 2014:56).

Considering the above, the research performed under this study is subjective in nature as it will take into account the perception of the researcher with regards to the subject matter.

1.4.2 Epistemological assumptions

Whereas ontology relates to the nature of a being, epistemology relates to the nature of knowledge (Cuthbertson *et al.*, 2019:95). It can also be clarified as the way valid knowledge is attained (O'Gorman & MacIntosh, 2014:58).

According to Slavin (cited by Kivunja & Kuyini, 2017:27) there are four sources available from which knowledge can be obtained namely intuitive, authoritative, logical and empirical sources. Obtaining knowledge through these four sources is explained by Kivunja and Kuyini (2017:27) as: i) when depending on one's instincts, hunches and faith the source of the knowledge will be intuitive; ii) authoritative knowledge will be obtained from people who are schooled in a certain subject or books; iii) rationalizing and analysing a subject will result in knowledge being sourced from logic; and iv) when knowledge is obtained from verifiable, unbiased facts it is considered empirical knowledge. Knowledge for this study will be attained from authoritative and empirical sources.

There are numerous epistemologies to apply in research, but the two relevant and opposing paradigms are positivism and interpretivism. Positivism relates to a version of science which is not bound to philosophical conjecture but based on definite data (Pruzan, 2016:15). O'Gorman and MacIntosh (2014:70) also concluded that the assumption for epistemological positivism is that, in relation to the researcher, the object being researched is deemed to be independent.

As opposed to positivism, the term interpretivism assumes that personal experience, interpretations and observations is necessary in the pursuit of knowledge relating to the object being researched (Cuthbertson *et al.*, 2019:96). Multiple realities are therefore taken into account as each individual's experience, interpretation and observations of a subject matter will differ significantly (O'Gorman & MacIntosh, 2014:65).

Bearing in mind that positivism mostly relates to quantitative scientific research as well as the fact that the research problem impacts a diverse group of users, the interpretivist paradigm is used to achieve the research objectives. In support of the interpretivist paradigm applied, the research performed is qualitative in nature.

1.4.3 Methodological assumptions

The meaning of methodology according to the Merriam-Webster online dictionary is “a body of methods, rules, and postulates employed by a discipline: a particular procedure or set of procedures” (Merriam-Webster Inc., 2020). With regards to research, methodological assumptions therefore relate to the process and procedures concerning the research (Cuthbertson *et al.*, 2019:99). Although there are numerous research methods available, only two qualitative methods are used, namely the doctrinal and normative research methods.

- Doctrinal research approach:

In layman terms doctrinal research can be defined as investigating the law and legal concepts relating to the law (Hutchinson & Duncan, 2012:85). Roux (2014:178) states that the customary objective of doctrinal research consists of convincing other professionals of the researcher’s grasp of the current law as well as the significance of discrepancies identified. This objective is attained by following a two-step approach where one first identifies the relevant laws pertaining to the subject and then interpreting the identified laws (Hutchinson & Duncan, 2012:110).

In order to identify the relevant laws, the focus of the researcher is on studying and evaluating the sources of the legal doctrines, being common law and legislation (Hutchinson & Duncan, 2012:113). When interpreting the identified legislation, Hutchinson and Duncan (2012:116) note the experience, skill and proficiency of the researcher will have an effect on the overall conclusion resulting that the outcome of the research cannot be duplicated by another researcher.

Legal doctrine is considered to be a hermeneutic discipline with the research object being documents and text, and the activity of the researcher being named as the interpretation of the aforementioned (Van Hoecke, 2011:21). According to Coetsee and Buys (2018:86) the documents can include legislation, standards and case law.

For this study approved legislation, case law, journal articles as well as interpretation notes and guides issued by SARS are examined. The result of the examination of above doctrines is used to address all secondary objectives.

- Normative research approach

After identifying and interpreting the relevant laws as part of the doctrinal research approach, the normative research approach gives consideration as to whether identified laws can be considered to be good or bad (Taekema, 2018:6). In order to make the aforementioned judgement, the researcher is required to not only unbiasedly consider all angles relating to the subject matter during the performance of the research, but it should also be specifically noted in the final document to demonstrate the thoroughness of the researcher's arguments (Van der Burg, 2018:4, 5). Normative research is also explained by Coetsee (2019:7) as where the researcher questions whether developed doctrines are appropriate.

Taekema (2018:4) notes the importance in describing a theoretical framework which will state the relationship between the current research and research performed by others relating to the same subject. Once this relationship has been identified arguments and counterarguments will be presented to either support or undermine claims made by other researchers (Van der Burg, 2018:14). Van der Burg (2018:15, 17) explicitly states the importance of documenting all the "links in the chain of argument" as well as the fact that arguments need to be sound and convincing.

The normative research approach is followed to address the third secondary research objective.

1.4.4 Literature review

The objective of a literature review is to extract the essential literature available on a subject matter (Rowley & Slack, 2004:31). This allows the researcher to obtain knowledge on theories available as well as identifying apertures in available literature (McCombes, 2021).

In obtaining knowledge on the mechanisms of VAT, the VAT Act, together with SARS interpretation notes relating to VAT as well as the Tax Law Amendment Bills are reviewed. Understanding relating to housing programmes is obtained through studying THA as well as the

National Housing Codes of 2000 and 2009. Publicly available journal articles and databases were also consulted to amplify information obtained.

1.5 Ethical considerations

No studies relating to this topic have been detected. As existing available data is used and no participants are involved in this study, no ethical concerns were identified although reassessments were performed on a continuous basis.

1.6 Chapter overview

The following chapters are used to organise this research performed on the subject matter.

1.6.1. Chapter 2: A review of the national housing legislation

This chapter focuses on the objectives of the national housing legislation and includes the source of funding, identification of the role-players and an overview of recognised housing programmes.

This chapter addresses the secondary objective of determining the objectives of the housing legislation as well as identifying NHPs.

1.6.2. Chapter 3: An analysis of the principles of a VAT system

The need and purpose of a VAT system is analysed. Specific consideration is given on the VAT treatment of transactions with government.

This chapter addresses the secondary objective considering the fundamental principles of a VAT system when dealing with government funding.

1.6.3. Chapter 4: An assessment of VAT on government funding for NHPs

The South African VAT legislation is analysed specifically in relation to funding from government for projects under the NHP. This includes reviewing the initial VAT legislation's effect on government transactions as well as resulting amendments which led to sections 8(23) and 11(2)(s) as currently legislated in the VAT Act.

The analysis includes but is not limited to the following resources: the VAT Act, Interpretation notes issued by SARS, Tax Law Amendment Bills and Acts, as well as explanatory notes accompanying the aforementioned.

This chapter addresses the secondary objective relating to South Africa's current VAT legislations when dealing with government funding.

1.6.4. Chapter 5: Conclusion

This chapter includes a summary of work performed and conclusions reached. Insufficiencies identified throughout the study is acknowledged and possible solutions to the deficits are proposed.

CHAPTER 2: A REVIEW OF THE NATIONAL HOUSING LEGISLATION

In his report on the Provincial Budgets and Expenditure Review of 2005/06 – 2011/12 (National Treasury, 2009:94) the Director-General of National Treasury acknowledged that the success of public housing programmes has the potential of decreasing poverty and the burden of disease on government as well as providing potential employment. Effective public housing programmes therefore has an important contributory role in decreasing the burden of indigents in South Africa. During the third Indaba of the DHS, Minister Lindiwe Sisulu enumerated the number of housing opportunities provided since democracy at a total of 4.7 million (DHS, 2020:13). The successfully completed number of housing opportunities attest to appropriate legislation imparting adequate guidelines on the policies, framework and the responsibilities and functions of the various role-players and decision-makers involved in the process of constructing and distributing low-income housing.

The objective of this chapter is to identify the relevant housing legislation aimed at addressing the need for adequate housing of every citizen in South Africa (as discussed in Chapter 1). This legislation is reviewed to identify the objective of the legislation, the role-players involved, sources of funding as well as the different housing programmes available.

The principal housing legislation and frameworks to be reviewed in relation to the construction and provision of housing for citizens generating a low-income are the Housing Act 107 of 1997 (see paragraph 2.1 below), the National Housing Code of 2000 (see paragraph 2.2 below) and 2009 (see paragraph 2.3 below).

2.1 The Housing Act 107 of 1997

The preamble to THA recognises the purpose of THA as “to provide for the facilitation of a sustainable housing development process”. The aim of this process is further described by Mashiane and Odeku (2021:271) as to ensure the right to adequate housing of citizens is enforced. THA also indicates the roles and responsibilities of the three tiers of government with regards to housing delivery and allows for municipalities to assume the role of developers in the process (National Treasury, 2009:94).

2.1.1 Definitions and general principles

Section 1 of THA contains important definitions of terms used within the Act. Included in these are the definitions of “housing development” and “national housing programme” which are pertinent to this study. References made to housing developments relate to the establishment of public and private residential environments, as well as the maintenance thereof. Any national policy framework which enables housing development including facilitating the delivery of houses, the re-establishing of existing housing stock as well as arrangements supporting indigents in obtaining their own accommodation, is referred to as a NHP.

Section 3(5) names the following four housing assistance measures as NHPs: a) the Housing Subsidy Scheme; b) the Discount Benefit Scheme; c) the Public Sector Hostels Redevelopment Programme; and d) the Bulk and Connector Infrastructure Grant. As mentioned in Chapter 1, it is important to note that although the term Housing Subsidy Scheme (hereafter referred to as “HSS”) was the requisite for housing funds received from government to be eligible for a VAT zero rating under the initial section 8(23) of the VAT Act, the term is not defined in either THA or the VAT Act. By means of analysing data extrinsic to these Acts, it was ascertained that the HSS consisted of five components during 1995 namely individual, consolidation, institutional and project-linked subsidies as well as relocation assistance (CSARS v Amawele Joint Venture CC, 2018).

Although the aforementioned section in THA stipulates four housing assistance measures as qualifying NHPs, the term NHP is more extensive than those identified in that section. This is evidenced in the obligation of the Minister to publish a housing code (section 4 of THA) containing all housing policies and procedural guidelines. The general principles of THA are to ensure national, provincial and local spheres of government are, amongst others, committed to prioritizing the housing needs of indigents, ensuring communities affected are informed (through effective communication) and empowered (through transferring skills of professionals involved in the process of constructing houses) as well as utilising available money in such a manner as to encourage private investments in housing projects.

2.1.2 Roles and responsibilities

Some of the duties the Minister of Housing is charged with under section 3(2) of THA include determining national policy relating to housing development, establishing and monitoring the performance of government in relation to housing delivery goals as well as assisting provincial government to effectively perform their duties by developing administrative capacity. Section 3(5) of THA however permits the Minister to, after negotiating funds for housing developments from

the state budget, allocate these funds to provincial governments (including certain municipalities allowed to administer NHPs in terms of section 10 of THA) to institute and finance NHPs. An important function of the Minister is also found in section 4(1) of THA which states his responsibility to publish the National Housing Code. This contains the National Housing Policy and is binding on the provincial and local spheres of government.

The roles and responsibilities of the three tiers of government set out in THA was summarised by the Socio-Economic Rights Institute of South Africa (hereafter referred to as “SERI”) as follows (SERI, 2011:14):

- National government should formulate a housing policy to develop a national housing development process as well as create a national housing data bank and information system to monitor the implementation of said policy.
- Provincial government, in the form of provincial departments (hereafter referred to as “PD”), is responsible to promote the delivery of suitable housing in the province by adhering to the framework set out in the housing code as well as allocating funds received from national government to municipalities. The Member of Executive Council (hereafter referred to as the “MEC”) of a province must administer the NHP and approve the projects and financing according to section 7(3) of THA.
- Local government (municipalities) is responsible to bring to fruition the constitutional right to adequate housing. This is achieved by pursuing housing developments, ensuring provision is made for infrastructure and services, and creating an environment that promotes development of houses in its jurisdiction.

It should be noted that in accordance with section 10(1) a municipality may apply to the MEC for accreditation to administer NHPs. The MEC will then allocate money for housing developments directly to the accredited municipalities instead of allocating it to the PDs.

2.2 The National Housing Code of 2000

The National Housing Code of 2000 (hereafter referred to as the “Code 2000”) was published on 21 October 2000 to comply with section 4(1) of THA but was subsequently replaced with the National Housing Code of 2009 (hereafter referred to as the “Code 2009”). In view of the fact that the Code 2009 refers users to the Code 2000 when a programme is identified which is not addressed in the Code 2009 (DHS, 2009a:9) together with the fact that the Code 2000 identified 7 programmes as HSSs (which was crucial in determining the VAT treatment of funds received by developers), Code 2000 is still deemed germane, and will therefore be reviewed.

2.2.1 General principles

Where the Housing White Paper of 1994 (hereafter referred to as the “White Paper”) provides the framework for the Code 2000 by stipulating responsibilities of role-players as well as the methods available to attain the housing vision (DHS, 2000: Ministers Statement), the Urban and Rural Development Frameworks of 1996 contributes the framework relating to rural and urban housing (DHS, 2000:10).

All three policy documents noted above provided the framework for the National Housing Policy and as such their crucial principles should be considered. These documents focussed on creating people-centred environments especially through efficient partnerships where private institutions commit to transferring skills and economically empowering communities. Additionally, the diversity of the country should have been acknowledged by ensuring fairness and equal access to housing opportunities, at the same time promoting the individual’s right to choose while fostering their efforts to improve their housing circumstances. The principles of transparency, accountability and monitoring were vital to guard the housing development system against inequity. Lastly it is essential for the housing development system to be sustainable and affordable in the long-term inferring the importance of balancing government’s allocation to develop human settlements, the standard and number of houses developed as well as the affordability to the final consumer (DHS, 2000:13-16).

2.2.2 NHPs contained in the Code 2000

As previously noted, THA defines four housing assistance measures as NHPs namely a) the Housing Subsidy Scheme; b) the Discount Benefit Scheme; c) the Public Sector Hostels Redevelopment Programme; and d) the Bulk and Connector Infrastructure Grant. The Consolidated Municipal Infrastructure Programme however replaced the Bulk and Connector Infrastructure Grant programme in 1998 and has since been administered by the Department of Constitutional Development rather than the Department of Human Settlements (DHS, 2000:169).

The remaining three NHPs contain several mechanisms which represent these programmes, and these will be discussed further. As indicated in paragraph 2.1.1, the VAT treatment of funds received in relation to housing programmes were initially associated with whether the funds received related to a project included in the HSS. The VAT legislation was subsequently amended to include all NHPs, but the distinction of whether a programme was part of the HSS was the criteria prompting funds to be subject to VAT at a rate of zero percent until 2010.

