IN THE TAX COURT

(GAUTENG DIVISION, JOHANNESBURG)

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

CASE NO: VAT 1015

BEFORE:

ACTING JUDGE N.P. MALI : PRESIDENT

MS. N SINGH : ACCOUNTANT MEMBER

MR. M.C. SEOTA : COMMERCIAL MEMBER

In the matter between

AB (PTY) LIMITED **APPELLANT**

and

THE COMMISSIONER FOR

THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

J U D G M E N T

MALI AJ:

[1] This is an appeal against the Value-Added Tax ("VAT") assessment raised by the respondent for the VAT periods 12/2007 to 12/2009. On 8 December 2010 the respondent issued various VAT assessments against the appellant in terms of section 31 of the Value-Added Tax Act, Act 89 of 1991 ("the Act").

[2] On 18 February 2011 the appellant objected to the above VAT assessments and on 19 July 2011 the respondent disallowed the objection, hence this appeal.

[3] The appellant is a company that specialises in the sinking of shafts and the development of underground structure, used in mining and hydropower applications. The appellant's principal place of business is Johannesburg.

[4] Certain of the appellant's contracts for work in its areas of specialisation are obtained through open tender processes. When tendering for contracts, the appellant includes its estimated costs for accommodation and meals requirements for its workforce. Its contract price therefore includes accommodation and meals costs. The appellant then charges output tax on the contract price.

[5] For purposes of servicing its clients, mostly mines, the appellant employs limited duration contract employees who are employed for a specific project undertaken by the Appellant. The majority of the limited duration contract employees are foreign nationals mainly Mozambique and Lesotho citizens.

[6] During the periods of assessment, the appellant provided accommodation and meals for its workforce. However, the appellant did not have its own accommodation facilities, and it contracted with third parties (including C entity) to provide hostel accommodation and meals for its employees at or close to the mines where the employees were deployed to carry out the construction activities of the appellant. The hostel owners, who are VAT vendors, duly invoiced the appellant an agreed fee and charged VAT thereon for provision of accommodation and meals to the appellant's employees, for the duration of the contract.

[7] The respondent's assessments concern the disallowance of the appellant's input tax deductions relating to accommodation and meals expenses incurred by the appellant when executing its contracts at various mines.

[8] The respondent disallowed various input tax amounts previously claimed by the appellant as follows:

8.1. for the period 12/ 2007 an amount of R117 781, 64;

8.2. for the period 01/2008 an amount of R149 815, 33;

8.3. for the period 02/2008 an amount of R31 483,58;

8.4. for the period 03/2008 an amount of R119 035,72;

8.5. for the period 04/2008 an amount of R29 741,83;

8.6. for the period 05/2008 an amount of R39 145,76;

8.7. for the period 06/2008 an amount of R29 806,23;

8.8. for the period 07/2008 an amount of R54 874,07;

8.9. for the period 08/2008 an amount of R23 844,66;

8.10. for the period 09/2008 an amount of R310 472,40;

8.11. for the period 10/2008 an amount of R113 265, 53;

8.12. for the period 11/2008 an amount of R169 664, 44;

8.13. for the period 12/2008 an amount of R53 032,31;

8.14. for the period 01/2009 an amount of R42 825,05;

8.15. for the period 02/2009 an amount of R33 461,52;

8.16. for the period 03/2009 an amount of R89 205,92;

8.17. for the period 04/2009 an amount of R93 903, 34;

8.18. for the period 05/2009 an amount of R87 608, 15;

8.19. for the period 06/2009 an amount of R97 008, 24;

8.20. for the period 07/2009 an amount of R142 392,39;

8.21. for the period 08/2009 an amount of R124 764, 96;

8.22. for the period 09/2009 an amount of R57 294, 32;

8.23. for the period 10/2009 an amount of R104 971,44;

8.24. for the period 11/2009 an amount of R50 160,97; and

8.25. for the period 12/2009 an amount of R157 962, 36.

[9] A total input tax amounting to R3 880 200.08 and R1 243 391.59 was disallowed by the respondent in the above tax periods.

[10] At the commencement of the proceedings the parties had narrowed the issues. The only remaining issue for determination by the court concerns the appellant's entitlement to deduct input tax in respect of the accommodation and food provided to its employees by C Entity. The respondent disallowed the appellant's input vat deduction on the basis that such deduction is prohibited by section 17(2)(a) of the Act.

[11] The battlefield of the parties in this appeal is whether the provision of hostel accommodation and catering services obtained by the appellant for the limited duration contract employees at C Entity where they stayed; constitute "entertainment".

[12] Section 16 of the Act provides for the calculation of tax payable. This includes the calculation of an amount that a vendor is allowed to claim as a deduction of input tax borne by him from output tax charged by him. The vendor needs to meet certain tax requirements before he can claim an input tax deduction, firstly the vendor must be in possession of a valid tax invoice from the supplier concerning the supply for which input tax is sought to be deducted; and secondly input tax sought to be deducted must have been incurred on goods and services acquired by the vendor for the purpose of making taxable supplies.

