IN THE TAX COURT
(JOHANNESBURG)

CASE NO: VAT 711

DELETE WHICHEVER IS NOT APPLICABLE

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

14 August 2009 .....
Van Oosten J

In the matter between

K C M **APPELLANT**

and

COMMISSIONER: SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an appeal in terms of s 33 of the Value-Added Tax Act 89 of 1991 (the Vat Act) by the appellant against the disallowance by the respondent of the appellant's objection against an assessment disallowing certain input tax credits in respect of value-added tax (VAT) for the tax period May 2005 to May 2007.

[2] The appellant is an association not for gain, incorporated in terms of s 21 of the Companies Act 62 of 1973. K C M as its name implies, was founded by

K and his wife G C in the USA where its headquarters are situated. Branches have been established in several countries, including South Africa. The appellant is neither a church nor a registered welfare organisation. It is an interdenominational Christian ministry with its sole aim and objective to promote, minister and spread the Word of God and proclaim the gospel of Jesus Christ. The teachings and messages of the appellant are spread by the use of television presentations, radio broadcasts, conventions, books, CD's, DVD's, videos, tapes, magazines, the internet and personal correspondence. In South Africa the appellant prints a magazine named The Believer's Voice of Victory which is distributed free of charge to recipients on the appellant's database, compiled from inbound communication. The appellant operates a small bookshop on its office premises in Randburg where it sells books, CD's, DVD's and other religious material. On the respondent's apportionment (for which it used the turnover based method) the profits generated from those sales contribute no more than 15% to the appellant's total income. All the appellant's other activities where services are rendered, are free of charge. The major source of its income consists of donations voluntarily and often anonymously made by friends of and, as they are referred to, partners in the ministry.

[3] The appellant is a registered VAT vendor,[1] as an association not for gain[2] from 1 May 2005. The appellant makes certain taxable supplies of goods and services in the course of carrying out its aims and objectives and declares and pays VAT in respect of supplies made. On the 28 August 2007 and resulting from a VAT audit conducted on the appellant's tax affairs for the period May 2005 to May 2007, the respondent in an assessment letter disallowed input tax credits claimed by the appellant relating to "non-taxable supplies" being religious material distributed free of charge, amounting to R1 432 323.00. The input tax related to customs duties and VAT incurred by the appellant on goods imported from overseas on entry into this country, as well as on the

[1] Pursuant to the appellant's application to be registered as a vendor as required in terms of s 23(1) of the VAT Act, as the total of its taxable supplies in a period of 12 months exceeded the then compulsory registration threshold of R300 000.

[2] The appellant qualifies as such in terms of the definition of "voluntary association" in s 1 of the VAT Act, which includes "(a) any religious institution of a public character".

expenses relating to reading and other material produced and printed locally. The appellant objected to the disallowance of the input tax but the respondent on 14 December 2007 dismissed the objection and further levied interest on amount of the input tax, in the amount of R176 344.90. The appellant's appeal to this court, as I have mentioned, is against the disallowance of the objection.

[4] Mr *Franck* who, although not legally qualified, regards himself (for good reasons, I should add) as an expert on value-added tax, appeared on behalf of the appellant and Ms *Rampersad*, an attorney in the employ of the respondent appeared on its behalf. I was assisted by two assessors, Ms JL *Kikani* (the accountant member) and Mr I *Nkama* (the commercial member). I am indebted to the representatives of the parties and my assessors for their valuable input and assistance in this matter. The appellant called three witnesses to testify. The first was Ms Christine Blumstein, the recently appointed chief executive officer of the appellant's branch or as she referred to it, administrative arm of the appellant in South Africa. In her evidence she extensively dealt with the objects and aims of the appellant as well as its activities. The second witness for the appellant was Mr TF van Heerden, an erstwhile Commissioner for Inland Revenue (as it was then known) with considerable experience in VAT taxation and in particular the workings of the VATCOM of which he was a member, prior to the implementation of the present VAT legislation. Thirdly, and lastly, Mr D Bailey, who is employed by the respondent, gave evidence concerning the guidelines in respect of VAT issued and published by the respondent for the benefit of VAT payers. The respondent called only one witness to testify, Mr J Coetzee, who was the auditor appointed by the respondent to conduct the auditing of the appellants tax affairs, which has become the subject matter of this appeal. I do not consider it necessary to traverse the evidence of the witnesses in any detail as the issue for determination in this appeal, as will become apparent later in the judgment, falls to be decided by reference to and interpretation of the relevant provisions of the VAT Act.

[5] The issue in this appeal in essence concerns the appellant's entitlement to claim input tax credits relating to those goods it distributed free of charge. The

question therefore is whether the goods and services in respect of which VAT was paid, were acquired by the appellant "wholly for the purpose of consumption, use or supply in the course of making taxable supplies" (*see* the definition of 'input tax' in s 1 of the VAT Act[3]). I need to add at this juncture already that an apportionment of input tax credits is provided for in s 17(1) of the VAT Act which provides that where goods or services are acquired only partly for the purpose of making taxable supplies, the vendor will only be entitled to deduct the tax incurred on the acquisition of such goods or services to the extent that they will be consumed used or supplied in the course of making taxable supplies. The appellant contends for an affirmative answer to the question in issue while the respondent stands by its assessment in disallowing the tax input credits.

