REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: VAT 712

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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DATE SIGNATURE

In the matter between:

XYZ (PTY) LTD Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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J U D G M E N T

VICTOR, J:

[1] The issues in this appeal relate to whether the currency exchange services in the duty free area of the airport rendered by the tax payer are to be VAT zero-rated or not.

[2] Of fundamental importance is the purpose of the VAT Act which is to provide for the taxation in respect of the supply of goods and services and the importation of goods. The respondent issued VAT assessments at the standard rate of 14% in respect of the period October 2003 to January 2005 on commission and fees charged by the appellant. Section 7 of the Value Added Tax Act No 89 of 1991 (the VAT Act) [1] provides that there shall be payment of VAT on goods or services supplied by a vendor (in this case the appellant) unless the VAT Act provides otherwise. On 7 January 2005 the Commissioner for the first time issued VAT Ruling 440 in respect of the purchasing and selling of foreign currency in duty free areas of the airport would not be zero-rated.

[3] Section 12 of the Vat Act exempts certain supplies e.g S12(a) "The supply of any financial services, but excluding the supply of financial services which, but for this paragraph would be charged with tax at the rate of zero per cent under section 11". The proviso to S2(1) of the VAT Act however makes it clear that a fee or commission charged in respect of a financial service is not zero-rated.

[4] Broadly speaking S11(1) of the VAT Act deals with the zero-rating of goods whilst S11(2) deals with the zero-rating of services. Clearly the Legislature intended that goods and services are to be considered separately.

[1] 7 Imposition of value-added tax
Cases
(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;
(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid by the vendor referred to in that paragraph,

[5] S1 of the VAT Act defines goods as "..corporeal movable things…but excluding money" and services are defined as "anything done or to be done ……but excluding a supply of…….money". Goods and services as defined in S1 of the VAT Act can only be zero-rated in terms of the instances referred to S 11.

[6] S1 of the VAT Act also defines the Republic as the geographical territory of South Africa including territorial waters. Hence the duty free area within an airport would be within the Republic unless the President or some other statute which has application on the VAT Act or the VAT Act itself determines otherwise.

[7] Goods mean corporeal moveable things but not money. The statutory interpretation of the supply of "services" in connection with money cannot be interpreted within the statutory framework of "goods". The relevant definitions are clear. In addition for a non-resident to qualify for a zero-rating in regard to financial services rendered in the Republic at the time of supply of the service, the appellant bears the onus to prove this.

[8] The question for determination is whether the appellant's reasoning on goods, services and the location of the transaction justifies zero-rating on the services involving the exchange of currency.

[9] The central and decisive issues in this appeal is whether money constitutes moveable property and whether the supply of services in the duty free area of the airport is in the Republic.

RELEVANT BACKGROUND FACTS

[10] The appellant is a foreign currency exchange dealer. It had been awarded a tender in 1999 to operate two bureaux de change in the duty free area of the departure hall of the O R Tambo International Airport. The appellant had for 4 years paid the standard VAT rate on the services rendered by it but changed this to zero-rating for the reasons referred to in this appeal..

[11] Prior to this the Reserve Bank did not allow South African residents to trade in the duty free area of the airport. It had lost R30million in revenue by dealing with non-residents only in compliance with the SA Reserve Bank's instruction. Pursuant to a request by the appellant to the South African Reserve Bank it granted the appellant permission to trade with South African residents in the duty free area. The letter is quite clear: "*I thank you for the information furnished and advise that we should, from an Exchange Control point of view, have no objection to your branches situated in the duty free areas transacting with South African residents*". This seems to have been one of the primary reasons for the appellant to change from the standard rating of 14% to the zero-rating on its services. In my view the emphasis in the letter is restricted to an exchange control point of view and the Reserve Bank directive does not purport to allude to the application of the VAT Act.

[12] Mr F who testified on behalf of the appellant stated that he was the General Manager - Finance for the period 1998 to February 2000. He was then again employed by the appellant as Financial Director for the period April 2002 to March 2009. He is a qualified chartered accountant. He had an intimate knowledge of the business. The two branches in the duty free section could deal only in travel related transactions. The appellant would "sell" foreign currency and add on a fee. There would also be a fee per transaction and a commission fee on each transaction. Rennies was one of the appellant's shareholders and when the appellant succeeded in the tender they continued to utilise the same *"point of sale*" software system which automatically provided for VAT.

