IN THE TAX COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

VAT CASE NO: 847

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE_____ _____
SIGNATURE

In the matter between:

A (PTY) LTD Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

MAYAT J

INTRODUCTION

[1] This is an appeal by a company named A (Pty) Ltd in respect of an assessment by the South African Revenue Service ("SARS"), represented in these proceedings by the Commissioner for the South African Revenue Service ("the Commissioner"). The appeal relates to the Commissioner's assessment of the appellant's liability for undeclared output tax in terms of the provisions of the Value-Added Tax Act, 89 of 1991 ("the VAT Act").

RELEVANT FACTUAL MATRIX

[2] It was recorded in a pre-trial minute relating to these proceedings that neither party intended to make use of evidence by way of affidavits. Pursuant to discovery by both parties, the legal representatives of both parties prepared bundles of relevant documents for the present proceedings. Against this background, Mr X, the sole director and shareholder of the appellant, was the only witness, who testified in these proceedings.

[3] Certain facts are common cause *ex facie* the documents on record and the testimony of Mr X. It is accordingly not in dispute that the appellant, a company named A (Pty) Ltd, is a registered as a vendor in terms of the VAT Act. It is also not in dispute that prior to November 2006, the appellant had rented out specified commercial premises to a company named B (Pty) Ltd in terms of an oral lease agreement. It is common cause that on the basis of a subsequent written lease agreement, which was concluded in November 2006, the appellant had extended the period of the oral lease agreement with B (Pty) Ltd.

[4] As recorded in communications from the appellant to SARS, it was never in dispute that the appellant had rented out certain immovable property to B (Pty) Ltd. Thus, it was admitted that the appellant had leased out a building for commercial use, initially in terms of an oral agreement, and subsequently in terms of a written agreement. The said building was developed by the appellant on the immovable property described as Erf Y, Bryanston. It is common cause that the street address of the said building, as specified on the written lease agreement with B (Pty) Ltd was at the address in Bryanston.

[5] It appears from documents on record that two further written lease agreements between the appellant (as lessor) and two other companies, named C (Pty) Ltd, and D (Pty) Ltd (Pty) Ltd, ("D (Pty) Ltd") were also concluded in July 2005. In terms of these two lease agreements, the appellant leased the "storage section" at the address in Bryanston and "the north wing" at the address, Bryanston to C (Pty) Ltd and D (Pty) Ltd, respectively. Both the said lease agreements were signed on behalf of the lessor and lessee, on the 4th of July 2005 by the same person, apparently Mr X.

[6] In these circumstances, the appellant concluded three lease agreements with three companies. As indicated by the names of the appellant and the three lessees reflected in terms of the three lease agreements on record, the appellant and all three lessees constituted a group of affiliated companies. To the extent that it is relevant in this context, Mr X confirmed in his evidence in this respect that he was a director and shareholder of the appellant as well as the three lessees in terms of each of the lease agreements.

[7] It was Mr X's further evidence that the appellant was a property owner and conducted business purely as a landlord. He further testified that B (Pty) Ltd was the main trading company in the group, which was involved in all spheres of the business of the sale of office automation equipment. As such, B (Pty) Ltd employed a large number of employees based at the address, Bryanston. As already stated, in terms of a lease agreement between the appellant and B (Pty) Ltd, the building at the address, Bryanston was leased by the appellant to B (Pty) Ltd. By contrast, Mr X testified that C (Pty) Ltd, which was a brokering company, and D (Pty) Ltd, which was a Black Economic Empowerment ("BEE") company, had no employees and did not occupy any premises. He accordingly indicated in his testimony that the lease agreements between the appellant and C (Pty) Ltd as well as D (Pty) Ltd were merely "pre-emptive measures" which "anticipated" a future arrangement.

[8] In these circumstances, even though the lease agreement between the appellant and B (Pty) Ltd was never in dispute, it appears from documents on record sent on behalf of the appellant to SARS, that Mr X initially denied that the appellant had rented out property to either C (Pty) Ltd or to D (Pty) Ltd. Thus, in a letter from the appellant's legal representative to SARS, referred to hereunder, it was denied that the appellant had entered into lease agreements with either C (Pty) Ltd or D (Pty) Ltd.