2.2.2.1 The Housing Subsidy Scheme (HSS)

Being the principal housing assistance measure, this scheme consists of six sub-programmes (DHS, 2000:169).

- Project-linked Subsidies²

A developer, once he identified land and prospective beneficiaries, needs to submit a project application to the Provincial Housing Development Board (hereafter referred to as the “PHDB”) who will assess the application for the approval of funds (DHS, 2000:199). Once approved, the housing subsidy funding will be allocated to the developer (but paid in progress payments) enabling the undertaking of the project and subsequent selling of the residential properties created (DHS, 2000:196).

The subsidy amount is determined by the PHDB through considering the number of residential units available to be sold to beneficiaries in the identified three subsidy bands and adding each of the subsidy bands together to obtain the full subsidy amount payable (DHS, 2000:197). The selling price of the property will be set out in the subsidy agreement entered into between the developer and the PHDB (DHS, 2000:208) and where the selling price exceeds the subsidy amount the beneficiary qualifies to receive from the PHDB, the beneficiary will be liable to finance the purchase of the residential property himself or by obtaining a loan.

- Individual Subsidies²

This programme is available on a first come first served basis to individual households when buying either an existing house or a residential property in the process of development with or without a top structure, but is not available to be utilised for rental property (DHS, 2000:218). These subsidies are further categorised between credit linked and non-credit linked subsidies, the latter pertaining to individuals not qualifying for loan finance which will submit their application to the PHDB who, once approved, will pay the approved subsidy to the conveyancer (DHS, 2000:241). Individuals qualifying for loan finance will submit their application for the subsidy and finance to the lender and the PHDB will, upon approval if the subsidy, pay the approved subsidy to the lender (DHS, 2000:241).

² The judgement in *The Commissioner for the South African Revenue Service v Amawele Joint Venture CC* (2018) identified this as being one of the five schemes formulated which qualified as a HSS in 1995.

- Project-linked Consolidation Subsidies³

This subsidy is only available on a group basis to beneficiaries who previously obtained state-assistance under another subsidy scheme enabling them to acquire serviced residential sites (DHS, 2000:252). The two essential role-players involved in applying for the assistance from the PHDB include a Community-based Organisation (responsible to represent the community) as well as a developer (executing the project from inception until completion) (DHS, 2000:244). The developer is responsible to set up a trust account at a registered financial institution which will be utilised by the PHDB when depositing subsidy payments (DHS, 2000:250).

- Institutional Subsidies³

Institutional subsidies are paid out in the name of the institution, being a financially viable, legal entity possessing the necessary experience in implementing and managing the project (DHS, 2000:255). The institution will be responsible for developing housing stock (usually on property owned by the institution) available to both qualifying and non-qualifying beneficiaries, providing security of tenure in manners other than immediate ownership as well as providing ongoing managing services for the project (DHS, 2000:254). Qualifying beneficiaries refers to beneficiaries qualifying for housing subsidies in terms of the general criteria of the HSS (DHS, 2000:253).

The institution should apply in writing to the PHDB who will assess and approve the application. After obtaining approval, the PHDB and the institution will enter into a subsidy agreement setting out the responsibilities, rules governing the transfer of stock as well as the consequences of transferring property to beneficiaries prior to the four years waiting period (DHS, 2000:267).

A condition central to institutional subsidies is prohibiting the transfer of ownership of the property to qualifying beneficiaries before a period of four years (since occupation of said property by the qualifying beneficiary) (DHS, 2000:253). Where the sale of property takes place after the required four years, the original subsidy received by the institution will be deemed a payment made in respect of the sale transaction and be considered an individual subsidy received by the beneficiary (DHS, 2000:270). The contrary will be true upon the transfer of the property to the beneficiary before the required four years and will

³ The judgement in *The Commissioner for the South African Revenue Service v Amawele Joint Venture CC* (2018) identified this as being one of the five schemes formulated which qualified as a HSS in 1995.

result in the institution having to repay the PHDB a determined amount of the institutional subsidy received (DHS, 2000:271).

- Relocation Assistance⁴

The Government of South Africa entered into a record of understanding (hereafter referred to as the “ROU”) and amended the record of understanding in 1998 (hereafter referred to as the “AROU”) with the South African Banking Trust and the Banking Council of South Africa respectively (DHS, 2000:275). The ROA and AROU relate to borrowers earning less than a specified monthly income, being in default of their loans from lenders for more than three instalment payments as at 31 May 1995 or 31 August 1998 respectively (DHS, 2000:277, 280), having the need to be relocated to more affordable housing. Under these records the borrower and lender enter into a right sizing agreement where the lender allows the borrower occupation of the property in return of receiving monthly rental (at an agreed price) as well as authorising the lender to dispose of the property at a price determined by the lender (DHS, 2000:281).

The borrower, after entering into a right sizing agreement, can apply for a relocation assistance from the PHDB (DHS, 2000:293). Eligibility for receiving relocation assistance is not influenced by the fact that the borrower might have already qualified for housing assistance from the government (DHS, 2000:285). The relocation assistance will be based on the subsidy amount the borrower would be eligible to receive under the rules of the HSS (DHS, 2000:285) and where the borrower qualifies for a loan as well, the relocation assistance will be subject to the rules of a credit-linked subsidy (DHS, 2000:292).

- People’s Housing Process

Where a beneficiary has an inclination to supplement their subsidy by either building or organising the building of their houses themselves, they can access additional resources such as housing subsidies as well as affordable technical, financial, administrative and logistical support via this programme (DHS, 2000:297). The nature of the potential beneficiary will determine the type of housing subsidy they will be eligible to apply for via the People’s Housing Process (DHS, 2000:298). Consolidated subsidies are available to owners, while project-linked or institutional subsidies will be available to non-owners,

⁴ The judgement in *The Commissioner for the South African Revenue Service v Amawele Joint Venture CC* (2018) identified this as being one of the five schemes formulated which qualified as a HSS in 1995.

occupants and landless people. Only rural people will be allowed to apply for rural subsidies via the People's Housing Process (DHS, 2000:317).

It is however compulsory for potential beneficiaries to set up a legal entity as a Support Organisation or contract an existing Support Organisation in order to participate in this HSS (DHS, 2000:299). This organisation will be responsible to facilitate the provision of technical and administrative assistance to beneficiaries, assist in planning and submitting the project to the PHDB, provide assistance to beneficiaries in applying for available HSSs and supplying an overall managerial and guidance role to beneficiaries throughout the programme (DHS, 2000:300). The PHDB provides establishment and facilitation grants to supporting organisations to assist them in performing their functions (DHS, 2000:302).

- **Rural Subsidies: Informal Land Rights**

This form of subsidy should be utilised as a last resort, when no other subsidies are available and is only accessible on a group basis to individuals enjoying functional as opposed to legal tenure over property (DHS, 2000:350, 351, 364). Beneficiaries of this subsidy will enter into an agreement with an accredited implementation agent who will be responsible to negotiate the project with the PHDB (DHS, 2000:375). Implementation agents will identify and plan the project for submission to the PHDB and when the project is approved be responsible to implement it (DHS, 2000:365).

2.2.2.2 The Discount Benefit Scheme

Representing a discount on the sales price or outstanding balances owed by the beneficiary, this scheme allows for a fixed amount to be utilised in acquiring state financed rental housing, in settling existing outstanding debtors' balances after acquiring state property as well as settling balances on loans obtained in order to finance the purchase of such property. However, this scheme only relates to contracted or constructed housing units, financed by the state by 30 June 1993 and allocated by 15 March 1994 (DHS, 2000:318). The application form for the Discount Benefit Scheme should be submitted to the public authority selling or letting the property or who issued the loan (DHS, 2000:325).

As this programme does not form part of the Housing Subsidy Scheme, it is worth mentioning that funding received will not fall in the ambit of sections 8(23) and 11(2)(s) of the VAT Act (paragraph 4.2.2.3). This will result in amounts received from the Discount Benefit Scheme to be subject to VAT at the standard rate up until the period where the VAT Act was amended to include all NHPs.

2.2.2.3 The Public Sector Hostels Redevelopment Programme

Applications for redevelopment of public sector hostels can be made for all public sector hostels (except those owned by municipalities in order to house their employees) to the PHDB in four stages (DHS, 2000:333). The initial stage consists of notifying the provincial government and the PHDB of the intention to initiate a hostel redevelopment project. Once this application is approved and a Local Negotiation Group (hereafter referred to as a “LNG”) has been established, the LNG will (with the inputs from consultants) apply for funding according to the budget to perform the preliminary planning. Thereafter, approval of the budget for preliminary planning will bring about submitting an application for funding and a request to continue with the detailed design. The final stage entails obtaining approval from the PHDB to proceed to tender (DHS, 2000:344-346).

Applications relating to rental, ownership and alternative use redevelopment schemes will be considered (DHS, 2000:337). Furthermore, funding is available to ensure participation, empowerment and capacity building as well as funding relating to physical redevelopment and professional fees for rental and ownership (DHS, 2000:348).

Similar to the Discount Benefit Scheme (see paragraph 2.2.2.2), the Public Sector Hostels Redevelopment Programme is also not classified as a Housing Subsidy Scheme and therefore funds received under this programme will not fall in the ambit of sections 8(23) and 11(2)(s) of the VAT Act resulting in funding being subject to VAT at the standard rate. The amendments to the VAT Act in 2010 (National Treasury, 2010:166) potentially included all programmes approved by the Minister of Human Settlements.

2.3 The National Housing Code of 2009

In an attempt to streamline housing project implementation by means of presenting distinct guidelines, the Code 2000 was revised extensively and replaced with the Code 2009. Policy principles, guidelines, norms and standards which applies to housing assistance programmes since 1994 is set out in the Code 2009 (DHS, 2009a:9). The regulations of Code 2000 will however apply if a programme is identified which is not contained in the Code 2009 (DHS, 2009a:9).

The White Paper and the Comprehensive Plan for the Development of Sustainable Human Settlements of 2004 (hereafter referred to as the “Comprehensive Plan”) essentially gives content to the housing policy in South Africa (DHS, 2009b:7). The general principle of these policies will therefore also need to be considered when determining the purpose and objectives of the Code 2009. In order to ensure the Code 2009 is up-to-date with any legislative and policy amendments, it is to be reviewed and revised on an annual basis (SERI, 2011:73).

2.3.1 General principles

Where the White Paper concentrated on objectively providing housing, the Comprehensive Plan focussed on providing sustainable human settlements (DHS, 2009b:15). The Comprehensive Plan brought to the table principles such as utilising the delivery of housing as a job creation strategy resulting in relieving of poverty and improving the quality of life for indigents while supporting spatial restructuring (DHS, 2009b:19).

Combining the principles and policies set out in the White Paper and Comprehensive Plan resulted in the establishment of the Code 2009. The intention was to streamline the implementation of housing projects by providing clear guidance and being less rigid (DHS, 2009a:10). The current NHPs are presented in the Code 2009 and, in order to identify the purpose of each specific housing programme, each programme is considered separately.

It should be emphasised that from 2010, the term NHP was inserted into the VAT Act (National Treasury, 2010:166) and was the deciding factor in whether funding received relating to NHPs attracted VAT at standard or zero rate. Although section 3(5) of THA identified the Housing Subsidy Scheme, the Discount Benefit Scheme and the Hostels Redevelopment Programme as NHPs, section 3(4)(g) of THA permits the Minister of Human Settlements to institute NHPs. The Minister must give notice in the Gazette of additional NHPs available under section 3(B) of THA. Considering the fact that the Code 2009 classifies all listed programmes as NHPs together with section 4 of THA which obligates the Minister to publish a National Housing Code, all programmes listed in the Code 2009 are considered to be NHPs for the purposes of THA and VAT Act.

2.3.2 NHPs contained in the Code 2009

Although each programme was established to benefit indigents, the end result of assistance can vary from obtaining ownership, renting residential units or utilizing social amenities. The requirements to qualify as a beneficiary to a NHP is not addressed in this study, but rather the purpose of the end-product constructed as well as the role-players involved in the construction. The sixteen NHPs as listed in the Code 2009 are categorized and discussed based on the form of secure tenure obtained.

The final form of secure tenure is important considering the final title holder will either utilise the property for personal, residential use or as a business providing amenities or rental units for residential accommodation. Where the unit is used by the owner for his own residential accommodation, the owner will be the final consumer of the goods as opposed to renting it out as an enterprise (i.e., not being the final consumer). This can have a significant effect on the VAT treatment of the transactions as final consumers are mostly unable to claim VAT on their consumption of goods or service. This is discussed in detail in Chapter 4.

2.3.2.1 Programmes where the indigent obtains ownership of residence

Eleven of the sixteen NHPs will result in the indigent obtaining the ownership of the residence and the indigent is considered the final consumer in terms of the VAT Act. The eleven programmes are:

- Individual Subsidy Programme⁵

Stimulating the growth of the secondary residential market, an objective of the Comprehensive Plan, is addressed through this NHP. Ownership of residential property or, where the beneficiary has access to credit, serviced stands linked to house-building contracts which are not linked to a housing subsidy project, is permitted to qualifying beneficiaries under the Individual Subsidy Programme (DGC, 2011:300). This programme is only available to beneficiaries who wish to acquire residential property in their individual capacity (SERI, 2011:74).

Assistance under this programme is split between three possible scenarios namely credit linked subsidies, non-credit linked subsidies and developer driven individual subsidies. For non-credit linked subsidies an application is submitted to the PD and approved by the MEC (DHS, 2009j:13) who issues a guarantee of approved funding and releases the approved funds upon registration of the property in the beneficiary's name (SERI, 2011:75). Application to access credit linked subsidies is directly submitted to approved financial institutions who, after concluding agreements with the MEC, are authorised to act as an agent of the MEC (DHS, 2009j:13). In the case of developer driven individual subsidies the developer and MEC agree on the amount authorised as well as the payment timeframe (SERI, 2011:75).

⁵ This programme was considered a HSS in the Code 2000.

- Consolidated Subsidy Programme⁶

Where the previous housing dispensation financed the acquisition of serviced stands for beneficiaries, these beneficiaries are now given the opportunity to obtain financial assistance in order to acquire houses for the serviced stands (DGC, 2011:300). Individual subsidies as well as project-based schemes are allowed under this programme, but the rules and requirements relating to those programmes will apply (SERI, 2011:93). According to the Code 2009 (DHS, 2009o:7), the assistance will apply to the top-structure only.

