THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 155/2012

In the matter between:

MASTER CURRENCY (PTY) LIMITED **Appellant**

and

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

Neutral citation:	*Master Currency v CSARS* (155/2012) [2013] ZASCA 17 (20 March 2013)
Coram:	Malan, Leach JJA and Southwood, Schoeman and Van der Merwe AJJA
Heard:	**1 March 2013**
Delivered:	**20 March 2013**
Summary:	**Value-Added Tax – supply of services – bureaux de change – duty free areas at international airport – whether services should be zero rated – s 11(2)(*l*) of Value-Added Tax Act 89 of 1991.**

ORDER

On appeal from: the Tax Court, Johannesburg (Victor J sitting as President):

The appeal is dismissed with costs.

JUDGMENT

Malan JA (Leach JA, Southwood, Schoeman and Van der Merwe AJJA concurring):

[1] The appellant, Master Currency (Pty) Ltd, appeals against the dismissal by the Johannesburg Tax Court (Victor J) of its appeal against the revised value-added tax assessments in respect of the October 2003 to January 2005 tax period on the basis, as it was expressed in respondent's assessment of 8 August 2007, that –

'the commission and transaction fees received by the 2 branches operating in the duty free area of the then Johannesburg International Airport should be standard rated in terms of section 7(1)(a) of the Value-Added Tax No. 89 of 1991 ….'.

It was submitted on behalf of the appellant that the services rendered by the appellant in the duty free area of the airport were not subject to VAT at the standard rate in terms of s 7(1)(*a*) of the Value-Added Tax Act 89 of 1991 but that, on a proper construction of s 11(2)(*l*), they should have been zero rated.

[2] In 1999 the appellant was awarded the tender to operate two bureaux de change in the duty free area of the then Johannesburg International Airport. There were numerous 'duty free shops' in this area where departing passengers were able to purchase goods free of taxes and duties. There was also a VAT refund administrator stationed in the area where departing non-residents could collect cheques for the VAT they claimed back on purchases they had made in South Africa.

[3] The services rendered by the appellant at the two bureaux were mostly cash transactions concluded with departing non-resident passengers in possession of a boarding pass and a passport. These passengers would present South African rand

to the appellant either in cash, travellers' cheques or cheques received from the VAT refund administrator. The appellant would then convert the rand into foreign currency, calculate the exchange rate margin and the commission and transaction fee and present the departing passengers with an invoice. The latter would then pay over a rand amount to the appellant in exchange for the equivalent in foreign currency less commission and a fee. The two bureaux dealt with non-residents only in accordance with an instruction by the Reserve Bank that residents were not allowed to purchase foreign currency as part of their travel allowance once they had passed through passport control and emigration. The appellant made a margin on the foreign exchange based on the difference between the rate at which it bought and at which it sold. It also charged a commission on the transaction as a percentage of its value, and levied a fee per transaction. The services rendered by the appellant are 'financial services' as defined in s 2(1) consisting of the exchange of currency.

[4] According to the evidence of Mr Mark Frankel, who was at one time its general manager of finance and later its finance director, the appellant was established in 1995 with the assistance of Rennies Foreign Exchange. It was licensed in 1997 by the Reserve Bank as a foreign exchange dealer with limited authority to deal in foreign exchange for travelling purposes with non-residents visiting and residents leaving South Africa. It had branches throughout South Africa and until 2003 used Rennies' point of sale computer system at all its branches. Rennies did not conduct foreign exchange business in duty-free areas and its software automatically calculated VAT at the standard rate on fees charged for foreign exchanges services. The appellant used the Rennies software in the duty free areas. This functionality, calculating VAT at the standard rate, could not be turned off. In October 2003 the appellant implemented its own point of sale system which included a functionality that allowed a branch to charge or not charge VAT. The appellant assumed that no VAT had to be charged in the duty free areas and in 2003 turned off the VAT functionality in branches in those areas. The basis for that assumption was the perception that no VAT was chargeable in a duty free area, a perception aided by complaints of non-resident customers. The previous concessionaire of the two bureaux was ABSA Bank Ltd and the appellant had taken over a number of its employees, including its manager, who informed it that goods

sold and services supplied in the departure area were deemed to be sold or supplied in international territory. The result of this was that between 1999, when the appellant commenced operations at the two bureaux de change, and 2003, VAT was charged on its fees and commissions at the standard rate, but this was not done after October 2003 when the appellant's own point of sale system was introduced.

[5] During their 2004 audit KPMG noticed that the two bureaux de change were not charging VAT. The matter was referred to the South African Revenue Service for clarification resulting in the ruling and eventual assessment.

