THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Commissioner for the South African Revenue Service v Capitec Bank Limited (94/2021) [2022] ZASCA 93 (21 June 2022)

The Supreme Court of Appeal (SCA) today upheld an appeal by the appellant, the Commissioner for the South African Revenue Service (SARS), with costs, against the judgment and order of the Tax Court, Cape Town, per Sievers AJ (the tax court), which had upheld an appeal to it by the respondent, Capitec Bank Limited (Capitec), against the additional value-added tax (VAT) assessment raised by the appellant, for the November 2017 VAT return. The SCA further remitted any penalty imposed under s 213 of the Tax Administration Act 28 of 2011 (TAA) read with s 39(1) of the Value-Added Tax Act 89 of 1991 (VAT Act) by SARS to Capitec.

On 15 February 2018, SARS issued a VAT assessment in terms of which it disallowed the amount of R71 520 811.85 claimed by Capitec as a notional input tax deduction in its November 2017 VAT return, on the basis that it did not qualify for deduction in terms of s 16(3)*(c)* of the VAT Act. Additionally, SARS levied a 10% late payment penalty for the resultant understatement of Capitec's VAT liability. The input tax deduction that Capitec had claimed related to its unsecured lending business, in terms of which Capitec advanced credit in the form of personal loans to customers under term loan contracts. In terms of clause 13 of a standard loan contract entered into between Capitec and its customers, Capitec provided its customers with loan cover, the proceeds of which were applied to settle or reduce the outstanding loan amount due to Capitec in the event of the customer's death or retrenchment. During the VAT period from November 2014-2015, Capitec claimed R71 520 811.85 as a deduction, which constituted the tax fraction of the total insurance payouts (R582 383 753.66) recovered by Capitec from its insurers and which Capitec used to settle the outstanding loans owed by its customers with respect to the loan cover. The tax court held that Capitec was entitled to deduct this amount from its VAT liability and it set aside the additional assessment for the November 2017 VAT return and directed SARS to refund the amount to Capitec.

The central question in the appeal was whether the tax fraction of the loan cover payouts qualified for deduction in terms of s 16(3)*(c)* of the VAT Act. The SCA found that the determination of this issue was largely dependent on whether the loan cover was a taxable supply, ie whether it was supplied in the course or furtherance of an enterprise.

The SCA found that, inter alia, the clear and unambiguous terms of the loan contract indicated that the customer was to receive loan cover from Capitec free of charge, ie no consideration was received by Capitec in respect of its supply of the loan cover. Therefore, in the absence of a consideration, the supply of the loan cover did not qualify as an 'enterprise' as envisaged in s 1 of the VAT Act. It was therefore not chargeable with tax in terms of s 7(1)*(a)* of the VAT Act – which charges tax on supplies in the course or furtherance of an enterprise.

The SCA found further that Capitec made an exempt supply of credit available to its customers, which was not deductible, and all other activities involved in doing so were incidental to the supply of credit, because the supply of the loan cover was not a taxable supply in terms of s 16(3)*(c)* of the VAT Act. Therefore, the supply of the loan cover was not a taxable supply as required by the first proviso to s 16(3)*(c)*(i) of the VAT Act. The SCA held that, on this basis alone, the tax fraction of the loan cover payouts did not qualify for deduction. Consequently, the main question in the appeal was answered in favour of SARS.

The SCA found further that Capitec did not apportion the deduction in its return, nor did it plead apportionment as a ground of objection to SARS's assessment or ground of appeal. In view of Capitec's failure to plead apportionment as a ground of objection and of appeal, the SCA held there would have been no basis to allow an apportionment and SARS was correct to disallow Capitec's deduction of the whole amount, on this basis alone. Capitec did not raise the issue of a mixed supply in the tax court. Capitec adopted an all or nothing approach. Capitec bore the onus and did not discharge it. Thus, the SCA held that it could not decide this issue on appeal.

Lastly, in terms of s 213 of the TAA read with s 39(1) of the VAT Act, SARS levied a 10% penalty on Capitec for the underpayment of VAT arising from the deduction of notional input tax in respect of the loan cover payouts. The SCA found that the requirements in terms of s 217(3) of the TAA, which provided for the remission of the penalty levied, were met. This was because this was the first time a penalty had been imposed by SARS on Capitec in the three years preceding the relevant VAT return; and there were reasonable grounds for Capitec claiming the deduction: Capitec had obtained a favourable opinion from a senior counsel; and the only way Capitec could reasonably have tested the issue was to claim the deduction in its tax return. The SCA thus held that in such circumstances the penalty should have been remitted, as it could not be said that the contesting of the amount was unreasonable.

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