The municipality will assume the role of the developer (unless they do not possess the necessary skills and capacity, where the PD will then assume the role) and is responsible for the implementation of the consolidated project as well as submitting the application to the MEC (DHS, 2009o:11). The MEC will pay the subsidy to the developer once the agreed milestones are achieved (DHS, 2009o:16).

- Institutional Subsidy Programme⁶

Complementing the Community Residential Units Programme (refer to discussion later in this chapter), people at the lower-end of the housing market are given the opportunity of affordable rental housing in any area in South Africa under this NHP (SERI, 2011:97). The main objective of the Institutional Subsidy Programme is to provide housing institutions with the necessary capital to provide and maintain affordable rental housing (DHS, 2009f:13). Housing institutions represent legal entities acquiring, developing and owning immovable property for the renting or purchasing thereof by people in the lower-end of the market (DHS, 2009f:14-15).

The MEC and PD are responsible for approving and administering the project as well as disbursing the subsidy to the housing institution in accordance with the agreed milestones (DHS, 2009f:21). Housing projects will only be considered by the MEC if they are financially viable and capital contributions made by the housing institution exceeds the institutional subsidy allocated to the project (SERI, 2011:97). These additional capital contributions by the housing institution can be obtained by donor funding or loans obtained from the National Housing Finance Corporation. After the institutional subsidy has been received, the housing institution is responsible to fund the maintenance and management of units from the rental income or alternative funding (DHS, 2009f:16).

⁶ This programme was considered a HSS in the Code 2000.

The institutional subsidy is paid out in the name of the housing institution and not the name of the beneficiary (DHS, 2009f:21). Beneficiaries have the option to purchase their rental unit after a period of four years, where the institutional subsidy will be converted to an individual subsidy on the National Housing Database (SERI, 2011:97). In the event of units being transferred to beneficiaries before the four-year period is completed, the housing institution will be penalised (DHS, 2009f:13). Unfortunately, the institutional subsidy in comparison to the loans from the National Housing Finance Corporation and donor funding resulted in an over reliance on donor funding which led to a shift from Institutional Subsidies to Social Housing Programmes (SERI, 2011:99).

- Enhanced People's Housing Process

Qualifying occupants of pre-1994 housing stock can obtain ownership up to the full prevailing Individual Housing Subsidy of the public housing stock (DHS, 2009i:11). This applies to state financed properties where either initial occupation occurred before 1 July 1993 or units and stands were contracted by 30 June 1993 and allocated to the individual before 15 March 1994 (SERI, 2011:75). Although previous programmes were implemented to achieve the transfer of pre-1994 housing stock, the Enhanced People's Housing Process supersedes all these policies and programmes (DHS, 2009i:7).

Public housing stock can be owned by either the PD or municipalities and beneficiaries need to apply to the programme (DHS, 2009a:38). The determined sales price should take into account the outstanding capital balance as well as other amounts in arrears (for example rent, rates, taxes) which accrued to the applicant of the Enhanced People's Housing Process (DHS, 2009i:21). Where the sales price exceeds the amount of assistance from the Enhanced People's Housing Process, the beneficiary needs to finance the remaining balance from his own resources (DHS, 2009i:23). It is important to note that the Enhanced People's Housing Process cannot result in a situation where beneficiaries to this programme remain in a position more advantageous than recipients of other housing programmes (DHS, 2009a:37).

- Integrated Residential Development Programme

A shift was made from simply reaching housing targets versus addressing settlement inadequacies in the Comprehensive Plan. This shift is addressed by developing integrated human settlements (DHS, 2009i:9) through the Integrated Residential Development Programme. Land and service stands for commercial, institutional and residential use are permitted to be acquired and developed under the Integrated Residential Development Programme (DGC, 2011:300). This NHP differs from the others

in the aspect that the identification and approval of qualifying beneficiaries is not a requirement to commence development (DHS, 2009l:14).

The housing chapter of the municipality's Integrated Development Plan (hereafter referred to as the "IDP") should contain the planned Integrated Residential Development Programme developments which will ensure funding is allocated by the MEC based on the approved IDP (DHS, 2009l:30). Project development is allowed to take place in two phases, where phase one entails the acquisition of land, establishment of the township as well as providing serviced stands, while phase two comprises constructing houses for qualifying beneficiaries or selling serviced stands to non-qualifying beneficiaries and commercial entities (SERI, 2011:81).

The municipality assumes the role of the developer (this function can also be undertaken by the PD if the municipality lacks capacity and skill) and in this function is responsible for planning and managing, by appointing professionals and contractors, the housing development project as well as applying for funding to the MEC (who approves and distributes funds) (SERI, 2011:81). According to the Code 2009 (DHS, 2009l:23) payments made by the MEC to the developer is centred on the assumption of progress payments which denotes that payments are made when agreed milestones are reached. Another source of funding for housing development is also obtained through the sale of service stands in phase one of the Integrated Residential Development Programme. These funds should be separately deposited and reserved for the funding of NHPs (DHS, 2009l:23).

- Upgrading of Informal Settlements Programme

This programme aims to accomplish community empowerment as well as tenure and health security by facilitating *in situ* upgrading of informal settlements (DHS, 2009m:13). Community participation is an important aspect of the Upgrading of Informal Settlements Programme and is obtained through participation of ward committees (SERI, 2011:87). An assessment of housing needs of the current occupiers will be compiled at the initial stage of the project, and the project will then be designed to address the identified needs (SERI, 2011:86).

The municipality assumes the role of developer (if they lack the capacity and skill, this can also be assumed by the PD), initiating and planning the project as well as applying to the MEC for approval (SERI, 2011:88). Once the MEC approves, the PD is charged with

reserving, reprioritising and allocating the necessary funds from the annual budget and disbursing the funds to the municipality in accordance with the memorandum of understanding entered between the municipality and the PD (SERI, 2011:88). It should be noted that at least 10% capital counter funding is required from the municipality before the MEC will consider approving the Upgrading of Informal Settlements Programme. The municipality is allowed to utilize funds from the municipal infrastructure grant to secure the counter funding capital (DHS, 2009m:19).

Upgrading of Informal Settlements Programmes transpires in four phases. Funding obtained through the Upgrading of Informal Settlements Programme is only allowed to be utilized in the first three phases (surveying, registration, geotechnical investigations, town planning, etc.) (SERI, 2011:86) while the fourth phase (housing consolidation) should be linked to Individual Housing Subsidy benefits or other selected NHPs (DHS, 2009m:27).

- Rectification of Pre-1994 Residential Property

This NHP helps to improve the quality and condition of houses, whether state-owned or already transferred to beneficiaries, constructed under the apartheid government (SERI, 2011:79) and focusses on the improvement of engineering services as well as restoring, improving and reconstructing of structurally unsound dwellings (DHS, 2009p:12). Funds will only be assigned to this programme if no funding is available from the municipal infrastructure grant (especially with regards to the improvement of engineering services) (SERI, 2011:79).

Funding received under this programme will represent a grant to the municipality and will not be deemed to be an Individual Housing Subsidy allocation (DHS, 2009p:19). The role-players according to the Code 2009 (DHS, 2009p:23) will consist of the municipality, the PD and the MEC. The municipality will identify projects in need of rectification and apply to the MEC for approval and funding of the projects, after which the municipality will implement the project. The PD will reserve funds from conditional grants received and release the funds to the municipality once it is approved by the MEC.

- Farm Residents Housing Assistance Programme

This programme was designed to accommodate farm residents required to reside on farms due to the vast distance between farms and surrounding towns (DGC, 2011:301). There are three main options available to the farmer under this programme namely the farmer provides rental accommodation to farm residents or he subdivides his land into small subsistence agriculture holdings and transfer these holdings to the residents or he

provides a portion of his farm to a housing institution who will provide rental units to farm residents (DHS, 2009a:47).

Provincial government will reserve a portion of their annual housing allocation received through the provisions of the DORA to fund the Farm Residents Housing Assistance Programme (DHS, 2009c:30). Applications to this programme should be submitted to municipalities who will recommend them to the MEC for approval after assessment of the application (DHS, 2009a:49).

- Housing Chapters of Integrated Development Plans

Although this programme does not directly result in indigents obtaining ownership, no funding will be made available by the PD for the NHPs if the project which requires funding was not indicated in the municipality's housing chapter of the IDP (DHS, 2009q:21). Where section 25 of the Municipal Systems Act 32 of 2000 obligates all municipal councils to adopt a "single, inclusive and strategic plan for development of the municipality", section 26 indicates the core components of the plan (also known as the IDP) which includes containing a housing chapter.

This programme provides guidance to municipalities on the housing chapters to be included in the IDP and provides for grants available to the municipality in order to assist them to obtain the necessary financial assistance to afford skilled human resources to compile the housing chapter (SERI, 2011:79). The municipality needs to apply for funding from the PD, and the amount of funding will vary depending on the type of support required by the municipality (DHS, 2009q:16).

- Emergency Housing Programme

This programme provides financial assistance to municipalities in providing temporary assistance to people who find themselves in an emergency housing situation (DGC, 2011:299). An emergency housing situation can include, but is not limited to, situations where their current situation is hazardous to their life (either where there is a risk to their health or safety) or where their existing house is destroyed or damaged (DHS, 2009e:9). Although temporary assistance is provided it should be noted that, where possible, this assistance could possibly present the initial phase of a permanent housing solution (DHS, 2009e:14). Consequently, the Emergency Housing Programme is classified as a programme where the indigent obtains ownership.

Funding for this programme comes in the form of a grant received by the municipality which is administered through the PD by means of approval by the MEC (SERI, 2011:94). Annually, funding relating to Emergency Housing Programmes is allocated by the Minister to the PD based on the provisions of the DORA (DHS, 2009e:16). Where the emergency assistance represents the initial phase of a permanent housing solution, this grant may be discounted against subsequent subsidies relating to the housing establishment (DHS, 2009e:14).

- Enhanced Extended Discount Benefit Scheme⁷

This NHP supports households desiring to supplement available housing subsidies by building or organising the building of their own homes (DGC, 2011:301). Community members are required to establish groupings, referred to as Community-based Organisations, to represent the beneficiaries in the decision-making process (DHS, 2009r:35). Provincial Government will appoint a Community Resource Organisation which will provide the Community-based Organisation with technical, operational and administrative assistance (SERI, 2011:301).

The Code 2009 (DHS, 2009r:29) necessitates four different funding streams namely capital, capacity-building, community contribution and bridging finance funding and is obtainable (amongst other sources) from housing subsidies, municipalities, community and donor funding. Local government will play a supportive role whereas the PD will make funds available to the Community Resource Organisations as per agreements.

2.3.2.2 Programmes where the indigent rents residential units

The Breaking New Ground Policy approved by government incorporated principles such as integrating housing (whether by means of subsidies, rental or bonds) and mixing different housing types which promoted the development of the existing residential market (DGC, 2011:294). Three NHPs give rise to rental housing units, the Institutional Subsidy Programme being one of them. Due to the fact that tenants have the option under the Institutional Subsidy Programme of acquiring their rental unit after four years, that programme was discussed under the section dealing with indigents obtaining ownership (section 2.3.2.1 above).

⁷ This programme was considered a HSS in the Code 2000.

The remaining two programmes resulting in the rental of residential units to indigents are as follows:

- Community Residential Units Programme

Serving the market of government owned residential units, this programme runs parallel to the Social Housing Programme (DHS, 2009g:10). The Community Residential Units Programme covers the upgrading of public and grey hostels, public housing stock where ownership cannot be transferred as well as existing abandoned buildings in the inner city or township areas which the municipality has taken over (DGC, 2011: 299). Through this programme a framework is provided to provide secure tenure as well as good quality rental units for the lowest-income sector in South Africa (SERI, 2011:103).

After applying and obtaining approval for the project from the PD (via the MEC), the project has to be included in the provinces' development programme as well as sending a letter of commitment to the municipality. Accredited municipalities or the PD will fund the programme from its annual DORA allocation (DHS, 2009g:27).

Operating costs should be realised through rental income whereas capital works and long-term maintenance will be financed by a once-off allocation (DHS, 2009g:11). Every five years an application to funding for long-term capital and major maintenance is allowed to be made to the PD (DHS, 2009g:19).

- Social Housing Programme

Social housing is defined in the Code 2009 (DHS, 2009h:17) as "a rental or co-operative housing option for low-income persons at a level of scale and built form which requires institutionalised management and which is provided by accredited social housing institutions or in accredited social housing projects in designated restructuring zones". The major difference between the Social Housing Programme and the Institutional Subsidy Programme is the requirement that accredited projects should be within a designated restructuring zone (DHS, 2009f:9). This programme aims to restructure the South African society by addressing structural, economical as well as social and spatial dysfunctionalities and widens the range of housing options available to the poor (DHS, 2009h:11).

A Social Housing Programme develops social housing stock utilizing institutional subsidies, loans from the National Housing Finance Corporation, donor as well as grant

funding (DHS, 2009h:6). The Social Housing Regulatory Authority is established by national government and oversees the social housing sector (DHS, 2009h:52).

There are two components involved in the funding of Social Housing Programmes namely standard and variable grants (DHS, 2009h:50). The national department or the Social Housing Regulatory Authority manages the allocation of funds of the standard grant, while the PD administers the disbursement and monitors compliance. The variable grant is administered by the PD or accredited municipalities, which is sourced from the Equitable Share housing budgets but is limited to the Individual Subsidy amount (SERI, 2011:101).

2.3.2.3 Programmes where the indigent obtains the right to utilize social amenities, ownership resides with government

As previously noted, one of the objectives of the Comprehensive Plan is to improve the quality of life of indigents. In order to achieve this, the following three NHPs were implemented:

- **Provision of Social and Economic Facilities**

This NHP provides municipalities, who are unable to afford it on their own account, access to funding for the upgrading or constructing of Social and Economic Facilities (DHS, 2009d:9). These facilities include clinics, community halls and parks, sport facilities, taxi ranks as well as informal trading facilities (SERI, 2011:76).

The municipality is responsible to identify the project, apply for assistance from the PD, assume the role as developer of the project and ultimately obtain ownership thereof (DHS, 2009d:20). The PD provides funding for the projects after obtaining authorization from the MEC although, in some cases based on the IDP of the municipality, the municipality might be obligated to fund a certain percentage of the project themselves (DHS, 2009d:18, 20).

- **Operational Capital Budget**

The need for implementation assistance in order to achieve housing development goals on a provincial level is recognised in the Comprehensive Plan (DHS, 2009k:8). As a result, this programme allows the provincial government to obtain funding for appointing external expertise or capacity as required by the PD and accredited municipalities, in order to effectively implement NHPs, by reserving a percentage of the annual funding allocated by the Department of Human Settlements (SERI, 2011:78).

