IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

Case No.: A 232/2007

In the matter between:

METROPOLITAN LIFE LIMITED Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

---

JUDGMENT: 16 May 2008

DAVIS J:

[1] This is an appeal against the judgment of the Special Income Tax Court delivered on 15 March 2006, dismissing the appellant's appeal against certain value added tax (VAT) assessments raised by the respondent.

[2] The appellant is a life insurance company and its main business involves the provision of life insurance to both local and international clients. Pursuant to its business, it makes use of various overseas consultants, business advisors and computer services. The appellant adopted the approach that where such services, with the exception of telecommunication services have been physically rendered outside of South Africa no, VAT is payable in terms of the Value Added Tax Act 89 of 1991 ('the Act'). Hence these international supplies stood to be zero rated in terms of section 11(2)(*k*) of the Act.

[3] The respondent adopted the view that the appellant had received "imported services" as defined in section 1 of the Act and thus raised assessment for VAT on such services to the extent that the services were used or consumed in the Republic otherwise than for the purpose of making taxable supplies.

[4] The court *a quo* found that the 'imported services' were assessed correctly as falling under section 7 of the Act which imposes VAT at a rate of 14% and that the ground for zero rating invoked the by appellant in terms of section 11 (2)(k) of the Act was inapplicable. The court applied section 14(5)(b) of the Act, which it held was dispositive of the scope for zero rating of 'imported services'. As these services would not be zero rated if made in South Africa, they did not qualify to be zero rated in terms of the applicable provision, section 14(5)(b). It is against this decision that the appellant approaches this court on appeal.

[5] As Mr Emslie, who appeared on behalf of the appellant, correctly submitted, the appeal is concerned exclusively with questions of law, being the interpretation of various provisions of the Act in relation to facts which are essentially common cause between the parties.

The relevant legislation

[6] Given that this appeal turns entirely on certain provisions of the Act, it is necessary to reproduce the relevant provisions.

The charging provision in the Act is section 7(1), which provides as follows:

> **"Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-**
>
> ***(a)*** **on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;**
>
> ***(b)*** **on the importation of any goods into the Republic by any person on or after the commencement date; and**
>
> ***(c)*** **on the supply of any imported services by any person on or after the commencement date,**
>
> **calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be."**

[7] The term "services" is defined as follows in section 1 of the Act:

> **"'services' mean anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of 'goods'.**

[8] The phrase "imported services" is defined as follows in section 1 of the Act:

"'imported services' means a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilised or consumed in the Republic otherwise than for the purpose of making taxable supplies".

[9] Throughout the relevant period of the present dispute section 11(2)(*k*) of the Act provided as follows:

"Where, but for this section, a supply of services would be charged with tax at the rate referred to in section 7(1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where –

...

(k) **the services are physically rendered elsewhere than in the Republic, not being telecommunication services supplied to any person who utilizes such services in the Republic".**

[10] Section 14(5)(*a*) and (*b*) provided that:

"the tax chargeable in terms of section 7(1)(*c*) shall not be payable in respect of –

> *(a)* **a supply which is chargeable with tax in terms of section 7(1)*(a)* at the rate provided in section 7;**
>
> *(b)* **a supply which, if made in the Republic, would be charged with tax at the rate zero per cent applicable in terms of section 11 or would be exempt from tax in terms of section 12;".**

[11] The facts in the present dispute reveal that the services with which this appeal is concerned, are imported services in that what was involved, was the supply of services made by a supplier resident or carrying on business outside the Republic to a recipient, the appellant, a resident of the Republic. The services were utilised or consumed in the Republic, otherwise than for the purpose of making taxable supplies. In general, imported services stand to be taxed at the rate of 14 per cent VAT in terms of section 7(1)*(c)* of the Act. The question for determining in the present case is whether another section of the Act was applicable to tax the transaction and, if so, which section.

Appellant's argument

[12] Mr Emslie's essential point against the unqualified application of section 7(1)*(c)* the present transaction was that the entire scope of section 7 had been made "subject to the exemptions, exception, deductions and adjustments provided for in this Act". In his view, this phrase clearly included the zero rating provisions contained in section 11(2) of the Act. Accordingly, if the supply of 'imported services' fell within any of the provisions of section 11 (2), the tax to be levied

would be at the rate of zero percent and not at 14 percent as provided for in section 7(1).

[13] Mr Emslie submitted that in terms of the relevant facts the supplies fell within section 11(2)(*k)* and thus stood to be taxed at zero percent. He further submitted that imported services were no less a supply of services than any other supply of services, the former being merely a subgroup of the latter. The application of section 11(2) was not restricted to vendors who were required to register for VAT purposes. On the plain wording of section 7(1) read with section 11(2)(*k*), the supply of these imported services stood to be zero rated.