[13] Section 17 of the Act deals with permissible deductions in respect of input tax. Section 17(2)*(a)* sets out what may not be claimed as input tax by a vendor. In other words the section expressly prohibits certain expenses from inclusion by a vendor as input tax and it provides as follows:

17(2) "Notwithstanding anything in this Act to the contrary, a vendor shall not be entitled to deduct from the sum of the amounts of output tax and refunds contemplated in section 16(3), any amount of input tax-

(a) in respect of goods or services acquired by such vendor to the extent that such goods or services are acquired for the purposes of entertainment:…

[14] The definition of ***"entertainment"*** in section 1 of the Act provides as follows: *"the provision of any food, beverages, accommodation, entertainment, amusement , recreation or hospitality of any kind by a vendor whether directly or indirectly to anyone in connection with an enterprise carried on by him".*

[15] A vendor is prohibited from deducting input tax in respect of good or services acquired by such vendor to the extent that such goods or services are acquired for the purposes of "entertainment". The purpose of the legislature in enacting the prohibition of input tax in terms of section 17(2)*(a)* of the Act is *inter alia* to avoid granting a deduction of input tax where the 'entertainment' in question involves a strong element of personal enjoyment, especially in circumstances where there is room for abuse.

[16] From the evidence led, the appellant's employees were provided basic accommodation and food, which the respondent acknowledged as adequate. The appellant called two Human Resource Managers who testified that the food and accommodation were not luxurious. As a result the contract employees prefer to not stay at a hostel, for among other reasons, lack of privacy, sharing of

small rooms by two employees and the preference of employees to cook their own meals. They further testified that there are other complaints in respect of the quality and quantity of food, poor lighting and broken taps. The appellant further referred the court to the photographs taken of the accommodation camps built by C Entity and food consumed by the employees which the input tax claimed is based. The purpose of the photographs was to persuade the court that the food and hostel accommodation were as basic as ever.

[17] Of importance is that the witnesses called were neither the consumers of the food and nor the users of the accommodation. The appellant is in agreement with the fact that the definition of the word **"entertainment"** includes provision of food and accommodation; however the appellant sought to argue that the food and the accommodation it provided to its employees were not intended for personal enjoyment; that being the mischief intended to be addressed by the legislation as envisaged in section 17(2) of the VAT Act.

[18] The respondent did not dispute that the accommodation and food were not luxurious, but conceded that it was adequate. The respondent further submitted that the reason the employees were leaving the accommodation camp is because of the increase in living out allowance which benefitted them.

[19] The appellant further submitted that an important consideration, when interpreting words and phrases, is to have regard to the context in which it occurs. In that regard the appellant's counsel relied on dictum by Lord Greene MR[1], the same quoted with approval in **C: SARS V Dunblane (PtY) Ltd**[2]. The

[1] IN Re Bidie [1949] Ch 121 at 129

dictum reads as follows:

"The real question what we have to decide is, what does the word mean in the context of the subsection in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that is designed to remedy".

The Appellant further referred the court to **Hoban v Absa Bank Ltd t/a United Bank and Others**[3] wherein it was stated that context is also relevant in regard to statutory definitions, and that context includes, but is not confined to, the text which immediately precedes or follows the particular word or phrase.

[20] The Appellant also referred to R v Secretary of State for the Home Department [4] wherein Lord Steyn in the House of Lord stated *"in the law context is everything"*

[21] In a nutshell the appellant's argument is that within the context of this matter the provision of food and accommodation to the appellant's employee should not be construed to be ***"entertainment"*** because there is no personal enjoyment by the appellant. Therefore ***"the provision of any food, beverages or accommodation"*** should also be restricted to that which results in personal enjoyment.

[22] The prohibition to claim input tax on entertainment expenses does not apply if a vendor provides entertainment as part of a business which continuously or

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[2] 2002 (1) SAR 38 (SCA) at 246
[3] 1999 (2) SA 1036 (SCA) at 1044 A-E
[4] [2001] 3 All ER 433 (JL) at paragraph 28

regularly supplies entertainment to customers for a consideration.

[23] A vendor may claim input tax if the entertainment expense was for an employee of the vendor, if the entertainment is supplied for a charge which covers all the direct and indirect costs of providing it and the vendor must have charged output tax on that charge. Further, the law makes provision for input tax deduction on entertainment expenses in respect of food and accommodation by the vendor employer when the employees have spent the night away from the place of usual employment or the employee's place of residence. The aforesaid scenarios are not applicable *in casu*.

[24] There is no merit in the appellant's argument that the court should take cognisance of the fact that "the food and the accommodation provided by the vendor to its employees were not intended for personal enjoyment". It was argued furthermore that that was the mischief that the lawgiver sought to cure.

[25] In my view, the legislature intentionally prohibited input tax relating to the provision of food and accommodation as entertainment expenses without categorising the type of food and accommodation as being luxurious or adequate. It will be impractical, unnecessary and tedious exercise to typify food and accommodation as either luxurious or adequate before same is classified as entertainment. It is not for the court to run wide imaginations as to the type of food and accommodation that may be considered luxurious and therefore exempted from the prohibition as deductible input tax.

[26] It is trite law that food and accommodation are considered "entertainment" and

therefore the input tax levied on them is not deductible. I find no problems with the interpretation of the applicable section of the Act that may warrant a resort to other canons of interpretation. The definition of the word **"entertainment"** is not ambiguous.

[27] I consider the appellant's provision of food and accommodation to its contract employees as constituting entertainment as envisaged in the Act and is therefore not deductible as input tax.

[28] In the result the appeal is dismissed.

[29] The assessments are confirmed to the extent set out in the "*C Entity"* and "*Mines and related costs"* column on page 30 of the Dossier.

NP MALI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT: ADV P J J MARAIS (SC)

INSTRUCTED BY : EDWARD NATHAN SONNEBERGS INC

FOR THE RESPONDENT: ADV MJ JANISCH

INSTRUCTED BY : SOUTH AFRICAN REVENUE SERVICE

DATE OF HEARING: 12 June 2014