The amount reserved on an annual basis is determined by the MEC in terms of the provisions of the prevailing DORA (DHS, 2009k:11). It should also be noted that funding

already provided under the specific NHP for project management is not allowed to be supplemented through the application to the Operational Capital Budget (SERI, 2011:78).

- Rural Housing Subsidy: Communal Land Rights⁸

This NHP relates to beneficiaries occupying land belonging to the state and governed by traditional authorities, but enjoying full functional tenure rights of the land (DGC, 2011:301). According to the Code 2009 (DHS, 2009n:7) subsidies are only available to community members when no other form of subsidies can be applied. Beneficiaries can however decide how to utilise the subsidy by either providing services, building houses or a combination of both (DGC, 2011:301).

Funding may not be accessed individually and is only available in the context of approved housing development projects (DHS, 2009n:15). The PD needs to reserve funding from their annual allocation and transfer it to the municipality once the project is approved by the MEC (DHS, 2009n:23). Projects will only be approved if they are in line with the municipal and district IDP and should be implemented by the municipalities (or supporting organizations appointed by the MEC) who will communicate with the traditional council, land administration committee and community members (DHS, 2009n:14, 17).

2.4 Conclusion

Through the reviewing of the housing legislation in South Africa, it can be concluded that the relevant legislations' purpose to ensure the constitutional right to adequate housing of citizens is met through the execution of NHPs. The original objective of simply ensuring citizens have access to housing has been revised to enhance the quality of life of citizens benefitting from NHPs by ensuring secure tenure (whether through acquiring houses or renting) in settlements offering social and economic amenities, together with safe and healthy living conditions.

At this stage, one thing should be kept in mind. Although President Ronald Regan of America light-heartedly mentioned in 1986 that all things able to move should be taxed (cited by James, 2015:1) it can be taken as a caution that almost all transactions will have a tax effect (whether it will be direct or indirect taxation). Although the government is mostly responsible to finance the development and construction of human settlements, the construction and development thereof will be performed by contractors from the private sector. These contractors are taxpayers offering services or goods for consideration in the furtherance of their enterprise, with the main purpose of generating a profit. Using these contractors will result in government funding being transferred

⁸ This programme was considered a HSS in the Code 2000.

from the public purse into the private sector where it will fall within the ambit of the relevant tax laws, including VAT. In order to determine the VAT effect (if any) on government funding received for NHPs, the fundamental principles of VAT systems, when dealing with government funding, must firstly be analysed and understood which is discussed in Chapter 3.

CHAPTER 3: AN ANALYSIS OF THE PRINCIPLES OF A VAT SYSTEM

According to the Davis Tax Committee (2014:7) the objectives of tax systems include, amongst others, the ability to increase revenue funding government spending as well as providing funds for redistribution to indorse social objectives. VAT was initially implemented as an official tax system in France during 1954 (Victor, 2010) and has since been employed by 170 countries worldwide, including South Africa, as their primary consumption tax system (OECD, 2020:210). The personal consumption of individuals provides the basis for VAT which, according to Schenk *et al.* (2015: 22), confirms the aim of VAT as to expansively tax personal consumption efficiently and neutrally. Neutrality, being considered by some as the leading principle of a VAT system (Amand, 2013:163), is achieved by the system requiring payments of VAT on various stages including where businesses receive VAT from sales made to their customers, and pay VAT on purchases made from their suppliers (OECD, 2017:20).

As stated in paragraph 2.4, funding for NHPs will inevitably fall within the scope of the VAT Act. In order to identify the VAT effect (if any) on funding received for NHPs, the fundamental principles of a VAT system are analysed to determine the general workings, as well as identifying which role-players and transactions should fall within the ambit of a VAT system.

This is accomplished by firstly considering the persons falling within the ambit of a VAT system (paragraph 3.1), followed by the description of what is considered to be economic activities for VAT purposes (paragraph 3.2). Hereafter the time and value of supply (paragraph 3.3), the different types of supplies (paragraph 3.4) and the principles regarding input tax's eligibility for deduction against output tax (paragraph 3.5) will be discussed. As a final analysis the principles encompassing government transactions and the effect of VAT thereon are discussed (paragraph 3.6) and in closing a high-level summary stating the current stand of South Africa with regards to VAT on government activities (paragraph 3.7) is provided.

3.1 Persons affected

All persons involved in economic activities fall within the scope of VAT and are often referred to as taxable persons (Williams, 1996:12). Taxable persons are however only required to register once their annual taxable sales, or expected annual taxable sales, from economic activities attain a statutory minimum level (Schenk *et al.*, 2015:59). According to the South African VAT Act 89 of 1991, a person required to register for VAT is referred to as a vendor.

3.2 Economic activity

The term economic activity is defined by the Cambridge dictionary (Cambridge University Press, 2021) as “the activity of producing, buying, or selling products or services”. Where a vendor is supplying products or services for payment by himself or another person, Williams (1996:25) considers the transaction to fall within the ambit of VAT. To supply products or services refers to the existence of an agreement where a vendor agrees to part with, and pass possession of his goods to a recipient who will take possession of the goods (Schenk *et al.*, 2015:92). This parting and passing possession of goods or services to another recipient should however be an ongoing or continuous activity (Stiglingh, 2021:ch. 31, par. 31.7.1) and therefore once-off sales which do not relate to the enterprise of the vendor will not be subject to VAT.

As opposed to the term economic activity, the South African VAT Act utilizes the term enterprise in defining economic activities. An enterprise is defined in section 1 of the VAT Act as a continuous activity of supplying goods or services for consideration, performed by a person in advancement of their activity, regardless of whether it generates a profit or not. This definition also confirms the notions that there should be an ongoing activity (Silver, 2019:ch. 3, par. 3.7.1) as opposed to once-off private sales of goods or services, as well as the fact that consideration should be received (Silver, 2019:ch. 3, par. 3.7.3). Accordingly, the VAT guide for Municipalities (SARS, 2017b:4) asserts that consideration paid is a requirement for the supplied goods and services to fall within the scope of VAT. This consideration amount will be the amount payable or receivable for goods or services inclusive of the VAT amount (SARS, 2017b:6). Notwithstanding the fact that the consideration is not limited to a monetary payment, Kaney (2015:6) states that the amount must still be expressible in a monetary value.

The Merriam-Webster online dictionary describes supply as the offering of goods and services in a sale transaction (Merriam-Webster, 2021b). The supply of goods implies, for tangible and immovable property (excluding land), the conveying of the disposal right of property, but exclude VAT on money transfers (Williams, 1996:21, 23). Where the disposal right of intangible property is conveyed, Williams (1996:22) considers it to be a supply of services. Where a vendor supplies goods or services within the scope of VAT he is liable to charge VAT on these transactions at the rate prescribed by government, and this tax will be referred to as output tax (Stiglingh, 2021:ch. 31, par. 31.2.1). The VAT paid by the vendor on the supply of goods acquired by him is referred to as input tax (Stiglingh, 2021:ch. 31, par. 31.2.2). Considering the fact that VAT is in essence a consumption tax, VAT revenue should emulate this classification and the revenue should be attributable to the authority where final consumption occurs (OECD, 2017:16). This is also known as the destination principle of VAT.

3.3 Value and time of supply

According to Brettenny and Strauss (2007:27) the value used to calculate the VAT amount should be either the value of money received or the open-market value at the time of supply of goods or services received as part of a barter transaction. This amount will include, without distinction, all items received as consideration by the supplier including payments made by third parties as well as subsidies from government. Where consideration refers to the amount inclusive of VAT, the term value of supply refers to the amount excluding VAT (SARS, 2017b:3).

In South Africa, section 10 of the VAT Act contains the rules for determining the value of supply. The general rule in section 10(3) determines the value of supply as the monetary amount received or, where consideration received was not money, the open-market value of the consideration received less the amount of VAT included in the consideration. There are however exceptions to the general rule which result in special rules for the value of supplies. Some of the transactions where special rules apply include transactions between connected persons, supplies where no consideration was received as well as vouchers.

Time of supply refers to the date and tax period a recipient qualifies to deduct input tax incurred on the purchase of goods or services when at the same time the supplier of the goods and services is obligated to declare the VAT levied on the goods and services sold (SARS, 2017b:3). In most countries VAT is accounted on the accrual basis (Schenk *et al.*, 2015:226), also referred to as the invoice basis, but the time of supply for goods and services might differ.

According to Williams (1996:28) the time of supply for goods will usually occur in unison with the delivery thereof. More specifically at the earlier of the date of the invoice, the delivery of goods, when goods are available for delivery, or when goods are paid for. For services the time of supply is when services are rendered (Williams, 1996:30) implying either when the invoice is issued or partial payment is received. Each VAT system however allows for special time of supply rules in the event of specified transactions, for instance the sale of goods between connected persons (Brettenny & Strauss, 2007:25).

Section 9 of the VAT Act offers the basic rule for the time of supply as the earlier of the invoice date or the receipt of payments (Silver, 2019:ch. 4, par. 4.2) together with numerous transactions having special timing rules which veto the general rule. The most familiar special rules relate to transactions between connected persons, rental agreements as well as supplies where the consideration cannot be determined beforehand.

3.4 Types of supplies

A person liable to register for VAT, in supplying goods and services for consideration, falls within the scope of VAT (HM Treasury, 2020:5). Unless the law exempts a supply of goods or services from VAT, VAT will be levied on supplies made by vendors (Williams, 1996:33) and these supplies will be referred to as taxable supplies. In order to increase the progressivity of VAT, governments implement exemptions as well as reduced or zero rates of VAT (VATCOM, 1990:ch. 2.2, par. 2). The VAT Act makes provision for taxable, which includes standard and zero rated, and exempt supplies (Silver, 2019:ch. 2, par. 2.6).

3.4.1 Standard rate taxable supplies

A tax invoice, according to Schenk *et al.* (2015:132), is to be issued by a vendor on his delivery of taxable supplies. Where goods and services fall within the scope of VAT, the supply will incur VAT at the standard rate unless the supply is specifically excluded (Kaney, 2015:73). A vendor will be entitled to claim a credit (refer to paragraph 3.5) against his output tax generated, based on the VAT levied on goods and services acquired to enable him to make taxable supplies (Schenk *et al.*, 2015:132).

3.4.2 Zero rate taxable supplies

Otherwise referred to as exemption with credit (Williams, 1996:50), zero rate supplies allow a vendor to not levy VAT on the supply of goods and services, but the vendor is allowed to claim the input tax paid in supplying the goods or services as a credit from his output (VATCOM, 1990:ch.2.2 par. 12). Zero rating effectively removes tax from a specific good or service (Schenk *et al.*, 2015:40), resulting in the most beneficial treatment for a vendor in allowing him a deduction for VAT incurred with no corresponding charge of VAT when supplying his goods or services (National Treasury, 2007:60). This results in no tax being collected and will therefore only be afforded to a limited number of transactions where government's objective in allowing the zero rate is considered more important than the collecting of tax on the specific transaction (De Koker & Badenhorst, 2021:ch. 5, par. 5.1).

Rather than being considered to be a rate of tax, zero rate should be perceived as a condition where no tax is being collected (Williams, 1996:50) and is generally utilised when goods and services are being exported or for internal supplies. Zero rated supplies are equally beneficial for consumers as well as suppliers due to the fact that the effective tax rate for either party will be zero (Odhiambo & Odada, 2015:347).

National Treasury (2007:60) notes that government providing goods and services to consumers tax free (in the case of exports) and providing relief in terms of their social policy (assistance to the poor) to be considerations when deciding on the zero ratings of goods and services. Including exported goods and services under zero rated supplies enforces the destination principle of VAT resulting in only domestic consumption being taxed (Ebrill *et al.*, 2001:3).

Likewise, some food and specified supplies are declared to be zero rated in order to lower the prices payable by low-income families (Schenk *et al.*, 2015:261), but it should be noted that this results in a corresponding decrease in government revenue. The VATCOM (1990:ch.3.7 par.3) however warned against using a tax system in order to attain the social objectives of a country as it is extremely ineffective. This corroborates with National Treasury's sentiment that assisting the needy by zero rating some goods is highly ineffective resulting in an increase in compliance cost and a distortion of consumer preferences and producer choices (National Treasury, 2007:83).

Section 11 of the VAT Act contains the goods (in subsection 1) and services (in subsection 2) which attracts VAT at zero rate. This includes *inter alia* exports of goods and services, the sale of a going concern, the supply of fuel levy, basic foodstuffs, municipal rates, grants and funds received for NHPs.

3.4.3 Exempt supplies

No VAT is payable on consideration received when making exempt supplies and the supplying vendor is prohibited from claiming input tax paid in rendering the supply (VATCOM, 1990:ch.2.2 par. 9). Stated differently, exemptions result in output to be untaxed and input to be irrecoverable (Ebrill *et al.*, 2001:83). Exemptions therefore do not completely relieve goods and services from VAT as the supplier of the goods and services ends up paying the VAT included in the sales price of supplies acquired (National Treasury, 2017:61). Odhiambo and Odada (2015:347) claim exempt supplies are only advantageous to the consumer as it decreases the effective tax rate to zero for the consumer, but the supplier is not allowed to claim input VAT which motivates increased consumption of exempt goods or services leading to a possible disparity between supply and demand of these goods and services.

The VATCOM (1990:ch.2.2 par. 11) warned that exempt supplies create administrative and compliance difficulties. Schenk *et al.* (2015:41) explain the reason for the difficulties is due to the fact that where a vendor makes mixed supplies (taxable and exempt) the input tax incurred by the vendor will need to be allocated between the supplies as he is prohibited from claiming tax credits for purchases relating to the exempt activities.

According to Ebrill *et al.* (2001:91, 94) exemptions can be entity (for instance public sector entities) or activity (for instance education, financial services) specific due to either addressing the basic social responsibility of government or due to the difficulty in determining the value added to financial services in order to calculate the VAT. Cnossen (2021:3) stated that exemptions could lead to, amongst others, a misrepresentation of input choices, tax-on-tax effects, a distortion of income as well as an increase to self-supply specific goods or services.

Section 12 of the VAT Act administers exemptions available to vendors. Financial services are included as an exempt supply due to the difficulty in determining the value of the supply (Stiglingh, 2021:ch. 31, par. 31.11.1). Likewise, supply of residential accommodation (Silver, 2019:ch. 9, par. 9.4), also referred to as the rental of a dwelling, is considered to be exempt. Education, childcare services and the transport of passengers (to name but a few) are also deemed to be exempt from VAT in South Africa (Silver, 2019:ch 9).