Application of the Act

[6] It was submitted on behalf of the appellant that judicial notice could be taken of the 'clear and well-established fact' that there are duty free areas at many airports where commercial transactions by passengers boarding international flights are free from government duties. In addition, the appellant submitted that, although the long title of the Act was intended to be of general application throughout the Republic, there was no indication of an intention to levy VAT in duty free areas. The Act, it was furthermore submitted, was understood and applied by the revenue and other authorities in this manner.

[7] The appellant's argument that the Act does not apply to the supply of goods and services in the duty free area is not based on any particular provision. Section 7(1)(*a*) clearly applies to the whole of the Republic. It imposes value-added tax:

'(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the 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.'

The Republic is defined in s 1, 'in the geographical sense', as –

'the territory of the Republic of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5 and 8 of the Maritime Zones Act, 1944 (Act 15 of 1994).'

'Duty free areas' at international airports

[8] For the appellant to escape liability for VAT it must bring itself within one of the 'exemptions, exceptions, deductions and adjustments' provided for in the Act (see also s 37). The Act as it read during the period of assessment contained no reference to a 'duty free area' or a 'tax free area' and did not use a similar expression.[1] The appellant did not bring itself within the confines of the Act but, as I have said, instead, suggested that a court could take judicial notice of a so-called 'well-established fact' that there are duty free areas at airports. Courts will generally take judicial notice of facts which are either so notorious as not to be the subject of reasonable dispute or which are capable of immediate and accurate demonstration.[2] The suggestion that judicial notice may be taken of the fact that many airports have areas where commercial transactions can be concluded free from government duties can obviously not be accepted. It is an excessively broad proposition, full of uncertainty as to the nature of the 'duties' and 'transactions'. No reliable evidence was presented to support this proposition, particularly in so far as services are concerned. The documentation supplied by the appellant forms no basis for a proper comparative law inquiry into the issue involved, nor does it provide any useful approach to the construction of s 12(2)(*l*).

[9] The appellant invoked two rules of construction, *contemporanea expositio* and *subsecuta observatio*, contending that VAT was not payable in the duty free areas and was in fact not paid (except by the appellant during 1999 to 2003). This, it was suggested, supported the contention that the relevant authorities construed the Act in the manner it contended. The appellant made reference to the canon of

[1] See now eg s 11(1)(*u*) and (*v*) inserted by the Revenue Laws Amendment Act 60 of 2008 and the definition of 'inbound duty and tax free shop' inserted by the same Act. There is also a reference to a 'customs controlled area' as defined in s 21A of the Customs and Excise Act 91 of 1964.
[2] D T Zeffertt, A P Paizes and A St Q Skeen *The South African Law of Evidence* 5 ed (2003) at 715 ff.

construction that a court may look 'not only upon the language of the enactment, but … "at the surrounding circumstances, and may consider its objects, its mischiefs and its consequences."'[3]

[10] The appellant submitted that a cardinal consideration in determining the intention of the legislature is to consider the fact that the legislation had been uniformly understood in a certain sense by those entrusted with its administration. But one should read *R v Detody*,[4] on which reliance was placed for this proposition, more carefully. Innes CJ there said:

'It will be proper also to pay some regard to the manner in which the Ordinance in question and the laws which preceded it upon the subject of native passes have been administered by successive Governments and succeeding sets of officials. Custom, of course, cannot prevail over the plain and unambiguous meaning of a statute, but where language is open to two constructions, then the fact that it has been uniformly read in one sense by those entrusted with the administration of the measure cannot be ignored. The Civil Law attached great importance to prior custom as a factor in the interpretation of statutes … But the tendency of modern decisions is greatly to restrict the weight to be attached to contemporaneous exposition. … "No usage can control the unambiguous language of the law …."'

Indeed in *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue*[5] it was remarked with regard to both canons of construction:

'Those doctrines rest upon two foundations. One is that there must at least be room for the interpretation in the language of the provision. The other is that the interpretation must have been accorded it for sufficiently long without it being gainsaid that it provides good reason for concluding that that is what it was intended to mean.'

The appellant could not identify the provisions of the Act which were understood by the authorities in the way suggested. Failing that, there is no room for the application of the two canons of construction and for a reliance on circumstances surrounding the legislation. The canons are canons of construction applicable to the language that must be construed. Absent a text they have no function.