[9] Notwithstanding the initial denial pertaining to lease agreements between the appellant and C (Pty) Ltd as well as D (Pty) Ltd, Mr X did not deny in evidence before this court that the appellant had in fact concluded lease agreements with both C (Pty) Ltd and D (Pty) Ltd on the 4th of July 2005. However, he indicated in this regard that even though there was consensus between the relevant parties, as evidenced by the written lease agreements, the appellant had elected not to enforce the lease agreements with C (Pty) Ltd

and D (Pty) Ltd. However, notwithstanding his evidence in this regard, he denied that the agreements with C (Pty) Ltd and D (Pty) Ltd were fictitious.

[10] Mr X also admitted in his evidence before this court that he had generated some 54 tax invoices relating to the monthly rentals payable by C (Pty) Ltd and D (Pty) Ltd to the appellant between the periods July 2005 and September 2007. He confirmed in this respect that he had generated the tax invoices on record after the conclusion of the written lease agreements with C (Pty) Ltd and D (Pty) Ltd. He further confirmed in his evidence that these tax invoices were utilized for the purposes of opposing an application for the liquidation of the appellant in the North Gauteng High Court, under case number 01/2008.

[11] Mr X admitted that he had deposed to and signed an answering affidavit on the 18th of March 2008 in the context of the liquidation application against the appellant, which was successfully opposed by the appellant. Thus, he admitted that he had stated under oath in the said answering affidavit, that the assets of the appellant, at that stage, included inter alia rental amounts due and payable to the appellant by B (Pty) Ltd and D (Pty) Ltd. More specifically, he confirmed in his evidence that he had previously stated under oath in March 2008 that both C (Pty) Ltd and D (Pty) Ltd were indebted to the appellant for rental, as reflected in the tax invoices generated by him. Thus, he stated under oath at the time that rentals collectable by the appellant from B (Pty) Ltd constituted approximately R4 565 700-00 plus VAT approximating R639 198-00 for the tax period 2005, 2006 and 2007, and that rentals collectable from D (Pty) Ltd constituted a sum of R 1 607 400-00, plus VAT in the amount of R197 400-00. He further stated at the time that rentals collectable by the appellant from C (Pty) Ltd constituted the total sum of R694 260-00 plus VAT in the amount of R85 260-00. Against this background, Mr X stated under oath at the time that the amount due to SARS constituted R950 000-000.

[12] Each of the tax invoices so generated, which are on record, had a heading in large bold letters stipulating "TAX INVOICE". Each of the said invoices further stipulated inter alia the name, company registration number, telephone number and VAT registration number of the appellant; the name and address of the addressee (as either B (Pty) Ltd or C (Pty) Ltd or D (Pty) Ltd); a space for the VAT number of the addressee; the date upon which the said tax invoice was issued; the description of the goods or services supplied as "RENT" as well as the month for which rent was supplied; and the value of the supply, the amount of VAT charged by the appellant as well as the consideration for the monthly rental. It may also be mentioned in this respect that the tax invoices so generated by Mr X, had the same format and details as the tax invoices on record issued by the appellant in relation to the rental payable by B (Pty) Ltd to the appellant.

[13] It appeared from tax invoices relating to B (Pty) Ltd, C (Pty) Ltd and D (Pty) Ltd, that the physical address for each of these companies on each of the invoices issued was stipulated to be the address, Bryanston. The postal address of all these three companies is also the same on each invoice.

[14] In these circumstances, Mr X admitted the conclusion of three lease agreements by the appellant in his evidence. However, he indicated that B (Pty) Ltd was the only lessee, which occupied space at premises located at the address, Bryanston. He further indicated in his evidence that the appellant's property at this address comprised some 5000 square meters, out of which there was 1800 square meters of office space, all which was occupied by B (Pty) Ltd.

[15] As regards D (Pty) Ltd and C (Pty) Ltd, Mr X indicated that notwithstanding the conclusion of lease agreements with these companies, both these companies did not occupy any office space at the address Place, Bryanston. He suggested in this respect that both the north wing and storage area at the address, Bryanston, were already leased out by the appellant to B (Pty) Ltd. As such, he stated that the lease agreements concluded with D (Pty) Ltd and C (Pty) Ltd were merely "historic lease agreements" and no

performance was rendered in terms of such lease agreements. He further suggested that the appellant could well have written off the rental payable by these two companies, after a period of non-payment.