3.5 Input tax

The VAT a vendor pays when acquiring goods and services used in making taxable supplies, is referred to as input tax (SARS, 2017b:6). It is further described by Kaney (2015:3) as the tax collected on business expenses. The definition of input tax contained in the South African VAT Act also emphasises the importance of the goods or services being acquired either for consumption or utilization when making fully or partial taxable supplies. Where the input tax is used in making taxable supplies, a person registered for VAT can claim a credit for the input tax paid (Schenk *et al.*, 2015:151). According to Williams (1996:54) the input tax credit is usually repaid by setting it off against the payable output tax, resulting in the registered vendor only paying the net amount.

A tax invoice is to be supplied by a taxable vendor to his customer where a taxable supply has been made (Kaney, 2015:21) and only if the customer is also a taxable vendor and in possession of the tax invoice will he be allowed a credit for the input tax paid (Williams, 1996:60). Where sufficient records are kept and the Commissioner deems it impractical to issue a full tax invoice (SARS, 2015b:2) vendors in South Africa are permitted to not issue a valid tax invoice.

An important distinction to make is whether the supplies made by a vendor are taxable supplies or exempt supplies, as it will have a significant influence on the allowable input tax credit (refer to paragraph 3.4 above). Provided that all the supplies made by a vendor are taxable supplies, the vendor will be able to claim the full amount of input tax incurred (see paragraph 3.4.1). If the vendor however uses the goods and services acquired to make a combination of taxable and

exempt supplies, the vendor will have to apportion the input tax incurred ensuring that only the input tax paid while making taxable supplies is available for credit (Williams, 1996:55).

Guidelines on the process to follow for apportioning the input tax in South Africa are set out in Binding General Ruling 16 issued by SARS (2015a:1) and is formulated on the taxable turnover as a percentage of the total turnover for a specific period. If goods or services purchased will be 95% used in making taxable supplies, section 17(1) of the VAT Act absolves the vendor from having to apportion the input tax. Where only exempt supplies are made by a supplier, registration as a VAT vendor will not be allowed and the cost of input VAT on these goods will be carried by the supplier and embedded in the final cost of the consumer.

3.6 Government activities

In most countries the goods and services provided by government bodies and non-profit organisations are considered as being exempt (Schenk *et al.*, 2015:288). Where public and private activities are however in competition with each other, this can cause a misrepresentation due to the public entity supplying exempt goods or services whereas the private company is supplying taxable goods or services (Copenhagen Economics & KPMG, 2011:5). When this is the case, the government authority will be required to register for VAT purposes (Ebrill *et al.*, 2001:93). There has however been a fair amount of confusion identifying which activities of government authorities should be subject to VAT (Schenk *et al.*, 2015:307).

In South Africa the government will be deemed to be the final consumer when they supply goods and services on a non-commercial basis (SARS, 2007:6) which will result in supplies falling outside the scope of VAT. Where supplies fall outside the scope of VAT, an entity is not entitled on credits for the tax inputs (Cnossen, 2021:12) and in most cases this will result in VAT being an extra cost for government which could influence the operating decisions of public bodies (HM Treasury, 2020:3). Corroborating with the non-commercial nature of government activities is the fact that goods and services are usually supplied for minimal consideration (if any), and generally financed through subsidies or grants without a direct link to the goods and services supplied (Cnossen, 2021:13). Since consideration being directly linked to the supply of goods and services is a requirement to qualify for registration as a VAT vendor (Kaney, 2015:6), most public bodies cannot register as VAT vendors.

Contrary to above, Bird and Gendron (2007:88) consider the treatment of government as a final consumer, simply because it supplies goods and services for free, as inaccurate. They give three categories for activities of government bodies namely:

- Redistribution of wealth and income to poor people, which does not add any value (and therefore taxing the value added is impossible);
- Providing public and social goods and services, usually at no fee or a fee significantly below market value; and
- Supplying goods and services similar to the private sector which may result in distorted competition.

Different countries employ different VAT systems when dealing with government funding. These systems vary from providing rebates to public bodies not allowed to claim input (implemented in the European Union) to considering all activities of public bodies to fall within the ambit of VAT (applied by New Zealand and Australia, also known as the full tax approach) (Copenhagen Economics & KPMG, 2011:6).

The European Commission undertook a study in order to identify the best course of action, and proposed that all government activities be divided in four categories guiding their VAT treatment. The categories and treatments are as follows (Schenk *et al.*, 2015:307):

- Government authorities transfer money in order to redistribute wealth allowing recipients to be able to consume goods (which are subject to VAT). Goods and services consumed by the recipients of the transfer payments will be subject to VAT but the transfer payment itself does not constitute goods or services and should not be subject to VAT.
- Goods and services provided by government authorities which are not available in the open market (and therefore not competing with the private sector) will not be subject to VAT as no consideration is paid by individuals.
- Government authorities provide goods and services available in the open market, but at a price below the current market value due to goods and services being subsidised. These goods should be subject to VAT, but the value on which VAT is calculated becomes a problem due to goods and services being subsidised.
- Goods and services available in the open market are provided at market value by government authorities resulting in direct competition for the private sector, and should therefore be subject to VAT.

In order to circumvent the confusion surrounding VAT treatment on government entities, it should be considered to apply a full tax solution on government activities (Copenhagen Economics & KPMG, 2011:6). This envisions a system where VAT is applied to all activities of government authorities resulting in a corresponding input tax deduction.

3.7 South Africa's stand on VAT on government activities

3.7.1 Government tiers

The government of South Africa consists of three tiers namely national, provincial and local government (refer to paragraph 2.1.2). When considering whether a person falls within the ambit of the VAT Act, it should be contemplated whether the person will qualify as a vendor. A vendor is defined in section 1 of the VAT Act as any person who is obligated to register for VAT. Section 1 of the VAT Act also provides a definition of the term person which includes any private entity used as a vehicle to conduct a business, as well as a public authority and a municipality.

Although the initial definition of public authority only referred to departments or divisions of public service (National Treasury, 1991:22), this definition has since been amended. The term public authority (De Koker & Badenhorst, 2021:ch. 3, par. 3.12), which includes departments and public entities, is specifically included in the definition of enterprise and these entities will be obligated to register as VAT vendors when the goods and services supplied are in competition with similar goods and services supplied in the private sector. Although the term municipality is defined separately, a municipality is also obligated to register for VAT purposes when making taxable supplies (De Koker & Badenhorst, 2021:ch. 3, par. 3.12).

A key concept to the definition of an enterprise is the term consideration. This refers to a payment (monetary or not) already made, or to be made as a result of goods or services supplied (Silver, 2019:ch. 3, par. 3.7.3). The link between the consideration received and the supply of goods or services is of the utmost importance. Where there is no link between the consideration received and the supply of goods or services, the supply will qualify as a donation which will not be considered a taxable supply resulting in no output VAT being payable, or input tax being claimable (SARS, 2017a:16).

Interpretation Note 39 issued by SARS (2017a:7) confirms that the first two tiers of the South African Government (national and provincial government) usually fall outside the scope of the VAT Act, with the exception of when they supply goods or services the Minister deems to be in competition with vendors in the private sector. Falling outside the scope of VAT equates to not being able to register as a VAT vendor, and therefore not being able to claim VAT on expenses incurred or levy VAT on the supply of goods or services. VAT charged by vendors supplying goods or services to national and provincial government will therefore be included in the cost of the goods and services acquired and will have to be funded through national and departmental budgets (HM Treasury, 2020:2). The third tier of the South African Government (also referred to as municipalities) is required to register as a VAT vendor, and all supplies by the municipality will

be subject to VAT at the standard rate, except for municipal rates and grants to vendors which will incur VAT at zero rate (De Koker & Badenhorst, 2021:ch. 3, par. 3.12).

3.7.2 Transfer payments

The term grant was only inserted in the VAT Act during 2005 (National Treasury, 2004:114) and it is important to note the preceding term used when describing the flow of funds between the different tiers of government was the term transfer payment. The first issue of Interpretation Note 39 (SARS, 2007:24) explained that the effect of a transfer payment on the state was irrelevant whether the transfer payment was subject to VAT or not. When transfer payments were subject to VAT it resulted in an increase in the expenses paid but also led to a corresponding increase in state revenue in the form of VAT collections.

Section 11(2)(p) was also inserted in conjunction with the definition of transfer payment. Read together with section 8(5) these sections resulted in transfer payments being deemed a service which attracted VAT at the rate of zero percent. The definition of transfer payment was however amended numerous times and was eventually found to be inadequate as it did not include payments made by local authorities as well as, amongst others, DORA equitable share distributions (SARS, 2017a:18). Hence the deletion of the definition of transfer payments and related sections in the VAT Act, and the insertion of the definition of a grant in the VAT Act (National Treasury, 2004:114).

3.7.3 Grants

Currently grants are defined in section 1 of the VAT Act and refers, in particular, to a public authority or municipality paying an appropriation, grant in aid or a subsidy to a vendor. The definition however specifically excludes payments made relating to NHPs as well as payments made where goods or services were supplied by the vendor in return for the payment in accordance with a procurement process. According to the Merriam-Webster online dictionary, an appropriation in this context refers to money provided by government for a specific purpose (Merriam-Webster, 2021a). A payment made in return for goods or services obtained by following procurement processes (or processes similar to the procurement process) can therefore never qualify as a grant (SARS, 2017a:20).

In layman's terms, where goods or services are supplied by a vendor to a public authority or a municipality in return for payment, these goods or services will be considered taxable supplies and incur VAT at the standard rate. According to National Treasury (2004:114, 118, 122) where no goods or services were supplied in return for money received from a public authority or a municipality, the payment made to the vendor will be deemed to be a grant and be considered a

taxable supply of services (made by the vendor at zero rate in accordance with sections 8(5A) and 11(2)(t). This principle does however appear to be contradicted with the exclusion of payments relating to NHPs from the definition of a grant. Where there is a supply of goods or services to a vendor or public authority relating to NHPs, this payment will incur VAT at the zero rate although physical goods or services will be supplied by the vendor. This appears to be a deviation from the accepted policy which leaves one to question the justification surrounding the presumed prejudice relating to funding of NHPs, as the supply of goods and services by a vendor to a public authority will always incur VAT at the standard rate, except when supplied in relation to NHPs.

The rationalization behind this policy deviation is not apparent when consulting the Explanatory Memorandum of the Revenue Laws Amendment Bill, 2003 (National Treasury, 2003a:31, 110, 111). Bearing in mind that government's social policy plays a role in rationalizing zero ratings (refer to paragraph 3.4.2) it could be argued that due to the fact that NHPs already contain definite qualification criteria ensuring only individuals receiving no or very low income can qualify for assistance under NHPs, funding for NHPs was considered to directly result in curbing inequity and assisting in the social reform of South Africa.

3.8 Conclusion

The aim of this chapter was to identify the fundamental principles of VAT systems, together with the relevant role-players and identifying the general practice when dealing with funding from government. Fundamentally most VAT systems employed by countries have similar terms and rules. Similarities include the prohibition of the final consumer to register as a vendor, determining whether the economic activities of a person are sufficient to register as a vendor, determining the time and value of supply, allowing different types of supplies as well as when and how input tax can be claimed. Although the overall fundamental principles exhibit similarities, the special rules and exceptions differ from country to country.

The VAT effect of government transactions does appear to have various viewpoints from not being subject to VAT to being subject to VAT on all transactions. Under the current VAT Act, national and provincial government entities are not required to register for VAT purposes, whereas local government entities will be obligated to register. Monies transferred from national and provincial, to local government entities will not be subject to VAT as they are not linked to the supply of goods and services and not transferred by registered VAT vendors. Local government entities are however required to declare VAT on amounts received where the amounts relate to supplies that are in competition with the private sector and the amount received is directly linked to goods and services to be delivered.

These principles are applied to the amendments of the VAT Act relating to funding received in order to finance NHPs.

CHAPTER 4: AN ASSESSMENT OF VAT ON GOVERNMENT FUNDING FOR NHP

4.1 Introduction

South Africa has been operating VAT as an indirect consumption tax system for three decades. Since enforcing the VAT Act in 1991 numerous changes have been made to the original act with the intention of accommodating the ever-changing business environments. The general purpose of any tax, as explained by Steyn *et al.* (2013:242), is purveying funds to the government enabling them to supply goods and services for the benefit of the public. Included in the goods and services supplied by the South African Government, is the provision of housing for South African citizens.

As discussed in Chapter 3, VAT applies to the supply of goods and services of a VAT vendor in the furtherance of his enterprise. Providing funding for NHPs will result in goods and services being supplied by a vendor and inevitably result in some of the transactions incurring VAT (as indicated in paragraph 3.7.). However, complicating this matter is the fact that government was not supposed to be subject to tax as taxation is responsible to fund the government enabling them to supply goods and service for the good of the public. Having government subject to taxation is akin to the proverbial dog chasing his tail and ultimately eating it. Being mindful of this, together with the need to maximise the benefit returned for each R1 spent by government, is one of the main reasons for the confusion relating to the VAT treatment of funds for NHPs. This confusion is evident from the number of amendments to sections 8(23) and 11(2)(s), as well as the repeal of these sections and the subsequent reversal of the repeal.

In order to determine the root cause of the indecision, the original VAT Act, together with all the amendments affecting the funding from government (with specific reference to NHPs) are identified and applied to determine the repercussion of the effective legislation. Only the amendments in the VAT Act relevant to government funding of NHPs are dealt with.

The aim of this chapter is to perform an assessment of the VAT legislation relating to government funding for NHPs. The VAT effect of legislation throughout the periods relevant to the identified NHPs in Chapter 2 are assessed.

The table below offers a brief chronological summary of the various NHPs and amendments to the VAT Act, along with the relevant periods to which the aforementioned relate.

Table 1 – Timeline of amendments to the VAT Act and housing legislation

VAT Act amendments	Amendment date	Housing legislation amendment
Original Act without any special provisions to government provided housing. Refer to paragraph 4.2.2.1	1991	n/a
Transfer payments introduced. Refer to paragraph 3.7.2. and 4.2.2.2	1992	n/a
n/a	1997	THA was published and effective. Refer to paragraph 2.1.
n/a	2000	Code 2000 was published by the Minister. Refer to paragraph 2.2.
Introduced grants, sections 8(23) and 11(2)(s) and removed references to transfer payments. Refer to paragraph 3.7.3. and 4.2.2.3.	2005	n/a
n/a	2009	Code 2009 was published to replace Code 2000. Refer to paragraph 2.3.
Section 8(23) amended to only apply to NHPs as announced by the Minister in a regulation and the reference to making taxable supplies was removed. Refer to paragraph 4.2.2.4.	2010	n/a
Sections 8(23) and 11(2)(s) repealed and reinserted. Refer to paragraph 4.2.2.5.	2015 & 2017	n/a

4.2 Hypothetical scenarios

The effect of the above legislative amendments are demonstrated and critically analysed by applying the effective legislation to hypothetical scenarios relevant to the specified time dispensation. Due to the sizable number of NHPs available similar items of the HSSs and NHPs were categorized together depending on the utilization of the funds once it was transferred from the public sector to the private sector. This approach gave rise to three categories namely individual beneficiaries, contractors and rental parties.