[14] However, in the light of the finding of the court *a quo* and its reliance upon section 14(5)(*b*) of the Act, Mr Emslie went on to examine the wording application of section 14(5) of the Act. The court *a quo* held that the kind of imported services performed in the present dispute fell exclusively within the scope of this section. By contrast, Mr Emslie submitted that imported services are to be taxed at the rate of zero percent in terms of section 11 (2)(*k*). Accordingly, if imported services were taxable in terms section 7(1) (*c*) of the Act, section 14(5) (*a*) did not apply because there was no supply 'which is chargeable with tax in terms of section 7(1)(*a*) at the rate provided by section 7'. Furthermore, section 14 (5) (*b*) could not apply because if the supplies have been made in the Republic they would not have been 'charged with tax at the rate of zero percent applicable in terms of section 11'.

Appellant's criticism of the court *a quo's* reliance on section 14(5)(*b*)

[15] Mr Emslie criticized the finding of the court *a quo* to the effect that section 14 (5)(*b*) of the Act was exhaustive of the question of the taxation of imported services that are otherwise charged to VAT under section 7(1) (*c*) of the Act: that is imported services which fall under section 7(1) (*c*) but not simultaneously under section 7(1) (*a*) of the Act. For the court *a quo*, the final question was whether the supplies are those which, 'if made in the Republic', would qualify for zero rating in terms of section 11(2) of the Act. By contrast Mr. Emslie contended that the wording of 14 (5)(*b*) implies clearly that the tax is not payable in the case of a supply that is taxed in terms of section 7(1)(*a*) at the standard rate of 14 percent provided for in section 7. If a supply of services by a registered vendor is zero-rated, it is not taxed at the standard rate provided for in section 7 and, in these circumstances, the provisions of section 14 (5)(*a*) do not apply. In other words, where a service is both an "imported service" and a service rendered by a registered vendor, (in terms of an enterprise as defined) and section 11(2) applies to zero rate such service, both section 7(1) (*a*) and section 7(1)(*c*) can and do apply to that service. Section 14 (5)(*a*) is not applicable because the service is zero-rated and tax is accordingly not chargeable *at the rate provided in section 7.*

[16] Mr. Emslie further contended that section 11(2) could apply to section 7(1) (*c*) in the event of an overlap between section 7(1)(*c*) and section 7(1) (*a*). Hence, there was no conceivable reason as to why the provision could not apply in the absence

of an overlap between sections 7(1) (*a*) and (*c*). So viewed, the purpose of 14 (5)(*b*) which provided "the tax chargeable in terms of section 7(1)(*c*) shall not be payable" was that it suspended the levying of tax on imported services but did not render an imported service either exempt or zero rated.

[17] Appellants' case can thus be understood best in counter position to the central finding of the court *a quo*. The court *a quo* held that section 14(5)(*b*) applied for the following reasons: "Imported services that are made by registered vendors and which can stand to fall under Section 14(5)(*b*) is a self contained provision which exclusively governs the zero-rating and exemption of those "imported services" which fall under section 7(1)(*c*) while not at the same time falling under s 7(1)(*a*). As such, s 14(5)(*b*) is exhaustive of the circumstances in which "imported service" falling under s 7(1)(*c*) qualify for zero-rating and exemption. Section 14(5)(*a*) and (*b*) have formed part of the Act since its inception. Section 14(5)(*b*) was plainly intended to be the exclusive source of zero-rating and exemption for imported services otherwise chargeable under s 7(1)(*c*), since s 11(2) in its original form referred explicitly to services under s 7(1)(*a*), i.e. services rendered by registered vendors; the removal of "(*a*)" from "s 7(1)(*a*)" in s 11(2) does not alter the role of s 14 (5)(*b*) as the exclusive governing clause in respect of zero-rating and exemption of imported goods which fall under s 7(1)(*c*)."

[18] By contrast, appellant's case can be summarized thus: Where supplies of services are zero rated, these supplies do not stand to be taxed at the rate of 14 percent in terms of section 7. Accordingly section 14 (5)(*a*) is inapplicable in that, on its own wording, once the transaction does not stand to be charged at the rate provided for in section 7, section 14(5)(b) is inapplicable to such transactions. The role of section 14 (5)(*b*) can be summarized thus: where tax is to be charged in terms of section 7(1)(*c*) and the provisions of section 14(5)(*b*) are applicable, there is a suspension of the levying of the tax on such imported services; that is the tax to be charged shall not be payable. Further, as 14 (5)(*b*) cannot be definitively read to conclude that it is exhaustive of the circumstances in which the imported services are zero rated or exempt, the plain wording of section 11(2)(*k*) should prevail and be applied to the present dispute