[6] A convenient and appropriate starting point is to consider the provisions of the VAT Act which are relevant for the determination of the dispute. Section 7(1) provides for the imposition of value-added tax and the relevant provisions thereof read as follows:

> Subject to the exemptions, exceptions, deductions and adjustments provided for in the Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as value-added tax-
>
> (a) on the supply[4] by any vendor of goods and services supplied by him in the course or furtherance of any enterprise carried on by him;
>
> (b) …

Several definitions in s 1 are relevant for present purposes and are quoted in full. "Enterprise" means:

> (a) in the case of any vendor, any enterprise or activity, which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or

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[3] See para 7 *infra*.

[4] Defined in s 1 as including "performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected…

["sale" in turn means an agreement of purchase and sale and includes any transaction or act whereby or in consequence of which ownership of goods passes or is to pass from one person to another].

> professional concern or any other concern of a continuing nature or in the form of an association or club;

"consideration" means:

> in relation to the supply of goods or services to any person, includes any payment made or to be made (…) whether in money or otherwise, or any act or forbearance, whether or not voluntary, in respect of, or in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person, but does not include any payment made by any person as a donation to any association not for gain:…

[7] This brings me to input tax which in relation to a vendor, means:

> (a) tax charged under section 7 and payable in terms of that section by-
>
> (i) a supplier on the supply of goods or services made by that supplier to the vendor; or
>
> (ii) the vendor on the importation of goods by him; or
>
> (iii) the vendor under the provisions of section 7(3);
>
> (b) …
>
> (c) …
>
> 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 or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose.

And, finally, "taxable supply" means:

> any supply[5] of goods or services which is chargeable with tax under the provisions of as 7(1)(a), including tax chargeable at the rate of zero per cent under section 11.

[8] The supply of goods and services by a vendor lies at the heart of the VAT system. The supply of goods and services, in the course or furtherance of any enterprise, is the precondition for the vendor's liability under the VAT Act. Fundamental to an enterprise is the concept of consideration, by definition contemplating payment, acts and forbearances whether for profit or not, but quite clearly and effectively excluding the feature of pure gratuitousness. A gratuitous act therefore cannot on a proper construction of the provisions of the VAT Act, constitute a supply of goods and services for a consideration.[6] Applied to the facts of the present matter, it is beyond dispute that the largest

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[5] See previous footnote.

[6] See generally *The Identification and Characterisation of Taxable Supplies for GST Purposes [2000] JATax 18; 3(4) Journal of Australian Taxation 261.htm.*

component of the appellant's activities (goods and services), are completely free of charge and therefore purely gratuitous. Concerning these, consideration is neither expected nor given. By way of example: the appellant's magazine, which is the main tool in its ministry, is without exception given away free of charge. Consideration in any form is simply absent. An association not for gain makes taxable supplies when it supplies goods and services otherwise than for profit for consideration, provided the supply is made in the furtherance of its aims and objectives. The supplies having been made by the appellant not for consideration but for distribution free of charge accordingly do not qualify as taxable supplies and must therefore be regarded as non-taxable supplies, as rightly contended for by the respondent.

[9] The appellant in an endeavour to overcome this hurdle, sought to rely on the provisions of s 10(23) of the VAT Act, which provides as follows:

> Save where otherwise provided in this section, where any supply is made for no consideration the value of that supply shall be deemed to be nil.

Mr *Franck* submitted that the provision does not say that a supply made for no consideration is not a taxable supply and that its purpose therefore is to ensure that input tax credits can be claimed even in the absence of consideration. I am unable to agree. Section 10 of the VAT Act deals with the value of supply of goods and services and the purpose of sub-section 23 is merely to provide a value of a supply in certain instances to be nil. I agree with Ms *Rampersad*: there is nothing in the wording of s 10(23) to justify reading into it a purpose to deem a non-taxable supply for no consideration to be a taxable supply for no consideration.

[10] For these reasons we have unanimously come to the conclusion that the appeal must fail.

[11] It remains to deal with the respondent's apportionment of VAT I have referred to. An apportionment of 15% was made on the turnover basis. The appellant however contended for an apportionment on the input based method. This aspect was discussed between the parties at a pre trial

conference on 27 July 2009 and it was agreed that in the event of the appellant being unsuccessful in this appeal, the apportionment of input tax deductable be referred back by this Court to the respondent for reconsideration of an appropriate apportionment ratio that is fair to both parties.

[12] In the result I make the following order:

1. The appeal is dismissed.
2. The apportionment of the input tax credits to which the appellant is entitled is referred back to the respondent for its reconsideration in conjunction with the appellant.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	***MR PS FRANCK***
FOR THE RESPONDENT	***Ms M RAMPERSAD***
DATE OF HEARING	***6 & 7 AUGUST 2009***
DATE OF JUDGMENT	***14 AUGUST 2009***