**REPUBLIC OF SOUTH AFRICA**

**IN THE TAX COURT OF SOUTH AFRICA**

**HELD AT CAPE TOWN, WESTERN CAPE**

**CASE NO: VAT 1857**

| | |
|---|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
| ..... DATE | ..... SIGNATURE |

In the matter between:

**ABC (PTY) LTD** Appellant

and

**THE COMMISSIONER FOR THE**
**SOUTH AFRICAN REVENUE SERVICE** Respondent

Date of hearing: 3 December 2019

Date of judgment: 25 February 2020

---

**J U D G M E N T**

---

**SIEVERS AJ**

**INTRODUCTION**

[1] This is an appeal against two VAT 217 Notices of Assessment issued by The Commissioner for the South African Revenue Service.

[2] The appellant is a property developer and a registered value-added tax vendor.

[3] During the two tax periods in question the appellant claimed a deduction of input tax pertaining to five immovable properties which it had purchased from sellers who were not registered VAT vendors.

[4] As the sellers were non-vendors the appellant had been required to pay transfer duty, and not input tax, on the five properties.

[5] The appellant calculated its notional input tax based on the consideration of money paid for the immovable properties and included the transfer duty paid in its calculation of the consideration paid.

[6] The respondent disallowed the inclusion of the transfer duty amounts paid in the calculation of the consideration to which the tax fraction was applied, thereby reducing the appellant's notional input tax amount.

**APPLICABLE LEGAL PRINCIPLES**

[7] In *Metcash Trading Ltd v Commissioner, SARS and Another* 2001 (1) SA 1109 (CC) the Constitutional Court set out the fundamental principles of the VAT system and noted (at para 12) that VAT is a tax on added value which is imposed at each step along the chain of distribution of goods and which is calculated on the value at each such step. The deduction of the input tax on purchases from the output tax on supplies has the effect that the vendor does not bear any VAT, with the total VAT burden to be borne by the final consumer.

[8] The Value-Added Tax Act, no 89 of 1991 ("VAT Act") in section 1 defines "input tax", in relation to a vendor, as including:

> "(*b*) an amount equal to the tax fraction (being the tax fraction applicable at the time the supply is deemed to have taken place) of the lesser of any consideration in money given by the vendor for or the open market value of the supply (not being a taxable supply) to him by way of a sale on, or after the commencement date by a resident of the Republic (…) of any second-hand goods situated in the Republic;
>
> …

> where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies … that the goods … are acquired by the vendor for such purpose."

[9] The term "consideration" is itself defined in section 1 of the VAT Act as follows:

> "in relation to the supply of goods or services to any person, includes any payment made or to be made (including any deposit on any returnable container and tax) whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person …"

[10] The principles applicable to the interpretation of statutory provisions are set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras [17] to [26]. Consideration must be given to the language used, the context in which it appears and the purpose of the provision. It is an objective process with a sensible meaning to be preferred to one with insensible or unbusinesslike results or one which would undermine the provision's apparent purpose. Neither language nor context predominates.

**DISCUSSION**

[11] The appellant calculated its input tax on the "consideration" in money given by the vendor as provided for in the definition of "input tax" set out above by including the transfer duty paid. The crisp question before the court is whether the words "any consideration in money given by the vendor" includes the payment of transfer duty.

[12] The definition of "consideration" set out above includes "any payment made … in respect of, … the supply of any goods …"

[13] The word "any" is to be given a wide meaning unless the context requires differently (*CIR v NST Ferrochrome (Pty) Ltd* 59 SATC 407 at 413). The said word is *prima facie* unlimited (*CIR v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) at 618 G-I.

[14] The amount must be paid "in respect of, in response to, or for the inducement of, the supply". The same wording is used in the definition of the term "consideration" in the New Zealand VAT legislation. It has been held by the New Zealand Taxation Authority that the phrase "in respect of" imports the notion of connection or relationship between the supply and the payment. The payment by a lessee or rates was held to constitute payment "in respect of" the supply of the lease. (De Koker VAT in South Africa (Lexis Nexis electronic version) at S 11.2.