Respondent's Argument

[19] Mr Rogers, who appeared together with Mr Masuku on behalf of the respondent, referred to the amendment effected to section 11 of the Act in terms of Act 27 of 1997. Prior to this amendment, section 11(2) of the Act was limited in its ambit to supplies of services referred to in section 7(1)(*a*) of the Act. That provision clearly provided that imported services would only be subject to zero rated tax if the supply was made by a vendor. The amendment to section 11(2) replaced an earlier reference to section 7(1)(*a*) with the present phrase: "the tax at the rate referred to in section 7 (1)". Prior to the amendment, Mr Rogers correctly submitted that section 7(1)(*a*) referred to the supplier of goods and

services by a vendor. Hence imported services with which the present case was concerned, not having been supplied by a vendor, would not otherwise be chargeable with VAT under section 7(1)(*a*).

[20] Mr Rogers submitted that, since section 11(2) was concerned with the zero rating of VAT, the 1997 amendment made, in effect, a cosmetic change to the legislation in that it made better sense to refer to the rate of VAT specified in section 7 (1); in particular because the rate of 14 percent was not referred to in either sub paragraphs (a), (b) and (c) of section 7 but only in the concluding part of the subsection. Accordingly, it was textually more accurate to refer to section 7(1), rather than to any of its sub paragraphs as had been the case prior to the 1997 amendment.

[21] Mr Rogers submitted further that it was clear that section 11 was intended to remain applicable only to goods and services supplied by vendors, otherwise chargeable under section 7(1)(*a*), notwithstanding the textual amendment. This conclusion became apparent when section 11(3) was examined in relation to the issue of imported services. This provision provides, *inter alia*, that where a rate of zero percent 'has been applied by any vendor under the provisions of this section', the vendor, 'shall obtain and retain such documentary proof substantiating the vendors entitlement to apply the said rate under those provisions as is acceptable to Commissioner'. Mr. Rogers thus contended that section 11(3) provided support for his submission that it was only where goods or

services are supplied by vendor that section 11 comes into operation. If it had been intended to apply to "imported services" rendered by a non vendor as in the present dispute, it would have been necessary to stipulate that the recipient of the service would have had to obtain and retain the necessary documentation, a circumstance not provided for by section 11(3).

[22] Mr Rogers correctly contended that the overall solution to the meaning of the 1997 amendment, in particular, and the general scope of section 14(5)(*b*) of the Act in general, required an analysis of the overall scheme of the Act in order to fully grasp the implications of respondent's arguments. It is to his argument about the scheme of the Act that I now turn.

[23] Briefly stated, section 7 provides for the imposition of VAT Section 11 provides for the zero rating of the supply of certain goods and services which otherwise would be charged with tax at the rate referred to in section 7 (1). Section 12 covers a range of suppliers of goods or services which are exempt from the rate of tax imposed in terms of section 7 (1)(*a*). Section 13 deals with the collection of tax on the importation of goods and section 14 with the collection of tax an imported services.

[24] Mr Rogers submitted that section 11(2) did not apply to imported services nor did it deal with transactions canvassed in section 7(1)(*c*) of the Act. On this basis, the Act would appear to provide for the imposition of VAT at a zero rate upon

various services specified within section 11 which would otherwise fall within section 7 (1)(*a*); that is the supply of services by a vendor in the course or furtherance of any enterprise carried by him or her. Where there is a supply of imported services by any person, that is services which are covered by section 7 (1)(*c*), then any relief from the imposition of the normal rate of tax of 14 percent must be found in section 14 (5)(*b*); that is the provision which provides tax relief for imported services and which section accordingly does all the regulatory work. In brief, section 14(5)(*b*) provides for zero-rating and exemption *mutatis mutandis* in accordance with ss11 and 12. In terms of s14(5)(*b*) the prerequisite for the application of these provisions is that the supply must be one which "*if made in the Republic*" would have qualified for zero-rating or exemption under s11 and s12. Expressed differently, the essential question is whether section 11(2) applies to all services or only vendor related services in terms of section 7 (1)(*a*). For section 11(2) to apply to a service rendered by a non vendor which can be categorized as an imported service, section 14 (5) would then appear to be redundant.

[25] Section 7(1)(*a*) imposes a tax upon the supplier of a service, that is a tax on his or her act of supply. By contrast, the tax imposed in section 7(1)(*c*) is imposed on the receipt of the service; that is it is imposed on the recipient.