4.2.1 Individual beneficiaries

This category relates to funding paid directly to individuals for housing. The person receiving the funds will be an individual and not a rental party or a contractor. In other words, the final beneficiary will receive the benefit rather than another party able to apply the funds to generate a profit (rental party or contractor). Individuals receiving these funds are not registered for VAT purposes and as the money represents funding not requiring the receiver to provide any goods and services in return, it shares the characteristics of a grant.

Housing programmes classified under this category include:

- Individual Subsidies

This is available for properties on the secondary housing market where an existing house or a vacant serviced stand linked to a house construction contract is acquired. The individual purchasing the house either receives the subsidy by way of a decrease in their outstanding loan balance, or a decrease in the sales price.

- Enhanced People's Housing Programme

Where households want to actively contribute to building their home, this programme will provide them with assistance. Although a community-based organisation needs to represent the beneficiaries, the benefit of the programme still resides with the individual households instead of another party able to use the money to generate a profit for themselves.

- Enhanced Extended Discount Benefit Scheme

This entails the transfer of pre-1994 housing stock to the occupant of the house. Again, no third party will be involved who is able to utilise the funds received for his own profit.

- Communal Land Rights

Subsidies under this programme are only available on a community basis, with a prerequisite of community members' participation. The traditional council of the community will perform the duties of the land administration committee.

- Relocation Assistance

The end result of this assistance is a reduction of debt, which benefits only the individual whose debt has been reduced and offered a relocation assistance. Again, no third party will be able to profit from this assistance.

As explained above, these transactions are not deemed to attract VAT, and therefore effects of the amendments of the VAT Act on these programmes are not demonstrated through hypothetical scenarios.

4.2.2 Contractors

This category relates to contractors receiving money from government in return for providing goods and services relating to housing programmes. This funding received from government is utilised in the contractor's enterprise in order to generate a profit, and although the funding is utilized to provide housing for South African citizens, a portion of the funds paid by government inevitably ends up in the private sector's purse as profit.

The housing programmes included in this category are as follows:

- Operational Capital Budget Programme

Central to this NHP is the requirement of, on a provincial level, expertise funded by this programme to be from external sources (refer to paragraph 2.3.2.3.). This results in the transfer of funds from government to the private sector.

- Integrated Residential Development Programme

Although the municipality usually assumes the role of the developer (paragraph 2.3.2.1.), goods and services are supplied by contractors resulting in funding being accounted for in the profits of private sector entities.

- Consolidated Subsidies

The municipality (in the capacity of developer) provides the households of pre-1994 serviced stands the opportunity of applying for assistance in the upgrading and constructing of houses (paragraph 2.3.2.1.). This will result in the municipality using

contractors to provide goods and service, and consequently money will be received by the private sector.

- Upgrading of Informal Settlements

Money will flow from government to the private sector where contractors upgrade informal settlements through financing the creation of serviced stands (paragraph 2.3.2.1.).

- Rectification of Certain Residential Properties Created Under the Pre-1994 Housing Dispensation

Contractors (under the control of the municipality as developer) are responsible to repair or reconstruct severely and structurally compromised dwellings (paragraph 2.3.2.1.). Using contractors will result in money flowing from the public sector to the private sector.

- Housing Chapters of the Integrated Development Plan

Where in-house capacity for the compilation of the housing chapter in the municipality's Integrated Development Plan is not available, the municipality can apply for support from the PD (paragraph 2.3.2.3.). The PD can provide personnel to assist the municipality, or they can provide funding to access outside capacity which will result in the consultants receiving funding from government for their own gain.

- Housing Assistance in Emergency Circumstances

Goods and service are provided by contractors, under the direction of the municipality, during the upgrading of informal settlements as well as relocation of people as a result of manmade or natural disasters (paragraph 2.3.2.1).

- Community Residential Units Programme

Although the ownership of housing stock will remain in the public sector (paragraph 2.3.2.2.), the construction and upgrading of these accommodation units will necessitate private sector contractors delivering goods and services, who in return generate a profit from government funding.

- Provision of Social and Economic Facilities

Ownership of these facilities remain with the municipality (paragraph 2.3.2.3.), but the developing of the facilities will require the services of private sector contractors.

- Project-linked Subsidies

The municipality (in their capacity as developer) will engage with the contractors to ensure goods and service are delivered to complete the proposed project (paragraph 2.3.2.1.).

Although the majority of NHPs fall within this category, the flow of funding from government to the private sector has two main routes namely from national, provincial to local government who will distribute it to an external supplier (scenario 1A) or alternatively, directly from the provincial government to the external supplier (scenario 1B), effectively bypassing the local government sphere. The hypothetical scenario which is used to illustrate the effect of sections 8(23) and 11(2)(s) on this category assumes that the allocation from government regarding the NHP is R100,000. This scenario, together with the role-players as set out in Scenarios 1A and 1B is applied on each amendment to the VAT Act relating to funding from government. The tables below illustrate the flow of funding for both scenarios without considering the effect of VAT.

Table 2 – Scenario 1A without VAT

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	-	-
Local Government	100,000	(100,000)	(100,000)	-

Table 3 – Scenario 1B without VAT

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	(100,000)	-

It should be noted that the change in the rate of VAT is not taken into account in the application of the hypothetical scenarios. This will ensure that the comparability of the legislation is maintained as the effect of the amendments in the legislation and not the changes in the VAT rate is investigated. A fixed VAT rate of 15% is used in all instances. It is also assumed that the threshold requirement to register for VAT purposes is met by all the relevant parties.

4.2.2.1 VAT period without any special provisions

a) Summary of the law

Section 1 of the VAT Act provided users with the definitions of the relevant terms used in the VAT Act. The term person included all legal and natural persons as well public and local authorities (National Treasury, 1991:22). Respectively the term authorities referred to departments of public service and councils able to levy rates on services rendered (National Treasury, 1991:21, 22).

Contractors usually used private companies, close corporations or sole proprietorships as vehicles to conduct their business operations and as such would have met the definition of a person in this VAT Act. The provincial government, being a department, as well as the local government rendering services in return for receiving rates would also have met the definition of a person as contemplated in this VAT Act. This did not yet require them to register for VAT purposes, as their supplies would have needed to be taxable supplies (National Treasury, 1991:88). If it was however determined that their supplies were taxable supplies as defined, they would have been referred to as vendors.

Goods and services subject to VAT under section 7(1)(a) of the VAT Act, as well as goods or services where VAT was charged at zero rate, would have been termed as taxable supplies (National Treasury, 1991:24). Looking at the definition of goods and services according to National Treasury(1991:16), goods were defined to include fixed property (and rights to such property) and all moveable things, but explicitly excluded (amongst others) money. Services were broadly defined (National Treasury, 1991:24) to basically include anything done which did not constitute goods but it also specifically excluded money. Guiding the taxability of the goods and services was section 7(1)(a) of the VAT Act which obligated the levying of VAT on the supply of goods and services in the course or furtherance of an enterprise by a vendor (National Treasury, 1991:32).

The term enterprise was defined in section 1 of the VAT Act (National Treasury, 1991:14). It specifically included activities of local authorities and for public authorities it included activities where the Commissioner determined them to be similar to taxable supplies made by other persons in the furtherance of their enterprises (in other words activities which were similar to

activities available in the private sector). In general, any activity where goods or services were supplied on a continuous basis by a person in South Africa in exchange for consideration would have been deemed an enterprise. Consideration was defined as to include any payment, in the form of money or otherwise, received as a result of the supply of goods or services (National Treasury, 1991:12).

b) Critical analysis

Flow of funding: National to provincial government (Scenarios 1A and 1B)

As national and provincial spheres of government do not supply goods or services in the furtherance of an enterprise, they did not fall within the sphere of the VAT Act and would not have been required to register as VAT vendors. The provincial government (department) was a public authority receiving money from national government for the purpose of redistribution to fund the housing project. Considering the fact that money was specifically excluded from being either goods or services, the department did not have an enterprise requiring registration as a VAT vendor and was therefore not liable to pay over VAT on funds received or entitled to claim VAT on expenses incurred.

Flow of funding: Provincial to local government (Scenario 1A)

The local government (municipality) would have been required to register for VAT purposes as they were supplying services and receiving levies in return for their supply. This entitled the municipality to VAT refunds on VAT paid to vendors in making taxable supplies, but also required the municipality to pay output VAT on taxable supplies made. All supplies made by vendors were considered taxable supplies unless they were specifically excluded under section 12 of the VAT Act. As mentioned in paragraph 3.4.1 and 3.4.2 there are two types of taxable supplies namely standard rated taxable supplies and zero rated taxable supplies. As there were no specific provision in section 11 of the VAT Act ensuring the supplies made by municipalities should be made at a rate of zero percent, the supplies of the municipality were subject to VAT at the standard rate.

Being a VAT vendor resulted in the municipality having to pay output VAT of R13,043 on the R100,000 received from the department, but also permitted the municipality to claim a refund of the same amount on the payment of the funds to the contractor. As stated above, the provincial department was unable to claim a refund for the VAT paid to the municipality due to not being a registered VAT vendor, which resulted in an increase in SARS revenue of R13,043. Although there was no system in place ensuring that these funds would have been allocated to fund NHPs

in the following year's budget allocation, these funds received by SARS would have been available for allocation to finance government activities in the following year's budget.

Flow of funding: Local government to contractor (Scenario 1A)

Applying the definitions above would have resulted in the contractor being required to register as a VAT vendor. The contractor supplied goods and services (in the form of professional fees and constructed houses) to local government in exchange for R100,000 consideration. The contractor was therefore furthering his enterprise by making taxable supplies and was subject to VAT. The municipality would have received a VAT invoice from the contractor and would be entitled to claim the input tax refund.

Similar to the flow of funding to the local government, the contractor had to pay output VAT of R13,043 on the R100,000 received from the local government, but was also allowed to claim a refund for the input VAT incurred in supplying the goods and services. The R100,000 allocated from national government therefore had the potential of contributing R86,957 to the relevant NHP.

Table 4 – Scenario 1A: No special provision for housing in VAT Act

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	(86,957)	(13,043)
Local Government	113,043	(100,000)	(86,957)	-
Received from Provincial Government	100,000	(100,000)	(86,957)	(13,043)
Refund from SARS	13,043	-	-	13,043

Flow of funding: Provincial government to contractor (Scenario 1B)

Funding for projects were directly paid from the provincial government to the contractor. This still resulted in funding flowing from a non-vendor (provincial government) to a vendor (contractor), which is similar to funds flowing between provincial and local government in scenario 1A. Likewise, VAT of R13,043 was a cost incurred by the provincial government which they were unable to claim from SARS due to not being a vendor (resulting in additional revenue for SARS). The R100,000 allocation from national government only resulted in contributing R86,957 to the relevant project.

Table 5 - Scenario 1B: No special provision for housing in VAT Act

Description	Inflow	Outflow		
		Total Outflow	To Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	(86,957)	(13,043)

It should be noted that, due to the fact that there were no special provisions for VAT on housing projects during this period, it was irrelevant whether funding related to projects under the HSS or NHP.

4.2.2.2 Transfer payment period

Unless otherwise stated, all relevant sections in the VAT Act remain as indicated in the previous section. Only amendments are discussed and applied.

a) Summary of the law

A new definition was inserted for a term named transfer payment referring to funds received by a department, not spent on goods and services for the department but paid over to other authorities (National Treasury, 1992b:11). This was defined in section 1 of the VAT Act as meaning “transfer payment as contemplated in paragraph A2.9 of the Manual on the Financial Planning and Budgeting System of the State published in terms of section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975)” (National Treasury, 1992a:19). This definition was later amended by substituting the reference to paragraph “A2.9” to “1.2.9.3” (National Treasury, 1997a:20). This last

amendment was only textual in nature (National Treasury, 1997b:10) and is not considered as a significant amendment for further discussion.

Transfer payments were defined in the Manual on the Financial Planning and Budgeting System of the State (cited by SARS, 2007:24) as:

“Transfer payments refer to amounts which will not be disbursed on goods or services by the department/administration on whose vote they appear, but will be paid over to other bodies. Included herein ... divided in two categories, viz:

- Current transfers which include grants in-aid, subsidies, contributions, financial assistance and aid *in natura* to foreign countries as well as pensions and social benefits,
- Capital transfers consisting of ordinary capital transfers, acquisition of shares and loans granted.”

The definition above gives the impression that a transfer payment will be funds which flow through from one entity to another.

Another relevant amendment was made which resulted in including section 11(2)(p) in the VAT Act. To the extent that payments received were regarded as transfer payments, these payments were deemed to relate to services rendered to the relevant authority which incur VAT at zero rate under section 11(2)(p) (National Treasury, 1992a:27).

b) Critical analysis

Flow of funding: National to provincial government (Scenarios 1A and 1B)

The VAT effect on funding from national to provincial government was identical to those explained in paragraph 4.2.2.1.b. Neither of these parties were registered VAT vendors and consequently fell outside the sphere of the VAT Act. No VAT was charged or claimed by these two spheres of government.

Flow of funding: Provincial to local government (Scenario 1A)

Funds received by the local government were deemed to be transfer payments as local government was not required to supply goods or services in return for the funding received. This funding incurred VAT at the rate of zero percent. This resulted in no VAT being paid by the provincial government who was not able to claim the input tax. VAT paid by the local government for goods and services supplied by the contractor would be refunded to the local government by SARS and be available for utilisation on other NHPs of the local government. Even so, taking into account the state of local government’s audit reports and susceptibility to irregular, fruitless,

wasteful as well as unauthorised expenditure it was probable, but highly unlikely, for these funds to be utilised for this purpose resulting in the funds paid over to SARS being forever removed from the budget allocated to the housing department.

Flow of funding: Local government to contractor (Scenario 1A)

The transfer payment provision resulted in local government not being required to pay over any VAT on funds received from provincial government due to the zero rating of these funds. Since these provisions classified transfer payments as deemed services incurring VAT at a rate of zero percent, local government was still entitled to claim input VAT on all expenses incurred.