[16] In response to questions put to him during cross-examination, Mr X explained that D (Pty) Ltd had a black shareholder and had merely served as a vehicle for transactions, which required a service provider with BBE credentials. Whilst he admitted in cross-examination that D (Pty) Ltd had received large amounts of deposits, which were reflected in its bank statements from July 2005 until September 2008, he nevertheless suggested that these two companies did not really trade in same way as B (Pty) Ltd. Notwithstanding his evidence in this respect, he could not dispute that D (Pty) Ltd had received the sum of R72 705-80 on the 4th of April 2006, the sum of R72 705-80 on the 7th of April 2006, the sum of R186 686-60 on the 28th of July 2006, the sum of R615 043-16 on the 24th of November 2006, and the sum of R1 226 120-28 on the 30th of January 2007. He could also not dispute that certain amounts were debited from the bank account of D (Pty) Ltd after deposits were reflected from time to time. These debits were stated to be for expenses such as attorneys' fees, petrol, and salaries, which appeared to be daily expenses for a company, which was actively trading.

[17] Similarly, Mr X confirmed in his evidence that the bank statements of C (Pty) Ltd also reflected account activity after the 4th of July 2005, when the lease agreement with the appellant was concluded. Thus, as with D (Pty) Ltd, he could not dispute deposits and debits from the bank account of C (Pty) Ltd, which suggested trading activity.

[18] As regards the tax invoices issued for rental in terms of the lease agreements with C (Pty) Ltd and D (Pty) Ltd, Mr X explained that he had been advised by his previous attorneys to substantiate the assets of the appellant for the purposes of opposing an application for the liquidation of the appellant. He accordingly indicated that he had generated "pro forma invoices" relating to C (Pty) Ltd and D (Pty) Ltd merely to demonstrate a potential revenue stream for the purposes of a healthy balance sheet. He further indicated in his testimony that these invoices were not given to either C (Pty) Ltd or to D (Pty) Ltd. In addition, he testified that these two companies had not utilized the tax invoices generated by him for the purposes of claiming input tax from SARS in terms of the VAT Act. In these circumstances, he suggested in his evidence that the provisions of the lease agreements relating to C (Pty) Ltd and D (Pty) Ltd were not executed and the appellant had elected not to enforce the said agreements. Thus, he indicated that even though he had caused invoices in terms of the applicable lease agreements to be issued, he indicated that it was never the intention of the appellant to "perform" in terms of the said lease agreements.

[19] Against this background, the appellant submitted returns for value added tax ("VAT") to SARS for the tax period from March 2005 to February 2006, the tax period from March 2006 to February 2007 and the tax period from March 2007 to February 2008. It is common cause in this respect that there were communications between various officials from the respondent, and Mr X relating to the appellant's apparent under-declaration of output tax in terms of the VAT Act. Thereafter, a VAT audit was ultimately conducted by SARS relating inter alia to an assessment of output tax payable by the appellant in terms of the VAT Act. It is not in dispute that pursuant to such audit, an "ASSESSMENT LETTER" was sent by SARS to the appellant dated the 26th of November 2008. The said letter stated inter alia as follows:

"Dear Sir

VENDOR: A (PTY) LTD
REFERENCE NO.: …..
PERIODS(S): 2006; 2007 and 2008
TAX TYPE: VAT

ASSESSMENT LETTER:

We refer you to the email dated 04 August 2008 that was sent by your representatives to this office and our letter of audit engagement dated 06/10/2008.

Revised additional **Notices of assessment** (**form VAT 217**) and a statement of account, relating to the tax, additional tax, penalty and interest arising from the following adjustments will be issued to you in due course:

A. Summary of adjustments made:

Tax Period	Provision of the VAT Act	Brief description of adjustment made	Amount of Adjustment	Additional Tax Imposed
2006	Section 7(1)(a) and Section 9(1) of the VAT Act No.89 of 1991	Under-declaration of Output VAT	166,118	0
2007	Section 7(1)(a) and Section 9(1) of the Act	Under-declaration of Output VAT	473,480	0
2008	Section 7(1)(a) and Section 9(1) of the Act	Under-declaration of Output VAT	441,980	0
	TOTAL		1,081,578	0

B. Explanation of adjustments intended to be made:

1. **Under-Declaration of Output tax:**

1.1 **The facts (audit findings)**

…..