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[3] *South African Railways and Harbours v Smith's Coasters (Prop) Ltd* 1931 AD 113 at 127.
[4] *Rex v Detody* 1926 AD 198 at 202-3 and see S I E van Tonder in cooperation with N P Badenhorst, C H Volschenk and J N Wepener *L C Steyn Die Uitleg van Wette* (1981) at 157 ff.
[5] *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) at 870E-F.

[11] The appellant also relied upon the respondent's s 72 ruling of 21 May 2003 in support of its contention that there are numerous duty free shops in the duty free areas where goods can be obtained without the payment of VAT. The full text of the ruling could not be found but it is referred to in a letter by the respondent to KPMG. The relevant passage read as follows:

'The section 72 ruling … provides that the duty free shops in South African International Airports may, subject to limitations set out in the said letter, supply movable goods at the zero rate to persons, who have already been cleared by immigration and who are in possession of a valid boarding pass for an international flight to an "export country" as defined in section 1 of the Act. It should be noted that the ruling was not granted because the duty free shops are outside the Republic but because the "qualifying purchasers" as defined in the VAT Export Incentive Scheme would be entitled to a refund of the VAT that is levied under section 7(1)(a) of the Act. For VAT to be levied in terms of section 7(1)(a) of the Act, the enterprise or activity must be carried on continuously or regularly in the Republic or partly in the Republic in terms of paragraph (a) of the definition of "enterprise" in section 1 of the Act.'

The ruling does not support the argument that *services* rendered by 'duty free shops' are free of VAT. The ruling concerns 'goods' only. And the ruling is not an understanding of the application of the Act but the exercise of a power in terms of s 72 which allows the respondent to make arrangements or give directions to overcome 'difficulties, anomalies or incongruities' in the application of the Act. Section 72 provides:

'If in any case the Commissioner is satisfied that in consequence of the manner in which any vendor or class of vendors conducts his or their business, trade or occupation, difficulties, anomalies or incongruities have arisen or may arise in regard to the application of any of the provisions of this Act, the Commissioner may make an arrangement or give a direction as to—

(*a*) the manner in which such provisions shall be applied; or

(*b*) the calculation or payment of tax or the application of any rate of zero per cent or any exemption from tax provided in this Act,

in the case of such vendor or class of vendors or any person transacting with such vendor or class of vendors as appears to overcome such difficulties, anomalies or incongruities:

Provided that such direction or arrangement shall not have the effect of substantially reducing or increasing the ultimate liability for tax levied under this Act.'

The purpose of the ruling is to deal with the situation where suppliers in duty free shops sell goods to departing passengers and charge VAT on these purchases, only for the customers to immediately go to the VAT refund administrator to claim a refund under the export incentive scheme. It therefore alleviates the administrative burden of vendors in cases where VAT is going to be refunded. It is thus not correct to suggest that the respondent regarded duty free shops as not being subject to VAT. On the contrary, it did; however, because the VAT payable is bound to be refunded, the ruling was made to 'overcome such difficulties, anomalies or incongruities'. Since the VAT was both chargeable (s 7(1)(*a*)) and refundable (s 44(9)) the ruling did not have the effect of substantially reducing or increasing the ultimate liability for VAT under the Act. There was therefore no question of an official remitting any portion of a tax or of absolving someone from the payment of tax.[6]

Section 11(2)(*l*)

[12] This appeal is essentially concerned with the construction of s 11(2)(*l*). Section 11 provides as follows:

'(2) 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—

(*l*) the services are supplied to a person who is not a resident of the Republic, not being services which are supplied directly—

(i) in connection with land or any improvement thereto situated inside the Republic; or

(ii) in connection with movable property (excluding debt securities, equity securities or participatory securities) situated inside the Republic at the time the services are rendered, except movable property which—

(*aa*) is exported to the said person subsequent to the supply of such services; or

[6] *Commissioner for Inland Revenue v J Gluckman* [1926] 1 SATC 1 at 2.

(*bb*) forms part of a supply by the said person to a registered vendor and such services are supplied to the said person for purposes of such supply to the registered vendor; or

(iii) to the said person or any other person, other than in circumstances contemplated in subparagraph (ii) (*bb*), if the said person or such other person is in the Republic at the time the services are rendered ....'

[13] The appellant contended that the rendering of its services were zero rated in terms of s 11(2)(*l*)(ii)(*aa*) because they were supplied in connection with movable property that was being 'exported'. This, it was submitted, is sufficient to secure a zero rating and s 11(2)(*l*)(iii) cannot be applied independently to disqualify the zero rating unders 11(2)(*l*)(ii) because sub-paragraphs (i) to (iii) must be read disjunctive-

ly.