The amendment in the VAT Act had no effect on the transactions of the contractor as discussed in paragraph 4.2.2.1b since the contractor was still required to supply goods or services to the local government. The contractor was still liable to pay output tax on funds received from the local government but was also entitled to claim input tax on all expenses incurred in supplying the goods or services.

Table 6 - Scenario 1A: Transfer payment period

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	-	-
Local Government	113,043	(100,000)	(86,957)	-
Received from Provincial Government	100,000	(100,000)	(86,957)	(13,043)
Refund from SARS	13,043	-	-	(13,043)

Flow of funding: Provincial government to contractor (Scenario 1B)

Funds transferred from provincial government to the contractor were not considered to be a transfer payment as the contractor was supplying goods and services in return for the funding

received. Consequently, this transaction attracted VAT at the standard rate and the provincial government was not able to claim a refund for the R13,043 paid to the contractor. This effectively increased the cost of the NHP financed with the VAT amount.

Table 7 - Scenario 1B: Transfer payment period

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	(86,957)	(13,043)
Received from National Government	100,000	(100,000)	(86,957)	(13,043)
Refund from SARS	-	-	-	-

Again, it should be noted that due to the fact that there were no special provisions for VAT on housing projects during this period, it was irrelevant whether funding related to a project under the HSS or NHP.

4.2.2.3 HSS and grant period

Unless otherwise stated, all relevant sections remain as indicated in the previous section. Only amendments are discussed and applied.

a) Summary of the law

Two amendment acts (Revenue Laws Amendment Act 45 of 2003 and Revenue Laws Amendment Act 32 of 2004) are discussed in unison as they were effectively promulgated into law on the same date (Proclamation No. 14 of 2005). These amendments significantly transformed the VAT effect of consideration received in relation to HSSs. This is evident from the fact that the amendments only came in effect on 1 April 2005 after being communicated in 2003 and 2004, and ended up prompting SARS to issue an interpretation note in 2007 detailing the application of the law before and after the amendments.

Due to role-players having conflicting opinions relating to the classifications of subsidies, grants-in-aid and appropriations, the correct and consistent application of the term transfer payment was few and far between (National Treasury, 2003a:31). This resulted in the removal of the definition for transfer payment in section 1 of the VAT Act as well as inserting (National Treasury, 2003b:138) and later amending (National Treasury, 2004:114) the definition for grant. After the amendment in 2004, a grant was defined in the VAT Act as “any appropriation, grant in aid, subsidy or contribution transferred, granted or paid to a vendor by a public authority, local authority or constitutional institution” (National Treasury, 2004:114) but specifically excluded where the payment was made in accordance with procurement processes stipulated in the PFMA and MFMA, as well as any payments as contemplated in section 8(23). The Explanatory Memorandum (National Treasury, 2003a:108) spelled out the fact that the term grant specifically excluded goods and services supplied to public and local authorities in exchange for funding.

Two additional subsections were added to the deemed supply provisions of the VAT Act. Firstly section 8(23) was added determining that where any payments were received for goods and services supplied by a vendor in terms of the HSS, the vendor will be deemed to have supplied a service to the local or public authority making the payment (National Treasury, 2003b:250). As already mentioned in Chapters 1 and 2, the term HSS is not defined in any legislation. The Code 2000 however provided general rules relating to HSSs and identified seven schemes operating under the umbrella of the HSS (*CSARS v Amaweale Joint Venture CC*, 2018). The seven schemes were the individual, consolidation, institutional, project-linked and rural subsidies as well as relocation assistance and the People’s Housing Process (refer to paragraph 2.2 for a short explanation on the schemes).

Secondly section 8(5A) was added stipulating when a vendor received a grant, he will be deemed to have supplied a service to any public or local authority as well as constitutional institutions as set out in Schedule 1 of the PFMA (National Treasury, 2004). Regardless of the fact that goods may be provided in return for grants or HSS payments received by vendors, these payments received were deemed to relate to service rendered as a result of section 8.

The new sections inserted in section 8 prompted the inclusion of additional provisions to section 11 of the VAT Act, which specified which activities would incur VAT at the rate of zero percent. Sections 11(2)(s) (National Treasury, 2003b:256) and 11(2)(t) (National Treasury, 2004:122) allowed for all payments received under sections 8(23) and 8(5A) to incur VAT at the rate of zero percent respectively.

b) Critical analysis

As explained in paragraph 4.2 all programmes contained in the Codes 2000 and 2009 were categorized depending on the utilization of funding received. The only programmes included in paragraph 4.2.2 which were effective during this period were the Consolidated and Project-Linked Subsidies contained in Code 2000. The scenarios therefore only relate to these two programmes during this dispensation.

Flow of funding: National to provincial government (Scenarios 1A and 1B)

Similar to the explanation in paragraph 4.2.2.2.b, this amendment had no impact on the VAT treatment of funding from national to provincial government. Neither of the two parties fell within the sphere of the VAT Act and could therefore not register as VAT vendors.

Flow of funding: Provincial to local government (Scenario 1A)

Funds transferred from provincial to local government were deemed an appropriation from provincial government and were considered to be a grant (previously they were considered to be transfer payments). In accordance with section 11(2)(t) grants were subject to VAT at a rate of zero percent causing the local government to charge output VAT of R0 on the funding received from provincial government. Consequently, provincial government did not have to bear the burden of additional costs due to their inability to claim input tax and no funds were transferred to SARS as a result of VAT incurred.

Flow of funding: Local government to contractor (Scenario 1A)

Funds transferred from local government to the contractor fell within the ambit of sections 8(23) and 11(2)(s) of the VAT Act and resulted in VAT being levied at a rate of zero percent. Since the funds received by the contractor consisted of taxable supplies, the input tax incurred by him will be refunded by SARS as part of his input tax claim. The amendments in this section resulted in the contractor receiving R100,000 to potentially apply to a NHP.

Table 8 - Scenario 1A: HSS and grant period

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	-	-
Local Government	100,000	(100,000)	(100,000)	-
Received from Provincial Government	100,000	(100,000)	(100,000)	-
Refund from SARS	-	-	-	-

Flow of funding: Provincial government to contractor (Scenario 1B)

The flow of funding directly from provincial government to the contractor resulted in R100,000 being available to apply to a NHP by the contractor due to the application of sections 8(23) and 11(2)(s).

Table 9 - Scenario 1B: HSS and grant period

Description	Inflow	Outflow		
		Total Outflow	To Local Government or Contractor	To / from SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	(100,000)	-
Received from National Government	100,000	(100,000)	(100,000)	-
Refund from SARS	-	-	-	-

In both scenarios no VAT was payable on the funds transferred from national government until the funds were transferred from a private sector entity to another private sector entity (from the contractor to his suppliers). Sections 8(23) and 11(2)(s) can therefore be seen as minimising the effect of VAT on government entities with regards to housing programmes.

4.2.2.4 Period of relief for NHPs approved by the Minister

Unless otherwise stated, all relevant sections remain as indicated in the previous section. Only amendments are discussed and applied.

a) Summary of the law

Section 8(23) was amended to remove any reference to the HSS and was replaced with “payments made to or on behalf of that vendor in terms of a national housing programme contemplated in the Housing Act, 1997 (Act No. 107 of 1997), which is approved by the Minister by regulation after consultation with the Minister responsible for Human Settlements” (National Treasury, 2010:166). This amendment came after the implementation of the National Housing Code 2009, which replaced the National Housing Code 2000. Code 2009 did not group the housing programmes under a term HSS but classified all programmes as NHPs.

As mentioned in paragraph 2.3.2 the new code contained 16 NHPs as opposed to the 9 contained in the previous code. By omitting the reference to HSS the zero rating effectively became available to all NHPs. According to an explanatory memorandum (National Treasury, 2015a:62) the intention of this amendment was for the Minister of Finance to determine which projects would be subject to the zero rating, and issue a regulation listing these programmes. This would have completely removed any uncertainty regarding to the VAT treatment of the NHPs.

Unfortunately, due to the diversity of the programmes available (individual subsidies, rental units, providing of funds to finance work performed on a municipal level) the Minister never promulgated the required regulations. Due to the amendment in 2017 excluding the requirement of the Minister approving the programmes to which the zero rating of section 8(23) applied, it was considered that sections 8(23) and 11(2)(s) were meant to apply to all NHPs contained in the Code 2009 as this code was published by the Minister.

b) Critical analysis

The results of scenarios 1A and 1B are identical to those described in paragraph 4.2.3.3 except for the fact that it is now not only limited to the programmes classified as HSS but to all the NHPs listed in the Code 2009.

4.2.2.5 Current period of relief available to NHPs

Unless otherwise stated, all relevant sections remain as indicated in the previous section. Only amendments are discussed and applied.

a) Summary of the law

Effective 1 April 2017, sections 8(23) and 11(2)(s) were repealed from the VAT Act (National Treasury, 2015b:154). These sections were however reinstated on the same date with the Taxation Laws Amendment Act 17 of 2017 (National Treasury, 2017b:100, 104). The wording of section 8(23) was however slightly amended to only include payments made to a vendor on behalf of a NHP, not subject to any regulations to be promulgated by the Minister of Finance.

b) Critical analysis

The effect of this amendment on the results of scenarios 1A and 1B will be identical to those described in paragraph 4.2.3.4.

4.2.2.6 Summary of legislative amendments regarding funding for housing programmes of contractors

Refer to the tables below for a summary of the legislative amendments based on the hypothetical scenarios. Only the actual income (the table refers to income as “I”) and expenses (the table refers to expenses as “E”) attributable to each role-player are indicated in this table in order to illustrate the difference in the original allocation from national government versus the funds received by the contractor to utilize in the housing project.

a) *Funding through three tiers of government*

Table 10– Summary of contractor scenario 1A

Description	Inflow (or outflow) for government			
	No VAT (Table 2)	VAT period (Table 4)	Transfer payment (Table 6)	Housing period (Table 8)
National Government	I: n/a	I: n/a	I: n/a	I: n/a
	E: (100,000)	E: (100,000)	E: (100,000)	E: (100,000)
Provincial Government	I: 100,000	I: 100,000	I: 100,000	I: 100,000
	E: (100,000)	E: (100,000)	E: (100,000)	E: (100,000)
Local Government	I: 100,000	I: 86,957	I: 100,000	I: 100,000
	E: (100,000)	E: (86,957)	E: (86,957)	E: (100,000)
Contractor	I: 100,000	I: 86,957	I: 86,957	I: 100,000
SARS	-	I: 13,043	-	-

Amendments to the VAT Act had no effect on the project costs to national and provincial government. This can be expected as both of these two spheres of government fall outside the scope of the VAT Act. In both cases R100,000 is spent on housing projects.

The zero rating of housing project funding results in R100,000 being received by the contractor who can utilise this amount in the construction of housing units. This offers the same result as if no VAT applied to the transaction. Without any special provisions regarding the transfer of funding for government entities, the amount available for the construction of houses is R86,957. This results in R13,043 not being available to the contractor to apply to the construction of the housing projects. It should however be noted that this R13,043 ends up in the pockets of SARS in the VAT period (paragraph 4.2.2.1), which will effectively place it in the basket of national government to allocate again on the next budget allocation.

The major difference between the VAT and HSS period is therefore the fact that the contractor has the potential to build a house worth R86,957 where there are no special provisions, compared to a house worth R100,000 where there are special provisions. The difference between these two amounts is the VAT amount charged on this transaction. Where special provisions allow the VAT to be charged at a rate of zero percent, the available funding to utilize against a housing project is effectively increased with R13,043. In other words, the budget allocated to the housing projects increased with R13,043 due to the zero ratings available.

b) Funding through two tiers of government

Table 11 – Summary of contractor scenario 1B

Description	Inflow (or outflow) for government			
	No VAT (Table 3)	VAT period (Table 5)	Transfer payment (Table 7)	Housing period (Table 9)
National Government	I: n/a	I: n/a	I: n/a	I: n/a
	E: (100,000)	E: (100,000)	E: (100,000)	E: (100,000)
Provincial Government	I: 100,000	I: 100,000	I: 100,000	I: 100,000
	E: (100,000)	I: (86,957)	E: (100,000)	E: (100,000)
Contractor	I: 100,000	I: 86,957	I: 86,957	I: 100,000
SARS	-	I: 13,043	-	-

Similar to the analysis performed in paragraph 4.2.2.6.a, the provision of special provisions regarding the funding for public housing projects results in more funds (equal to the VAT payable on the allocated amount from national government) being available for housing projects.

4.2.3 Rental parties

Included in this final category are parties receiving funding from the government in order to construct rental units (available to low-income individuals) to manage for their own gain. In layman's terms, these entities receive funding and utilise it to generate money through the rental of residential property.

Housing programmes included in this category are:

- Institutional Subsidies

Together with their own capital, institutions receive money from government (as mentioned in paragraph 2.3.2.1.) financing the construction of residential housing units. These institutions are only allowed, but not obligated, to sell these units to the tenant after a four-year period of occupation by the tenant wanting to buy the unit.

- Farm Residents Housing Assistance Programme

The farmer has the option of either selling his land for development by government (similar to the contractor category) or alternatively acting as the developer of residential units on his own property (similar to the institutional subsidy). Government will finance these activities and the farmer (constructing these units on his land) will generate rental income from houses constructed with state funding (refer to paragraph 2.3.2.1.).

- Social Housing Programme

This programme shares similarities with the institutional subsidy programme, except that the houses built have to be located in a restructuring zone (refer to paragraph 2.3.2.2.).

a) Summary of the law

As noted earlier in this chapter, the VAT Act applies to vendors. This term is defined in section 1 of the VAT Act as being a person required to register for VAT. Section 23 of the VAT Act stipulates the prerequisite of carrying on an enterprise before a person is allowed or required (once supplies made exceed a predetermined threshold) to register for VAT. Although there have been numerous amendments to the definition of an enterprise in the VAT Act, the fifth proviso to the definition has remained unchanged since the inception of VAT in 1991. This proviso excludes the making of exempt supplies from the definition of an enterprise resulting in the person making only exempt supplies not being able to register as a VAT vendor.

Section 12 of the VAT Act specifies the activities which will not be subject to, or is exempt from VAT. More specific to the subject at hand, section 12(c) refers to the supply of a dwelling. Although this section was amended once in 2004 (National Treasury, 2004:124) the just of this section refers to the letting and hiring of a dwelling under an agreement. Although the definition of a dwelling was amended three times, a dwelling basically refers to any building or structure which is mainly used as a residence of a natural person, but excludes the supply of commercial accommodation (which usually relates to lodging which includes the supply of domestic goods and services).