See attached schedules indicating the amounts of differences that have been added to the Output already declared on VAT 201, marked "Annexure A, B and C".

1.2 ….

1.3 **Applying the statutory and case law to the facts (conclusion)**

Based on our findings and extracts from the Act, the revised assessments have now been raised to add the Output of R166 117.56, R473.980 and R441, 980 to 2006, 2007 and 2008 respectively to the output that was already declared.

1.4 ….

C. Nature of assessments to be issued:

1. **Additional Assessments:**

The above adjustments will be raised as additional assessments in terms of section 31(1) of the VAT Act.

D. Right to Request reasons for assessments:

It is our submission that reasons for the adjustments to the above assessments have been explained above….

You must then deliver your request for reasons to the writer, within 30 business days of the due date/s of the assessment/s…….

E. Objections:

1. **Process relating to Objections**

……
…….

2. **Late Objections**

.....

C. Payment:

Amounts in dispute:

Adjustment	Capital	Additional tax	Interest	Penalty
	985,251.21	0	235,570.41	108,157.80
Total	R985,251.21	R	R235,570.41	R108,157.80

D. Correspondence and queries:

Please note that all correspondence other than objections and ADR 1 forms, must be addressed to the writer."

[20] Annexures, A, B and C to the above letter constituted a schedule of rental received by the appellant in the 2006, 2007 and 2008 tax years, from B (Pty) Ltd, C (Pty) Ltd and D (Pty) Ltd, respectively. Each of the said schedules stipulated in two columns the amount of the monthly rental received by the appellant from each of the said three companies and the VAT component of the said rental in each month. Thus, the said schedules set out the basis upon which the cumulative amounts specified in the said letter, were computed. As indicated in the main heading of the letter set out above, the said letter together with annexures A, B and C thereto, is referred to in this judgment as "the assessment letter".

[21] In these circumstances, it was conveyed to the appellant by way of the assessment letter that the appellant had under declared output VAT for the periods of assessment 2006, 2007 and 2008. It is not in dispute that after the assessment letter was sent, there were further communications between the representatives of SARS and the representatives of the appellant. The appellant conveyed to SARS in this respect inter alia that it had not received the VAT 217 referred to in the letter of assessment. The appellant also requested certain additional schedules from SARS. The requested schedules were provided by SARS to the appellant in due course.

[22] In due course, the appellant's legal representative requested the Commissioner in November 2009 to condone the late filing of an objection by the appellant to the assessment letter. The appellant also lodged an objection to the assessed penalties and interest simultaneously with the said request for condonation. The said objection, which was dated the 17th of November 2009, incorporated a detailed letter (comprising some 32 pages) dated the 14th of November 2009 from the appellant's legal representative to SARS, under the heading:

"**TAXPAYER: A (PTY) LTD**
VAT ASSESSMENT: 2006, 2007 AND 2008 TAX PERIODS"

It may be mentioned in this context that the detailed objection on behalf of the appellant made reference to an "assessment" by SARS.

[23] Part of the assessment by SARS in relation to supplies made to B (Pty) Ltd for the periods of assessment July 2005 to February 2006 was conceded by the appellant in its objection. Thus, in relation to B (Pty) Ltd, the appellant effectively only objected to the assessment by SARS relating to the period between February 2006 and September 2007. In addition, the appellant objected to the assessment by SARS relating to C (Pty) Ltd and D (Pty) Ltd.

[24] Notwithstanding Mr X's evidence in the present proceedings, it was denied in the objection lodged that either C (Pty) Ltd or D (Pty) Ltd had concluded lease agreements with the appellant. These denials were repeated in the appellant's initial grounds of appeal in this matter dated the 20th of June 2012. Thereafter, on the basis of amended grounds of appeal, dated the 12th of October 2012, subsequently filed on behalf of the appellant for the hearing of this appeal in November 2012, it was admitted by the appellant that both C (Pty) Ltd and D (Pty) Ltd had indeed concluded written lease agreements with the appellant. Thus, as already indicated, Mr X did not dispute the conclusion of the lease agreements with C (Pty) Ltd and D (Pty) Ltd in his evidence.