[26] Without the provisions of section 14(5)(*a*), a situation may arise, albeit rare,

where an imported service is supplied by a vendor who would then be taxed in terms of section 7 (1)(*a*). The recipient, being the customer, could find herself taxed in terms of section 7(1)(*c*). Accordingly, section 14(5)(*a*) would appear to prevent the commisioner from recovering the tax, both from the supplier in respect of the supply of the service, and from the recipient, being the recipient of the imported services.

Evaluation

[27] The amendment brought about in 1997 may not, as sadly is often the case with tax legislation, have been an exemplary illustration of clarity of legislative drafting. However, if all imported services stood to be zero rated in terms of section 11(2)(*k*) as it applied after the 1997 amendment, it would have been unnecessary for section 14(5)(*b*) to continue to make provision for zero rating of services on the basis of a hypothetical enquiry as to the position of a supply in question having been made in the Republic. In short, there would have been no need for further grounds of zero rating, if the very fact that the service had been rendered outside South Africa was sufficient to qualify that supply for zero rating in terms of section 11(2)(*k*).

[28] The respondent seeks to reconcile section 11(2) with section 14(5). By contrast the appellant argues that section 11(2) applies, given its plain meaning but it then fails to put up a plausible illustration of where section 11(2)(*k*) may apply without an application of section 14 (5)(*b*) or vice versa. As a counter to the redundary

argument, Mr Emslie offered an example of services not physically rendered which fall within the scope of the definition of service in terms of section 1. The service could be zero rated in terms of section 14(5)(*b*) of the Act even though, as they were not physically rendered section 11(2)(*k*) would be inapplicable. The problem with this example is that it fails to provide an answer as to when zero rating does apply in terms of section 11(2)(*k*) and thus it fails to adequately explain the role of section 14(5)(*b*) of the Act.

[29] Significantly, appellant's accountants in a letter of 10 January 2003 conceded that, on the line of argument adopted by appellant, section 14(5) would be redundant in that, after the 1997 amendment, section 14 (5)(*b*) should logically have been amended to withdraw all the references to services which would have been zero rated if supplied in the Republic so that the subsection only referred to the exemption applying to services which would had been exempt if supplied in the Republic.

[30] Tautologous legislation is not unknown but it is preferable to seek to construe a statute so as to make sense of it in its entirety. In my view, section 14(5)(*b*) can be construed so as to be exhaustive of the cases of imported services which may well otherwise have been charged under section 7(1)(*c*). This will allow section 11(2) to govern those services rendered by a vendor which would otherwise be taxed in terms of section 7(1)(*a*). Not only does this conclusion give a coherence to the Act as a whole but it also gives far greater sense to the effect of the 1997

amendment, described in the Explanatory Memorandum as 'textual', than would be the case urged upon this court by appellant, namely an amendment which would have changed the very nature of the relationship between section 14(5)(*b*) and section 11(2).

[31] Faced with competing meanings to both sections 11(2) and 14(5), a court should follow the approach of Hurt AJA in SARS v Airworld CC and another [2007] SCA 147 at para 25: 'In recent years courts have placed emphasis on the purpose with which the Legislature has enacted the relevant provision. The interpreter must endeavor to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention. Thus, In Standard General Insurance Co Ltd v Commissioner for Customs and Excise, Nugent and Lewis JJA said: 'Rather than attempting to draw interference as to the drafter's intention from an uncertain premise we have found greater assistance in reaching our conclusion from considering the extent to which the meaning that is given to the words achieves or defeats the apparent scope and purpose of the legislation. As pointed out by Nienaber JA in De Beers Marine when dealing with the meaning of "export" for the purpose of s 20(4) – which draws a distinction between export and home consumption – the word must "take its colour, like a chameleon, from its setting and surrounds in the Act".'

[32] This *dictum* supports the approach that the Act and the 1997 amendment should be interpreted purposively and holistically and that provisions should be given a clear meaning whenever plausible. Thus, in both sections 11(2)(k) and 14(5)(b) can be made to do work within the scheme of the Act, that must constitute the preferred interpretative approach.

Conclusion

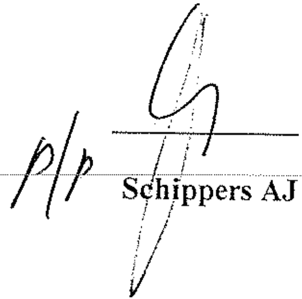
[33] For these reasons, the imported services rendered in the present case were assessed correctly as charged to VAT in terms of section 7(1)(*c*) of the Act. The basis for taxation at a zero rate, which appellant sought to invoke in terms of section 11 (2)(*k*), is inapplicable to this kind of service. Accordingly, the appeal is dismissed with costs, including the costs of two counsel.

DAVIS J

I agree

ZONDI J

I agree



p/p **Schippers AJ**