Point of Sale Software

[13] For four years prior to 2003 when the point of "*point of sale"* software system was changed, the appellant charged VAT. Thereafter the VAT calculation function could be turned on or off. Mr F of the appellant took the decision to turn it off. His view was that it was a duty free area and there were general complaints from the public about having to pay VAT. This meant both residents and non residents were not paying VAT on the services rendered by it in the duty free area. He did not consider it necessary to take legal advice or obtain a directive from the respondent at the time he turned off the VAT function key. He regarded services rendered in the duty free area as services supplied in connection with moveable property from the Republic by the recipient for conveyance to an export country.

[14] In 2004 the auditors KPMG raised a query about the appellant not charging VAT in the duty free area and to this end a request was made to the respondent on 10 November 2004 for a directive. In January 2005 the respondent directed that VAT was payable on the transactions at the standard rate in terms of S7(1)(a). This meant that the appellant had not charged VAT on its transactions from October 2003 to January 2005. The amount claimed by the respondent is R1 473 009.

THE STATEMENT OF APPEAL

[15] The appellant contends that the services rendered by it (which is the exchange of currency) are zero rated in terms of the exclusion contained in S 11(2)l)(ii)(aa) of the Act as once the currency is exchanged it "is exported to the said person subsequent to the supply of such services". In addition the services supplied were in connection with "movable property" which was subsequently exported by way of removal from South Africa to an export country within the meaning of the word set out in S1 (d) of the definition "exported" in section 1 of the Act [2] and should therefore be zero-rated.

[2] 'exported', in relation to any movable goods supplied by any vendor under a sale or an instalment credit agreement, means-

(a) consigned or delivered by the vendor to the recipient at an address in an export country as evidenced by documentary proof acceptable to the Commissioner; or

(b) delivered by the vendor to the owner or charterer of any foreign-going ship contemplated in paragraph (a) or (c) of the definition of 'foreign-going ship' or to a foreign-going aircraft when such ship or aircraft is going to a destination in an export country and such goods are for use or consumption in such ship or aircraft, as the case may be; or

(c) delivered by the vendor to the owner or charterer of any foreign-going ship contemplated in paragraph (b) of the definition of 'foreign-going ship' for use in such ship; or

(d) removed from the Republic by the recipient for conveyance to an export country in accordance with the provisions of an export incentive scheme approved by the Minister;

[16] In order to succeed in its zero rating approach the appellant bears the onus[3] to show that it is subject to the exemptions in terms of the VAT Act. The legal principles to be applied in determining the issue are to be found in the VAT Act itself. In my view there is nothing contradictory in the VAT Act nor indeed are there any rulings by the respondent in other matters or in any other statutes referred to anomalous. The VAT Act when dealing with the definition of money is specific and the term in the Republic and its application is clearly defined in the VAT Act.

AN ANALYSIS OF THE WORDING OF S11(2)l)(ii)(aa) AND S 11(2)(l)(iii)

[17] The main submissions on behalf of the appellant are focused upon the interpretation of S11(2)(ii)(aa) and S11(2)(l)(iii). Zero-rating is defined in S 11 of the VAT Act:

> "(1) Where, but for this section, a supply of goods would be charged with tax at the rate referred to in section 7 (1), such supply of goods 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) …; 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
> (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,
> and not being services which are the acceptance by any person of an obligation to refrain from carrying on any enterprise, to the extent that the carrying on of that enterprise would have occurred within the Republic; or"

[3] Section 82 of the Income Tax Act read together with the VAT Act

[18] Upon a proper interpretation of S11 there is no room for contradiction in the interpretation and application between the concept of allowance and disallowance of zero rating of services between S11(2)l)(ii)(aa) and the wording of S11(2)(l)(iii). The appellant submits that the imposition of VAT in the circumstances of this case will require a restrictive interpretation limiting the words "in the Republic at the time the services are rendered" to exclude services rendered to recipients of moveable property when they are in a customs controlled area in respect of the tax free sale of goods. It is clear from the definition referred to above that money is not moveable property. The Republic is geographically defined and therefore there is no room for contradiction.

[19] The appellant contends that the non –residents whilst in the duty free area of the airport are not in the Republic when the services are rendered and therefore the words ("in the Republic ") should be given a restrictive meaning.

[20] S11(2) (k) expressly provides that the zero-rating applies if " the services are physically rendered elsewhere than in the Republic or to a registered vendor in a customs controlled area." A duty free area is not a place designated by the President as elsewhere than in the Republic in accordance with the VAT Act nor is it so decreed by another Minister as relevant to the application of the VAT Act. The appellant's services vis a vie the VAT Act are accordingly rendered in the Republic.