[25] On the 3rd of March 2010, the Commissioner partially allowed the appellant's objections relating to the Commissioner's assessment of supplies made by the appellant to B (Pty) Ltd, but disallowed the appellant's objections to the Commissioner's assessment of supplies made by the appellant to C (Pty) Ltd and D (Pty) Ltd. The Commissioner stated at the time that the objections in this respect were disallowed due to misrepresentations pertaining to the invoices, which were issued. Whilst the appellant was advised of its right to appeal, it was also stated in the said letter at the time that the obligation to pay any taxes, penalties, additional taxes and interest charged on such taxes and additional taxes, was not suspended by an appeal. Thereafter, on the 6th of April 2010, the appellant noted the present appeal against Commissioner's decision to disallow the appellant's objections relating to supplies by the appellant to C (Pty) Ltd and D (Pty) Ltd.

[26] To the extent that it is relevant in this context, it appears that the appellant subsequently ceased trading and sold its business as a going concern. In terms of the said sale, the transfer of the immovable property, which was leased out by the appellant, to a company named E (Pty) Ltd was registered on the 14th of February 2008.

APPLICABLE LEGISLATIVE FRAMEWORK

[27] In terms of section 7 of the VAT Act, it is provided that subject to certain exemptions, exceptions, deductions and adjustments, a tax to be known as value added tax ("VAT") is to be imposed on vendors, registered in terms of the VAT Act. In terms of section 10 of the VAT Act, the value of such tax constitutes a prescribed rate of the amount charged for the supply of goods or services by the vendor concerned.

[28] Whilst the VAT Act does not define an assessment, the definition of an assessment in terms of the Income Tax Act, 58 of 1962, as amended, ("the Income Tax Act") includes "the determination by the Commissioner, by way of a notice of assessment" of an amount upon which any tax can be levied in terms of the Income Tax Act.

[29] "Input tax" in relation to any vendor is defined in the VAT Act to include the tax charged in terms of section 7 of the VAT Act and payable in terms of the said section to a supplier of goods or services to a person who "supplies". "Output tax" in relation to any vendor is defined to mean the tax charged in terms of section 7(1) in respect of the supply of goods and services by that vendor.

[30] The notion of "supply" in terms of the VAT Act is defined to include performance in terms of a sale or a rental agreement. As to when a vendor is deemed to "supply" rental, section 9(1) of the VAT Act stipulates that unless otherwise provided in the VAT Act, any supply of goods or services is deemed to take place *either* at the time an invoice is issued by the supplier concerned; *or* at the time the recipient in respect of the supply in question receives same; *or* the time any payment is received by the supplier concerned, whichever is the earlier (my emphasis).

[31] In terms of section 15(1) of the VAT Act, every vendor is generally obliged to account for VAT payable on an invoice basis, subject to certain exceptions. In terms of section 16(3) of the VAT Act, a vendor is entitled to claim a deduction for input tax within five years of the date of issue of the relevant tax invoice.

[32] Section 20(4) of the VAT Act provides that unless otherwise allowed by the Commissioner, a tax invoice shall contain the words "tax invoice", and shall incorporate the name, address and VAT registration number of the supplier; the name and address of the recipient, and where such recipient is a registered vendor, the VAT number of the recipient; an individual serialized number and date upon which the said tax invoice is issued; a full and proper description of the goods or services supplied; the quantity and volume of the goods supplied; and the value of the supply, the amount of the tax charged as well as the consideration for the supply.

[33] Section 31(1) of the VAT Act provides as follows:

"Where –

(a) any person fails to furnish any return as required by section 28, 29 or 30 or fails to furnish any declaration as required by section 14; or

(b) the Commissioner is not satisfied with any return or declaration which any person is required to furnish under a section referred to in paragraph (a); or

(c) the Commissioner has reason to believe that any person has become liable for the payment of any amount of tax but has not paid such amount; or

(d) …; or

(e) …

(f) …

the Commissioner may, notwithstanding the provisions of section 32(5) of this Act and section 83(18) and 83A (12) of the Income Tax Act, make an assessment of the amount of tax payable by the person liable for the payment of such amount of tax, and the amount so assessed shall be paid by the person concerned to the Commissioner."