[14] The respondent, on the other hand, argued that s 11(2)(*l*)(iii) was dispositive of the matter. If the services were rendered to persons who were present in the Republic at the time the services were rendered that is the end of the matter and no zero rating under s 11(2)(*l*)(ii) is possible.

[15] The appellant suggested that the word 'or' where it appears after subparagraph (ii) in s 11(2)(*l*) be read disjunctively. The word 'or' means, as was remarked,[7] 'to differentiate clearly between two [or, as in this case, three] situations'. The word 'or' separates the different subparagraphs providing for three different, self-standing situations. In each of these situations services to non-residents will not be zero, but standard, rated. The word 'or' cannot be read conjuctively in the same manner as 'and' because this would mean that all three subparagraphs must apply for a service to be standard rated. This is not possible because subparagraphs (i) and (ii) are mutually exclusive (one dealing with land and the other with movable property). Moreover, there is no basis for the submission that subparagraph (iii) applies to services, unrelated to movable and immovable property, such as services of a personal or advisory nature, or relating to incorporeal property.

Section 11(2)(*l*)(ii)(*aa*)

[7] *MV Iran Dastghayb Islamic Republic of Iran Shipping Lines v Terra-Marine SA* 2010 (6) SA 493 (SCA) para 22.

[16] The appellant argued that it is entitled to a zero rating by virtue of s 11(2)(*l*)(ii)(*aa*). This not correct. Section 11(2)(*l*) defines services to non-residents which are zero rated. Subparagraphs (i) to (iii) are exceptions to the zero rated services, and are in effect services that are standard rated. Subparagraph (i) deals with services to non-residents in connection with land situated in the Republic. Subparagraph (ii) deals with services in connection with movable property situated inside the Republic; they are zero rated but not where the services fall under subparagraphs (*aa*) or (*bb*). It is not so that a status is conferred on the services referred to in subparagraphs (*aa*) or (*bb*). These subparagraphs help to define the services referred to in the main body of paragraph (ii). This means that the fact that a service may fall under sub paragraph (ii)(*aa*) does not mean that it cannot be covered by subparagraph (iii). This follows from the reference in subparagraph (iii) to subparagraph (ii)(*bb*): if the appellant were correct the words in subparagraph (iii) 'other than in circumstances contemplated in subparagraph (ii)(*bb*)' would have been unnecessary because the 'secured' zero rating under subparagraph (*bb*) would not be 'lost' by virtue of subparagraph (iii).

[17] Subparagraph (ii)(*aa*) does not require the recipient to be in the Republic when the services are rendered. This reflects the principle that services consumed in the Republic attract VAT at the standard rate. The historical amendments to s 11(2)(*l*) demonstrate this principle. Originally, s 11(2)(*l*) provided that services were zero rated if supplied 'for and to a person who is not a resident ... *and who is outside the Republic ... at the time the services are rendered* ....'. The amendments brought about by s 89 of the Taxation Laws Amendment Act 30 of 1998 deleted the italicised words in s 11(2) and introduced paragraph (*l*)(iii) as a self-standing exception. Further amendments to s 11(2) and specifically 11(2)(*l*) were made by the Taxation Laws Amendment Act 27 of 1997 followed by the amendments made by the Taxation Laws Amendment Act 30 of 1998 and the Revenue Laws Amendment Act 53 of 1999. The Explanatory Memorandum on the 1998 Taxation Laws Amendment Bill stated (clause 89):

'When VAT was introduced, the intention was to levy VAT on consumption in the Republic. To achieve this, those suppplies where consumption does not take place in the Republic and the benefit of services is not enjoyed in the Republic, are subjected to VAT at a rate of zero per cent ...

The amendment to section 11(2)(*l*) is aimed at eliminating any doubt as to the scope of this subsection. The supply of the services must be made to a recipient who is not a resident, and neither the recipient nor any other person to whom the services are rendered may be in the Republic at the time the services are rendered, for the zero rate for VAT to apply.'

The Explanatory Memorandum in respect of the 1999 amendment stated (clause 85):

'This amendment is aimed at putting it beyond doubt that the presence in the Republic of the recipient of a service, or of any other person to whom the service is rendered, at the time the service is physically rendered ... will prohibit the zero-rating provided for in this subsection from being applied.'

[18] The decision of the court below on s 11(2)(*l*)(ii)(*aa*) was based on the finding that foreign currency was not proved to have been 'exported' as defined in the Act. The appellant, however, did not rely on the defined meaning of 'exported' but on its common-law meaning.