[21] The appellant refers to a number of wide ranging rulings in terms of statutes relating to immigration, customs and excise and the SA Reserve Bank as examples requiring the wording of for example “in the Republic” to be read in a particular way. Another example cited by the appellant is the VAT export incentive scheme where goods delivered to a purchaser at an international airport are zero-rated. The appellant also relies on the Commissioner’s ruling No 72 of May 2003 where there is a zero-rating on goods sold to travellers who have been cleared by immigration thus deemed to be removed from the Republic S11(1)(a). Reference is also made to a ruling on 21 May 2003 by the Commissioner that goods would be considered exported by duty free shops at international airports if delivered to the holder of a valid boarding pass for a flight to an export country. In further support of the interpretation of the words in the Republic the appellant relied upon the Ruling No. 423 of 3 February 2004 which confirmed the zero-rating of services supplied by taxidermists in preparing a trophy animal for foreign hunters without even requiring the presence outside the Republic of the foreign hunter concerned.

[22] Clearly the above examples which the appellant relies upon to demonstrate the concept of supply to non-residents who are still in the Republic are examples relating to “goods” and not “services” which is the clear distinction the VAT Act makes. The golden rule of interpretation is called for.

See Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008 (5) SA 1 (SCA) Van Heerden JA stated

> “[16] In Manyasha v Minister of Law and Order this court reiterated the so-called 'golden rule' of statutory interpretation in the following terms:

> It is trite that the primary rule in the construction of statutory provisions is to ascertain the intention of the Legislature. . . . One seeks to achieve this, in the first instance, by giving the words of the provision under consideration the ordinary grammatical meaning which their context dictates, unless to do so would lead to an absurdity so glaring that the [Legislature] could not have contemplated it."

[23] It is the appellant's case that the prohibition in 11(l) (iii) [4]does not apply in cases where the services relate to movable property in the duty free area of the airport and that the words "*in the Republic*" should be given a restrictive interpretation in order to overcome the conflict inherent in the legislation concerned and should be interpreted to exclude the customs-controlled or the duty free area of an airport from the ordinary meaning of "in the Republic".

[24] The appellant asserts that the anomaly arises from a proper interpretation of S11(l) (ii) (aa) read with the definition of exported in section 1 which allows for the zero rating of services supplied to a recipient of movable property when in the Republic on condition that such property is exported by the recipient. In my view S11(l) (iii) prohibits the zero-rating of services where the recipient whether a non-resident or not is in the Republic at the time the services were rendered.

[25] The appellant regarded the duty free area of the airport as being beyond the borders of South Africa. It relied on a direction from the Reserve Bank which indicated that the appellant could transact with South African residents in the duty free area. It is respondent's contention that the service is consumed by the non-residents in the Republic and therefore S11(2)(l) (iii)

[4] (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,

and not being services which are the acceptance by any person of an obligation to refrain from carrying on any enterprise, to the extent that the carrying on of that enterprise would have occurred within the Republic

applies. [5] In my view the services are consumed in the Republic and therefore the respondent's directive that VAT is payable must succeed. The ordinary construction of the VAT Act applies. Even where the words to be construed are clear and unambiguous but if there are two clear possible meanings both linguistically clear then a purposive approach is called for. See Bastion Supra at para 19 and the authorities quoted. This is not such a case.

[26] Section 11(2)(l)(ii) provides zero rating of goods and services to a person who is not a resident of the Republic. The appellant contends that money is to be regarded as property[6] and thus falls within the provisions of the export incentive scheme approved by the Minister. The relevant export scheme provides for export by the qualifying purchaser himself which includes the tourist however S11(2)(l)(iii) disallows the zero rating of services in cases where the recipient is in the Republic at the time of supply thereof except for the circumstances in "(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". The appellant has not placed facts before this court justifying a finding that the services exchanging currency to tourists in the duty free area as being services to a registered vendor in terms of subsection (bb).

[27] According to the appellant an analysis of the history of the section shows the following. In 1992 to 1993 services were only zero rated if supplied to a non-resident outside the Republic. The zero rating was allowed if the

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[5] *South African Rugby Football Union v C: SARS* 2000 (1) SA 279 (A) where the foreign entities were found to be a resident of the Republic.

[6] *CIR v Lever Brothers Ltd and Another* 14 SATC 1 at 9; *Ogis v SIR* 40 SATC 100 at 107; ITC 1840 72 SATC 79 at 90.

services were in connection with movable property. In 1994 to 1995 the zero rating was allowed in respect of services relating to movable property if such property was exported subsequent to the supply of services. The words "*present outside the Republic*" were retained. In 1999/2000 the words "*present outside the Republic*" was removed and the reintroduction thereof as a new requirement for zero rating services is that other than those relating to movable property e.g. advertising services to non-residents.