[34] Section 31(4) of the VAT Act provides that:

"The Commissioner shall give the person concerned a written notice of such assessment, stating the amount upon which tax is payable, the amount of tax payable, the amount of any additional tax payable in terms of section 60 and the tax period (if any) in relation to which the assessment is made, and… "

[35] In terms of section 31(5) of the VAT Act, the Commissioner is obliged to state in the notice of assessment in terms of subsection 31(4) that the person to whom the said assessment is made can object to such assessment, within 30 days of the date of such notice of assessment.

[36] In terms of section 39(7) of the VAT Act, as it was for the period 2007-2008, to the extent that the Commissioner is satisfied that the failure on the part of a person to make payment of tax within the prescribed period, did not result in any loss to the State, or did not result in such person benefitting financially by not making such payment, the Commissioner may remit, in whole or in part, the applicable interest. Similarly, section 30(7)(b) provides that the Commissioner may remit, in whole or in part, any applicable penalty, if the failure of the person to make payment was not attributable to an intent not to make payment, or to a postponement of the liability for the payment of tax.

[37] In terms of section 83(13)(a)(iii), the court has the discretion to refer a matter back to the Commissioner to impose additional tax, at a rate determined by the court, if the court deems it appropriate.

LEGAL ISSUES

[38] Against this background, it was contended by way of a point *in limine* on behalf of the appellant that the assessment letter from the Commissioner did not constitute an assessment as envisaged in the VAT Act.

[39] The appellant's case on the merits was primarily premised upon the averment that the appellant had not made supplies to C (Pty) Ltd and D (Pty) Ltd as envisaged in the VAT Act. As such, it was contended that the appellant had not under-declared output VAT, and the appellant was not liable to the Commissioner for output VAT in respect of rental payable by C (Pty) Ltd and D (Pty) Ltd, as specified in the VAT invoices on record.

[40] In the event that the court finds that there were supplies to C (Pty) Ltd and D (Pty) Ltd by the appellant in terms of the VAT Act, the court has the discretion to remit, in whole or in part any applicable interest or penalty.

Point *in limine*

[41] As regards the point *in limine,* it was averred on behalf of the appellant that the assessment letter did not constitute an assessment as contemplated in terms of sections 31(4) and (5) of the VAT Act. Specifically, it was contended that to the extent that the assessment letter made use of verbs in the future tense, and to the extent that the assessment letter did not stipulate a "due date", the said letter was not intended to constitute an assessment of the appellant's liability for output tax.

[42] The appellant's counsel made much in this context of phrases in the assessment letter, which suggested an assessment by the Commissioner at a future date. Thus, it was pointed out that the assessment letter stipulated that revised notices of assessment and a statement of account "will be issued to you in due course"; and that adjustments "will be raised as additional assessments in terms of section 31(1) of the VAT Act". It was also pointed out that under the heading "Right to request reasons for assessments", reference was made in the assessment letter, to the "due date/s of assessment/s". In addition, the court was referred to headings in the assessment letter such as "Explanation of adjustments intended to be made", as well as "Nature of assessments to be issued."

[43] I was referred to the case of *Commissioner for Inland Revenue v South African Custodial Services (Pty) Ltd* 2012 (1) SA 522 (SCA); 74 SATC 61. In this case the court dealt with the issue of the finality of an assessment in circumstances where the Commissioner sent a letter to a taxpayer relating to the assessment of a taxpayer's income tax for specified years, where the taxpayer concerned was also advised in the said letter that "Tax assessments will be issued to you in due course". Thus, similar to the present case, it was suggested in the letter under review that assessments would be issued at a future date. The taxpayer concerned in that case was also notified, as in the present case, of its right to lodge an objection in the prescribed form.

[44] In considering whether the letter from the Commissioner in the above case constituted an assessment, the Supreme Court of Appeal took cognizance of the fact that an assessment in terms of the Income Tax Act was defined in essence as a determination by the Commissioner by way of a notice of assessment (served on a taxpayer) of an amount upon which any tax is leviable. On this basis, it is my view that the court in that correctly found that the letter from the Commissioner under consideration in that case, on the face of it purported (with one exception) to be a determination as defined in the Income Tax Act.[1] The court also found that the only consideration which ran counter to its finding in this respect was the sentence in the said letter from the Commissioner, which stipulated that the "Tax assessment will be issued to you in due course". [2] Be that as it may, the court found that the said sentence in the letter was simply intended to convey to the taxpayer that the determination having been made, an appropriate computer generated form