As the three programmes categorised as rental parties relate to the provision of a dwelling under an agreement, it stands to reason that the services supplied will be exempt and the entities supplying the service will not be required or allowed to register for VAT purposes. Funding received from government relating to the construction of the residential units, as well as the rent received for the units will not be subject to VAT. This will cause no output VAT being payable on services supplied as well as no input VAT being claimable on expenses incurred in the production of income as the rental parties will not be VAT vendors due to not carrying on an enterprise. This will be the case regardless of whether sections 8(23) and 11(2)(s) of the VAT Act apply due to the rental parties not being able to register as VAT vendors.

An alternative to this viewpoint (of rental parties being able to register as VAT vendors) is however also discussed (refer to part c in this section).

b) Critical analysis

Flow of funding: National to provincial government

A hypothetical scenario of the government allocating R100,000 for the construction of rental units will result in no VAT being generated by the transaction. National government allocates R100,000 to the provincial government for the construction of social housing units. As national and provincial government do not fall within the sphere of the VAT Act (paragraph 3.7), this allocation does not result in any VAT being payable.

Flow of funding: Provincial government to local government or rental parties

Two options are available in allocating the funds to the rental parties. One option is the provincial government directly allocating the funds to the rental parties. This will result in no VAT being payable on the transaction as the party paying the funds is not subject to VAT, as well as the party receiving the funds is not a VAT vendor (due to the supply of exempt services).

Alternatively, the provincial government can transfer the money to the local government, who will in the end transfer the money to the rental party. The transfer of funding between the provincial and local government (municipality) will be an appropriation (representing a grant). As the municipality will be a registered VAT vendor (refer to paragraph 3.7) the zero rating in section 11(2)(t) will apply to grants received (as the municipality is not required to deliver any goods or services to the provincial government in return for the funding received). Upon the transfer of the money from the municipality to the rental party, the same VAT consequences as discussed between the provincial government and the rental parties will apply. The only difference being the municipality, as a registered VAT vendor, will be entitled to claim input VAT on expenses incurred. Unfortunately, the expenses incurred (the distribution of funds to the rental party) were not incurred by a VAT vendor, and therefore no VAT will be claimable by the municipality.

Although the suppliers of the goods and services used in the construction of the rental units will most likely be VAT vendors, the rental parties will not be able to claim the input VAT incurred as they are not registered VAT vendors. This results in the cost incurred in the construction of the rental units to include VAT at the standard rate. The table below provides a summary of the funds allocated and the VAT effect thereof:

Table 12 – Scenario for rental parties

Description	Inflow	Outflow		
		Total Outflow	To Rental Party	To / From SARS
National Government	n/a	(100,000)	-	-
Provincial Government	100,000	(100,000)	-	-
Local Government	100,000	(100,000)	(100,000)	-

c) Alternative viewpoint – rental parties may register for VAT

It could be argued that the funding received from government regarding the construction of the rental units may be regarded as a partial taxable supply given the fact that the consideration received related to a deemed supply under section 8 of the VAT Act. Although an unlikely scenario, this will allow the rental parties to register as VAT vendors, but an apportionment between their exempt and taxable supplies (in accordance with Binding General Ruling 16 as

issued by SARS (2015a:1)) will need to be made to ensure only input VAT relating to the supply of taxable services will be claimed.

Another point to consider is the change in use if it is decided to sell all the units after the retention periods. The selling of a dwelling is not an exempt supply and the rental party might be obligated to register for VAT once the required threshold in taxable supplies is met (in accordance with section 23 of the VAT Act). This will result in the rental party being liable to pay output VAT on all revenue received from the selling of the units.

d) Conclusion of rental parties

The possibility of rental parties registering as VAT vendors (discussed above) was considered but is deemed improbable. The more likely scenario is that rental parties are not permitted to register as a vendor for VAT purposes. This will result in no VAT being charged on goods and services made, but also prohibits the claiming of VAT incurred on supplies made. National government allocated R100,000, and the contractor received R100,000 to construct houses. Although the contractor will incur expenses on purchases from other vendors, he will not be able to claim the input VAT due to the delivery of exempt supplies.

4.3 Conclusion

The purpose of this chapter was to perform an assessment of the VAT legislation relating to government funding for NHPs, with specific consideration regarding the relevant housing legislation and the effect at the time of the amendments to the VAT Act.

Sections 8(23) and 11(2)(s) in the VAT Act enables VAT vendors to spend more on the construction of low-income houses resulting in the construction of units to the potential value that corresponds to the initial investment by government. Unfortunately, not all housing programmes affords the service provider the ability to register as a VAT vendor as the general requirements of making taxable supplies and carrying on an enterprise should still be adhered to. This results in the loss of construction of low-income housing units to the value of the VAT incurred in the construction process.

NHPs were categorized based on the utilization of the funds once it was transferred from the public sector to the private sector. This resulted in three categories being identified for further consideration regarding the VAT effect on funding of the NHPs in these categories. For the category where individual beneficiaries obtained the benefit directly from the government, the amendments to the VAT Act had no effect since the parties involved in the transaction were not registered VAT vendors. For programmes funding the establishment of institutions renting out

residential property, the amendments also did not result in a significant change due to the fact that the party responsible for the letting of the property was not allowed to register as a VAT vendor on account of supplying exempt services.

Amendments of the VAT Act had a definitive effect on programmes providing funding to contractors to construct units or provide services relating to programmes included in the HSS or NHPs. As indicated in the VAT period, the outcome where one of the parties is not registered as a VAT vendor will be an inflow for SARS in the form of output VAT received without a corresponding claim relating to the input tax. The HSS period illustrated the effect of zero rating on the funding from government (no input and output VAT). The major difference between these two periods (the VAT and HSS period) lies in the potential value of the project constructed in the VAT period being reduced with the amount of VAT payable to SARS (amounting to R13,043 in the hypothetical scenario's) without a corresponding input tax credit..

It should be noted that abovementioned will result in government receiving an additional income to the value of the unclaimable VAT amount (R13,043 in the hypothetical scenario's) in the VAT period due to the effect of VAT on project funding. This amount will however be absorbed in the total funds annually allocated to the different departments. As such, it appears that implementing a VAT zero rating guarantees the integrity of funding received from government in ensuring none of the funding allocated for use in a zero rated project will be lost to the cause by having to be paid over to SARS for reallocation in the next budget period. The zero rating of NHPs represents a budget allocation policy and the question is therefore not whether the zero rating of NHPs is right or wrong but rather whether it conforms with the budget allocation policy and can be used as a tool to increase budget allocation with the value of VAT included in the services.

CHAPTER 5: CONCLUSION

With the housing deficit in South Africa estimated at approximately 2.5 million in 2020 (CCE News Team, 2020) the need to ensure the provision of efficient, effective and affordable housing solutions is emphasised. In a quest to address the housing deficit, sections 8(23) and 11(2)(s) were inserted into the VAT Act allowing supplies made relating to Housing Subsidy Schemes (which was later amended to include NHPs) to incur VAT at a rate of zero percent.

At first glance this special consideration of the VAT effect for funding to finance NHPs appears straight forward, but unfortunately these sections of the VAT Act were the cause of great confusion. To curb the confusion the wording of the Act was amended, but in emphasis of the extent of the confusion it was announced in 2015 that the zero rating pertaining to the funding of NHPs would be repealed effectively 1 April 2017 (National Treasury, 2015b:154). This decision was effectively reversed by the inclusion of sections 8(23) and 11(2)(s) in the VAT Act with effect on 1 April 2019.

The repeal and reinsertion of these sections in the VAT Act gave rise to the problem statement of this study which is that the repealing of sections 8(23) and 11(2)(s) from the VAT Act will impede the original intention of legislation to benefit projects classified as NHPs. This impediment can result in some South African housing projects not being economically viable for developers as well as decreasing the number of South African citizens benefitting by receiving low-cost housing due to VAT being payable on monies received.'

In light of the confusion caused by these two sections, this study set out to determine whether the proposed repealing of sections 8(23) and 11(2)(s) of the VAT Act would result in the alignment of the fundamental principles and objectives of the NHPs, as well as those of the VAT Act. The quest to obtain answers relating to the research question gave rise to three incidental secondary objectives namely: reviewing housing legislation to determine the objectives of the legislation as well as an overview of the historic and current NHPs, analysing the underlying principles of a VAT system when dealing with government funding as well as considering the evolution of South Africa's VAT legislation ensuring the achieving of social housing objectives. Each one of these objectives were individually scrutinized and discussed in separate chapters. The summary of each of these chapters are discussed below.

5.1 Chapter 2: A review of the National Housing Legislation

The purpose of this chapter was identifying housing legislation relevant in addressing the need of citizens to have adequate housing. Although numerous legislations are available, the three major legislations concentrated on were THA, the Code 2000 and 2009.

The legislation noted above was used to determine the current NHPs. Although the Code 2009 specifically refers to the programmes included there-in as NHPs, it is not stated explicitly in THA that the Housing Codes will contain all the NHPs. Section 3(5) of THA only refers to four programmes as being NHPs which includes the term Housing Subsidy Scheme. However, this term is not defined somewhere in legislation and it was assumed that programmes referring to Housing Subsidy Schemes referred to some of the programmes included in the Code 2000 and 2009.

The Code 2000 and 2009 listed seven and sixteen housing assistance measures respectively, which are available to indigents to enable them access to ensure secure tenure. Adjusting available policies to the ever-changing needs of citizens and the economic environment ensures that each individual's housing need is met whether through renting a unit, obtaining a housing subsidy, gaining a rural subsidy enabling him to reside close to his place of employment, and others. It is therefore concluded that the housing legislation available enables the government to successfully (at least on paper) address the housing needs of citizens.

5.2 Chapter 3: An analysis of the principles of a VAT system

The objective of this chapter was to determine the VAT effect (if any) on funding received for NHPs. The fundamental principles of VAT systems were analysed to determine the general workings thereof as well as the role-players and transactions which should fall within the ambit of a VAT system.

VAT systems were found to be a very effective and neutral consumption tax system employed worldwide. All persons (natural and legal) are subject to VAT when involved continuously in the supply of goods and services for consideration. Generally, government is not liable to register as a taxable person with regards to VAT, but with the global evolving of services delivered by private entities as well as government entities this has become more complicated. This resulted in the compulsion of government entities to register for VAT in some countries.

The principle currently at play is whether the government entity is adding value to the goods or services they are supplying or are they simply the final consumer. It is concluded that when goods

and services supplied by the government entity is in competition with similar goods and services supplied by private businesses, the government entity will be obligated to register and levy VAT.

5.3 Chapter 4: An assessment of South Africa's VAT legislation when dealing with government funding for NHPs

The objective of this chapter was to determine the VAT effect of legislation throughout the periods relevant to the identified NHPs. The effect of each amendment to the VAT Act was analysed and compared to the fundamental principles of a VAT system identified in Chapter 3 to determine the most appropriate VAT treatment of funding for NHPs.

The various NHPs were categorised according to the utilization of the funds once it was transferred to the private sector. Three categories were identified namely individual beneficiaries, contractors and rental parties. For individual beneficiaries no VAT effect was identified. Where rental institutions received funding for NHPs, the fact that the institutions' main enterprise related to the supply of exempt services resulted in them not being able to register as a VAT vendor and although they consequently are not liable to pay over VAT on revenue, they can unfortunately also not claim VAT on expenses incurred. This will result in VAT being an additional cost to these entities.

The most significant effect of sections 8(23) and 11(2)(s) were illustrated on the contractor level. Where an entity is not entitled to claim a VAT refund on expenses incurred in the provision of the NHP, it will result in additional revenue for SARS (which will become available for allocation in the next budget cycle) but will also reduce the funds available for utilising in the NHP with the amount payable to SARS. The zero rating provision in the VAT Act can therefore be used as a tool to increase certain sectors' budget allocations in the current year by eliminating the VAT payable on the monies received.

5.4 Achievement of main objective and answer to research question

The main objective of this study was to determine whether or not the proposed repealing of sections 8(23) and 11(2)(s) of the VAT Act aligns with the objectives and fundamental principles of the NHPs and VAT systems respectively.

The main objective of housing legislation is to secure tenure for beneficiaries. A variety of NHPs are available as vehicles to secure tenure of beneficiaries, and these NHPs are financed mainly through funding obtained from government.

VAT systems are responsible for taxing the value added by a vendor and generate revenue for government to be utilised in, amongst others, obtaining social objectives (including the provision of housing for citizens). In most cases government entities are not seen as vendors as they are delivering services to the citizens of a country from money received through the collection of taxes and not from consideration received. Where a third party delivers goods and services to government, these goods and services should incur VAT as value was added by the vendor.

Sections 8(23) and 11(2)(s) ensure that the value added by a vendor, in delivering goods and services to government in the form of NHPs, are not taxed. As opposed to VAT payable on the funding of NHPs only being available for budget allocation in the following year, the zero rating provisions relating to NHPs ensures the total amount allocated to NHPs are available for utilization on NHPs in the current year. It should be noted that without the zero rating provisions available for funding of NHPs, the VAT paid on the funds allocated would still have ended up with government, effectively increasing the revenue available for allocation in the next budget period. The zero rating of NHPs is therefore not a question of right or wrong but rather a budget allocation driven by policy. Where the policy makers considers VAT to be the appropriate tool to increase the budget available for housing, utilizing sections 8(23) and 11(2)(s) of the VAT act will achieve this purpose.

The objectives and fundamental principles of the NHPs and the VAT system are therefore considered to align to the extent that the zero rated VAT treatment allocates a greater amount of funding directly for the utilisation in achieving the housing needs of indigents.

5.5 Recommendation for further research

Chapter 4 indicated the difference in funding available for utilisation by NHPs with and without the zero rating provisions of section 8(23) and 11(2)(s). The zero rating of NHPs effectively increases the budget allocation available to NHPs in the current year (illustrated in paragraph 4.2.2.5). This is opposed to where no zero rating relating for NHPs exists which results in the amount attributable to the VAT fraction only being able for budget allocation (by either national or local government depending on the tiers of government involved in supplying the NHP) in the next budget period (illustrated in paragraph 4.2.2.2).

The zero rating of funds for NHPs is a budget allocation and further research could include investigating the extent in which a VAT system can and should be used for budget allocations.

5.6 Limitation of research

The research was limited to the principles surrounding the zero rating of NHPs under the historic and current legislation in South Africa. No consideration was given to alternative legislation relating to the policies and procedures on the delivery of social housing of other countries.

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