[28] It is the appellant's case that the respondent has attempted to reintroduce the 1994/1995 version of the section in total ignorance of the latest amendment namely to treat the zero rating of movable goods and services on the same footing by removal of the unnecessary requirement and reintroducing it only in respect of services other than movable goods. Ruling No 423 of 3 February 2004 made no mention of the section 11(2)(l)(ii) and (iii) requirement as a disqualifying factor.

[29] In my view the statute is sufficiently clear not to have to use rules relating to evolution of amendments to construe the relevant sections of the VAT Act. I am mindful of the other rules of statutory construction when there is doubt or ambiguity. See Bastion Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School supra at para 17

> "[17] It is however also a well-established rule of construction that words used in a statute must be interpreted in the light of their context, and that, in this regard, the 'context'"

[30] The respondent contends that appellant has not discharged the *onus* as required in terms of section 82 of the Income Tax Act together with the VAT Act. See *CIR v Goodrick* 1942 OPD 1 (SATC 279). In order to discharge the *onus* there must be affirmative evidence that satisfies the court upon a preponderance of probability that the services in respect of the exchange of money is not taxable. The averments must be corroborated by evidence.

THE PROPER APPLICATION OF THE VAT ACT ON THE FACTS OF THE CASE

[31] The respondent contends that the appellant has to show that it supplied services to non-residents of the Republic in connection with movable goods which were exported subsequent to the supply of the said services. The VAT Act specifically excludes money in the definition of goods. Mr F on behalf of the appellant was clear that it supplied money. In my view this takes the appellant's services, being the exchange of money, out of the application of section 11(2)(l)(ii)(aa) " is exported to the said person subsequent to the supply of such services;". The export of goods means goods exported in terms of a sale and/or instalment credit agreement. In order for the appellant to succeed it has to show that the services were supplied to a non resident in connection with moveable goods exported subsequent to the supply of the services. Once money falls outside the ambit of moveable goods and services then the appellant cannot rely on a zero-rating.

[32] Currency is excluded from the definition of export. The appellant's services were clearly supplied in connection with money. Exported means

> 'exported', in relation to any movable goods supplied by any vendor under a sale or an instalment credit agreement, means-
>
> (a) consigned or delivered by the vendor to the recipient at an address in an export country as evidenced by documentary proof acceptable to the Commissioner;….
>
> (d) removed from the Republic by the recipient for conveyance to an export country in accordance with the provisions of an export incentive scheme approved by the minister.

[33] The appellant has failed to demonstrate that its services fall within the above two categories. In my view money or currency does not fall into either of the above exemptions. If reliance is being placed on currency being exported then there has to be the requisite documentary evidence. Furthermore in terms of S2(1)(a) of the VAT Act the definition of financial services includes an exchange of currency and not a “sale” of currency.

[34] The appellant’s reliance on the export scheme for its services must fail. In terms of S7(2)(d) of the VAT Act the provisions of the Customs and Excise Act relating to the clearance of goods shall apply. Accordingly if money is regarded is to be regarded as an export it must be an export incentive scheme approved by the Minister.

[35] Mr F was unable to provide any evidence of that. The appellant contends that the services it renders applies to movable goods which it delivers to the recipient in the Republic of South Africa and is then removed by that recipient from South Africa. In my view the exchange of currency does not constitute an export. To qualify for export there must be a sale or credit agreement or an instalment sale agreement. The exchange of money does not qualify as a sale. Part 2 of the export scheme provides that where the

RSA vendor supplies the movable goods to a qualifying purchaser including a tourist and non-resident who is not in South Africa at the time of supply, the RSA vendor must then deliver the goods to harbours or airports and then the vendor can decide at his own risk to zero rate the supply. He then has to ensure the following: Deliver the goods to the designated harbour or airport, retain the documentation from customs and excise for 5 years and for 5 years retain his copy of the tax invoice as well as the purchaser's order. The respondent contends that paragraph (d) does not find application as the goods in question constitute money which was expressly excluded. In any even the appellant did not render its services in accordance with the export scheme.

[36] To sum up I find that the services supplied by the appellant are services in connection with money and do not constitute moveable property with a zero-rating of VAT. Furthermore the services are consumed in the Republic and are not exported as envisaged in the VAT Act. The appellant's appeal must accordingly fail.

The order I would make is:

> The appeal is disallowed and the assessment by the Commissioner must stand.

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VICTOR J

JUDGE OF THE HIGH COURT

SOUTH GAUTENG DIVISION

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I concur

Signed obo MR MATLALA in his absence having read and concurred in this written judgment

MEMBER

I concur

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pp MS KILANI in her absence having read and concurred in this written judgment

MEMBER