[1] at paragraph 30
[2] at paragraph 31

would be sent to the taxpayer in due course.[3] Thus, the court found that notwithstanding the counter-indication in the language of the said sentence, the overwhelming impression was that the letter sent was indeed an assessment.[4]

[45] For similar reasons, it is my view that the overwhelming impression created by the assessment letter in the present case was that it was indeed, an assessment: it determines, in a reasoned manner, the Commissioner's assessment of the appellant's liability. Moreover, the assessment letter clearly stipulates by way of a heading that it constitutes an "ASSESSMENT LETTER". It is also clearly stipulated that the assessment period relates to VAT for the period 2006, 2007 and 2008. Significantly, the said letter also states: "reasons for the adjustments to the above assessments have been explained above". Most importantly, the Commissioner's assessment is clearly premised upon computations set out in the Schedules marked Annexures A, B and C annexed to the assessment letter.

[46] In these circumstances, notwithstanding the indication in the assessment letter that adjustments "will" be raised, and notwithstanding the further reference to the "due date/s of assessment/s", it is my view that the Commissioner effectively made the necessary determination as envisaged in section 31(4) of the VAT Act. This is, of course, also borne out by the fact that when the appellant's legal representative lodged an objection to the letter of assessment, as provided for in the letter of assessment, the said objection justifiably referred to the contents of the letter of assessment as an "assessment". Thus, the appellant correctly acknowledged the assessment letter as an "assessment" as contemplated in the VAT Act.

[47] I accordingly conclude that there is no merit in the point *in limine* to the effect that the assessment letter does not incorporate an assessment in terms of the VAT Act.

Merits of appeal

[48] As regards the appellant's case on the merits, notwithstanding previous communications to the contrary, the appellant admitted at the hearing of this matter that monthly tax invoices for rental as envisaged in the VAT Act were issued by the appellant to C (Pty) Ltd and D (Pty) Ltd for the periods July 2005 to September 2007. Be that as it may, it was also averred on behalf of the appellant in this respect that to the extent that C (Pty) Ltd and D (Pty) Ltd did not really trade, these invoices were only "pro forma invoices". It was further averred that to the extent that the appellant did not enforce the lease agreements with C (Pty) Ltd and D (Pty) Ltd, there was no "performance" in terms of the said lease agreements. It was accordingly contended that no "supply" took place, as envisaged in the VAT Act.

[49] As regards Mr X's evidence pertaining to the tax invoices issued by the appellant being "pro forma invoices", it is not in dispute that each of the invoices generated by him, stipulated inter alia the name, company registration number, telephone number and VAT registration number of the appellant; the name and address of the addressee (as either C (Pty) Ltd and D (Pty) Ltd); a space for the VAT number of the addressee; the date upon which the said tax invoice was issued; the description of the goods or services supplied as "RENT" as well as the month for which rent was supplied; and the value of the supply, the amount of VAT charged by the appellant as well as the consideration for the monthly rental. It is also not in dispute that the format and particulars incorporated in these invoices were identical to the format and particulars incorporated in the tax invoices issued by the appellant for rental payable by B (Pty) Ltd.

[50] As regards the question whether all the invoices generated for the appellant (incorporating the above details) complied with the provisions of the VAT Act, it is significant that the appellant partly conceded output VAT in relation to rental payable by B (Pty) Ltd. To the extent that the invoices issued to B (Pty) Ltd incorporated the identical format and details as the invoices issued in relation to C (Pty) Ltd and D (Pty)

[3] at paragraph 32
[4] at paragraphs 31 and 32

Ltd, it can hardly be disputed that the latter invoices generated by Mr X complied in all material respects with the provisions of section 20(4) of the VAT Act.

[51] As regards the appellant's averment that it had not supplied anything to C (Pty) Ltd and D (Pty) Ltd in terms of the VAT Act, it is specifically provided in terms of section 9(1) of the VAT Act, that the supply of the goods or services by a vendor is deemed to take place at the time a VAT invoice is issued, at the very earliest. Thus, the supply is deemed to take place before such invoice is received by the recipient or paid by the recipient. As such, whether or not the appellant received payment for renting its property, and whether or not the appellant actually enforced payment of rentals by C (Pty) Ltd and D (Pty) Ltd, are of no consequence in relation to the appellant's liability for declaring output VAT. Similarly, whether or not C (Pty) Ltd and D (Pty) Ltd actually traded is also irrelevant in the context of the present appeal.