[15] The transfer duty paid was in respect of the supply of second hand goods, being the properties purchased. This interpretation is in accordance with the purpose of allowing a vendor a notional input tax credit in relation to the purchase of second hand goods. This does not result in a portion of the Transfer Duty being recovered, it rather has the effect less VAT being paid or a greater refund being received as is provided for by the VAT Act through the concept of a notional input tax.

[16] The respondent led evidence that its practice is that the purchase price paid in respect of the sale of the immovable property is the only consideration that is utilized in the calculation of the notional input tax credit. In *Marshall NO and Others v Commissioner, SARS* 2019 (6) SA 246 (CC) it was held (para 10) that a unilateral practice on one part of the executive arm of government should not play a role in the objective and independent interpretation of legislation by the courts, which is to be done in accordance with constitutionally compliant precepts. The practice is accordingly irreverent to the present enquiry.

[17] The definition of input tax provides for the lesser of the consideration given, or the open market value of the supply to be applied. Section 3(2) of the VAT Act provides that for the purposes of the VAT Act the open market value of any supply of goods shall be the consideration in money which the supply would generally fetch, being a supply freely offered and made between persons who are not concerned persons.

[18] The open market value of supply of the fixed properties was however not raised in the present matter, where the dispute raised was solely whether the quantum of the consideration to be used for the calculation of the notional input tax should include the amounts paid in respect of transfer duty. In terms of rule 34, the issues in an appeal to the tax court will be those contained in the statement of the grounds of appeal and, if any, the reply to the grounds of appeal.

[19] In this appeal this question of the open market value is not raised as an issue. In its Statement of Grounds of Assessment and Opposing Appeal the respondent records expressly that the issue in dispute is whether consideration as contemplated in the definition of “consideration” in section 1(1) of the VAT Act, in respect of the supplies made by the non-vendors for the fixed properties, to the appellant, for purposes of claiming notional input tax, is either the purchase price of the properties or the purchase price of the fixed properties plus the transfer duty paid thereon.

[20] The broad definition of consideration in section 1 of the VAT Act which includes any payment made in respect of the properties is unambiguous and the clear language used includes transfer duty paid. The words in parenthesis in the definition are not relevant to this

enquiry with the word “tax” referred to therein being defined as tax chargeable in terms of the VAT Act.

[21] This conclusion is based upon the clear language used. The conclusion reached is sensible and not unbusinesslike. It does no violence to the context of the provision. That the legislature did not intend to impose both Vat and transfer duty on the same supply of fixed property is evidenced by the complete exemption from transfer duty provided in section 9 (15) of the Transfer Duty Act 40 of 1949 in respect of the acquisition of property under a transaction which for purposes of the VAT Act is a taxable supply of goods to the person acquiring such property.

[22] The Explanatory Memorandum on the Taxation Laws Amendment Bill, 2011 dated 27 January 2012 provides that:

> “The rationale for notional input credits when acquiring second-hand goods is primarily based on the need to eliminate double VAT charges on the same value-added. For instance, is a VAT vendor develops and sells fixed property, the selling vendor charges VAT on the sales price. If the fixed property is sold to a non-vendor, the VAT charge is an additional cost for the non-vendor. If the non-vendor further on-sells the same fixed property to a second VAT vendor, the second VAT vendor indirectly bears the same fixed property to a second VAT vendor in respect of the initial purchase (and for VAT incurred in respect of improvements). Notional inputs for the second VAT vendor in respect of these second hand goods (i.e. fixed property) eliminate double VAT charges on the same value-added by providing notional input relief in the absence of actual inputs.”

[23] The above interpretation is thus compatible with the stated purpose of the provision allowing for a notional input tax.

**CONCLUSION**

It is ordered that:

(a) The appeal is upheld.

(b) The Respondent is directed to alter the Notices of Assessment in accordance with the court’s findings.

(c) Respondent shall pay the Appellant’s costs.

**SIEVERS, AJ**

JUDGE OF THE HIGH COURT