[19] I will assume, as was submitted by the appellant, that the definition of 'exported' has no application to the facts of this case. The appellant argued that 'export' means both the carrying out of something out of a country (cf s 1 'export' (*a*), (*b*) and (*c*)) as well as the sending of goods out of a country (cf s 1 'export' (*d*)). See also s 11(2)(*a*)(i) and (ii)). In s 11(2)(*l*)(ii)(*aa*) the phrase used is 'exported *to* the said person'. The most common meaning of 'export' is the sending of goods out of the country. To call the non-resident recipient the 'exporter' in the circumstances of this case unduly strains the meaning of the word. The property is rather 'exported' by the supplier 'to the person' to whom the services are supplied. The use of the words 'exported *to* the said person' leaves no doubt that the 'said person', the non-resident, is not the exporter but that the property is exported to him. When the wording of subparagraph (*aa*) was introduced the opening words of s 11(2) required that the recipient had to be outside the Republic. This made it clear that the type of export then envisaged by subparagraph (*aa*) was direct.

[20] The appellant also relies on two rulings on taxidermists (that is, 165 VAT Legislation at 71 (Issue 25) and 423 at 203 (Issue 28)) suggesting, by implication, that the hunters were in the Republic at the time the services were rendered, and that those rulings supported its suggested construction of s 11(2)(*l*)(ii)(*aa*). Such a

conclusion, however, cannot be drawn from the wording of the two rulings. On the contrary, the opposite seems more likely.

Section 11(2)(*l*)(*g*)

[21] The appellant finally submitted that its services should be zero rated by virtue of the provisions of s 11(2)(*g*). The supply of services is zero rated, where –

'the services are supplied directly in respect of –

(i) movable property situated in any export country at the time the services are rendered....'

I will assume that the appellant is entitled to raise this point even though it is raised only in reply and contrary to the provisions of Rule 12.[8] The argument is rather ingenious but, as I will demonstrate, clearly wrong. Banknotes, being 'currency' as defined in s 2(2), are 'movable property' as referred to in s 11(2)(*g*)(i) and the exchange of currency is a 'financial service' as defined in s 2(1). Banknotes, it was submitted, used to contain a promise whereby the issuing bank undertook to pay the face value of the note to bearer.[9] Although modern bank notes no longer all contain such a promise they nevertheless embody personal rights which are situated at their place of issue, that is the place where the debtor resides.[10] It follows, so the argument went, that the incorporeal rights attaching to banknotes are situated in the country where they are issued and where the issuing bank resides. The banknotes exchanged by the appellant are therefore 'movable property' situated in 'export countries' at the time the services (that is, the exchange of currencies) are rendered.

[22] The appellant produced no evidence as to the nature of the bank notes exchanged at its bureaux de change. Assuming again that notice of the nature of foreign banknotes can be taken, the argument ignores entirely the history of money and central banking.[11] The promises to pay to bearer that were contained in some

[8] Rule 12 of the Rules Promulgated under Section 107A of the Income Tax Act, 1962 (Act 58 of 1962), Prescribing the Procedures to be Observed in Lodging Objections and Noting Appeals against Assessments, Procedures for Alternative Dispute Resolution and the Conduct and Hearing of Appeals before a Tax Court R 467 *GG* 24639 of 1 April 2003.
[9] See *Woodhead Plant & Co v Gunn* (1894) 11 SC 4 at 9.
[10] See *Stellenbosch Farmers' Winery Limited v Commissioner, South African Revenue Service* 2012 (5) SA 363 (SCA) para 56.
[11] See eg A N Oelofse 'The Nature of Bank-Notes Issued by the South African Reserve Bank' 1982 *Modern Business Law* 90.

banknotes cannot today be regarded as promissory notes embodying an incorporeal right against the issuing bank. In *The Bank of Canada v The Bank of Montreal et al*[12] Laskin CJC said:

'What is said to be an unconditional promise to pay a sum certain in money is itself money. The words on the face of the paper money, "I will pay to the bearer on demand", cannot alter its character as money and turn it into a different document which calls for the payment of money.'

It follows that banknotes, with or without a promise to pay its face value on demand, cannot be regarded as documents that embody incorporeal rights that are situated, in the case of foreign notes, elsewhere.

[23] The appellant has failed to show that the Johannesburg Tax Court reached the incorrect conclusion. The appellants' services rendered in the duty free area are subject to VAT at the standard rate and were correctly assessed as being so by the respondent.

[24] In the result the appeal is dismissed with costs.

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F R Malan
Judge of Appeal

[12] *The Bank of Canada v The Bank of Montreal et al* 1978 (1) SCR 1148 at 1154; 76 (3d) 385 at 388.

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