[52] Furthermore, declaration of output tax by the appellant to SARS is not dependent upon a correlating claim for input tax by a vendor to whom the appellant "performed" in terms of a rental agreement, as suggested by Mr X. Similarly, declaration of output tax by a vendor such as the appellant, who rents out property, is not dependent upon whether such vendor elects to enforce performance by a lessee in terms of a lease agreement during the term of the lease. In the final analysis, as already indicated, in terms of the provisions of section 9(1), VAT was payable by the appellant as soon as the various tax invoices were issued by the appellant.

[53] It also my view that it does not avail the appellant to contend that the invoices issued to C (Pty) Ltd and D (Pty) Ltd were actually fictitious. See, in this regard the unreported judgment of Hiemstra AJ in the case of *XYC CC v the Commissioner for Inland Revenue* (in the Tax Court, North Gauteng) case number VAT 889, where the court found that an appellant was liable for output tax in relation to fictitious VAT invoices, in circumstances where the inference loomed large that he had participated in a fraud for his own gain. As with that case, it is also my view in this context that Mr X did not provide a credible account of the tax invoices generated by him. Furthermore, for the reasons already given, whatever, his explanation was, the appellant is liable for payment of output VAT in terms of the VAT Act.

Interest and Penalties

[54] As indicated above, the Commissioner imposed the normal statutory penalty and interest in relation to the appellant's failure to pay output tax. As such, the Commissioner elected not to exercise its discretion to remit the applicable penalty and interest in terms of section 39 of the VAT Act. I agree with counsel for the Commissioner in this context that the appellant's failure to make payment within the prescribed period not only resulted in financial loss to the State, but also resulted in the appellant benefitting financially. It is also my view that the appellant's failure to make payment in the circumstances of this case was obviously premised upon a clear intention on the part of the appellant not to make payment. In these circumstances, there is no basis for this court to interfere with the Commissioner's assessment pertaining to the statutory interest and penalties in this respect.

Additional Tax

[55] Where a taxpayer omits to render a return relating to any amount, or makes an incorrect statement, the Commissioner is entitled in terms of the provisions of the Income Tax Act, to impose an additional tax.[5] In the present case the Commissioner did not do so, but counsel for the respondent requested the court to refer the matter back to the Commissioner for the assessment of an additional tax at a percentage determined by the court. It is my view in this respect that as the appellant has already been properly penalized by way of the statutory penalty and interest, it is not appropriate to impose an additional tax in the circumstances of this case.

[5] Section 76 of the present Income Tax Act

Costs

[56] In terms of section 83 of the Income Tax Act, the court may on application by the Commissioner grant an order for costs against an appellant inter alia where the claim of the Commissioner is unreasonable, or where the grounds of appeal, which are relied upon by the appellant are frivolous. In the only reported case in relation to frivolous grounds of appeal, the word "frivolous" was construed to mean, "manifestly futile" by Squires J, sitting as President of the Rhodesian Income Tax Special Appeals Court. [6] I am persuaded that the grounds of appeal relied upon by the appellant are frivolous and "manifestly futile" in the circumstances of the present case. An adverse costs order against the appellant is accordingly warranted.

ORDER

[57] Based on the aforegoing, there is no basis for this appeal to be upheld, and the following order is accordingly made:

1. The appeal in this matter is dismissed;
2. The respondent's assessments relating to the capital, penalties and interest payable by the appellant pursuant to the appellant's failure to pay output tax are confirmed; and
3. The appellant is directed to pay the respondent's costs.

DATED AT JOHANNESBURG THIS 13th DAY OF NOVEMBER 2012

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MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Agreed by:

NONHLANHLA JIYANE
ASSESSSOR OF THE
TAX COURT OF SOUTH AFRICA

CHURCHILL MRASI
ASSESSSOR OF THE
TAX COURT OF SOUTH AFRICA

Appellant's Counsel	:	C Louw
Respondent's Counsel	:	R Tsele
Date of Hearing	:	8th November 2012

[6] ITC 1316 (1980) SA SATC 229