IN THE TAX COURT

(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED.	**CASE NO: VAT 1005**
..... DATE ..... SIGNATURE	

BEFORE:

ACTING JUDGE N P MALI — **PRESIDENT**

MS A BAIG — **ACCOUNTANT MEMBER**

MR B MATHIBELA — **ACCOUNTANT MEMBER**

In the matter between

AB CC — **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 decision of the respondent disallowing the appellant's objection to the revised assessments raised by the respondent for the Value Added Tax ("VAT") periods from 07/2008 to 09/2010. On 11 April 2011, the respondent issued a letter of assessment against the appellant in terms of section 7(1)(a) read with section 11(2)(s) and section 8(23) of the Value Added Tax Act 89 of 1991 ("the Act").

[2] The appeal is based on the appellant's assertion that it was entitled to levy VAT at a zero rate in terms of section 11(2)(s) of the Act in respect of the supplies it made to an entity, ("C"). Alternatively, the respondent avers that the appellant should have levied VAT at the standard rate, because the services rendered by it were not in respect of building new houses and/or houses for first time owners; and, therefore, do not qualify as a subsidy or grant in terms of the Housing Subsidy Scheme. The appellant asserts that the services it rendered were made in terms of the Housing Subsidy Scheme referred to in section 3(5)(a) of the Housing Act 107 of 1997 ("the Housing Act") and as such attract VAT at a zero rate.

[3] The issue to be determined in this appeal is whether the rectification of houses constructed between 1994 and April 2002, the rehabilitation of 610 (six hundred and ten) damaged houses and the building of completely new houses by the appellant on behalf of C were made in terms of the Housing Subsidy Scheme referred to in section 3(5)(a) of the Housing Act, and,

therefore, the appellant was correct to levy VAT at a zero rate and, as such, entitled to a refund of the amount it paid to the South African Revenue Service (SARS), together with interest.

[4] During the period under appeal, the appellant charged C, VAT at standard rate. The appellant later submitted and made payments in respect of VAT returns reflecting VAT levied at the standard rate in respect of services rendered to C. When C raised the issue with the Appellant, referring to the terms of the contract, the appellant realised that it had committed an error in levying and collecting VAT from C. The Appellant then submitted revised VAT returns seeking to amend the declaration from the standard rate to the zero rate. The amendment then resulted in the appellant being entitled to the VAT refund in the sum of R38, 162 303.07.

[5] On 11 April 2011, the respondent issued an assessment letter refusing the VAT refund on the basis that the services rendered by the appellant were not in terms of building new houses for first-time home-owners and, therefore, did not qualify as a subsidy or grant in terms of the Housing Subsidy Scheme. On 28 April 2011, the appellant objected to the said assessments.

[6] On 3 August 2011, the appellant's objection was disallowed on the basis that the funds received by the appellant from C, for rectification or revitalisation as well as emergency assistance, do not fall within the ambit of six mechanisms of the National Housing Code 2000, and, as such, do not qualify in terms of the Housing Subsidy Scheme which attracts VAT at a zero rate. The

respondent contends that the services fell out of the scope of the Housing Subsidy Scheme and, as such, were subject to VAT at the standard rate.

[7] It transpired that at some stage SARS considered refunding the VAT amount paid by the appellant to SARS. It then sought an undertaking from the appellant that such money, when refunded, would be paid back to C. Upon the appellant explaining the reason why it could not pay that amount back to C, the respondent changed its stance about paying the refund. The reason advanced by the appellant was that C instructed the appellant to finalise other projects it had with C without being paid for the same, in a way causing the appellant to be out of pocket.

[8] Section 7(1) of the Act provides for the levying of VAT 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 out by the vendor. The levying of VAT in terms of section 7 of the Act is subject to the exemptions, exceptions, deductions and adjustments provided for in the Act.

[9] Section 11(2) of the Act deals with zero rating and provides as follows:

> "*Where, but for this section, a supply of services would be charged with tax at the rate referred to in section 7(1), such supply of services shall subject to compliance with subsection (3) of this section , be charged with tax at the rate of zero percent where-*

…

(s) In terms of section 11(2(s) the service are deemed to be supplied to a public authority or municipality in terms of section 8 (23);

[10] Section 8(23) of the Act deals with certain supplies of goods or services deemed to be made or not made. The section sets out what is deemed to be supplied. It provides that a vendor shall be deemed to supply services to any public authority or municipality to the extent of any payment in terms of the Housing Subsidy Scheme referred to in section 3(5)(a) of the Housing Act, made to or on behalf of that vendor in respect of the taxable supply of goods and services by that vendor.

[11] Section 3(5)(a) of the Housing Act provides:

"The following housing assistance measures, which were approved for financing out of the Fund in terms of section 10A. 10B. 10C or 10D of the Housing Act, 1966 (Act No. 4 of 1966) are deemed to be national housing programmed (sic) instituted by the Minister under subsection (4)(g):

(a) The Housing Subsidy Scheme……"

[12] The appellant is involved in the building construction of low cost housing. On 3 December 2007, C entered into a contract with one D Trading CC ("D"). D later ceded the contract to the appellant. The crucial terms of the contract were as follows:

> "*C intends to rectify the defects contemplated in paragraph 1.2 above by means of the National Housing Programme: rectification of houses delivered between 15 March 1994 and 31 March 2002. The objective of the programme is to rectify defects in respect of*
>
> *(i) Municipality services; and*
>
> *(ii) Top structure defects."……*
>
> *"the proposed development project will be in accordance with the National Policy on rectification of houses delivered between 15 March 1994 and 31 March 2002, provincial policy and procedure approved in November 2006, and chapter 12 of the Housing Code where the MEC has the authority to assist household in emergency cases".*
>
> *"The Vat treatment of the supply is recorded as follows as per the agreement between the parties:*
>
> *The IA ('Implementing Agent') acknowledges that services rendered in accordance with the provisions of the Housing Subsidy Scheme are* ***zero***

rated for Value Added Tax purposes in accordance with Section 11(2)(s) of the Value Added Tax Act, 89 of 1991." (my emphasis).

[13] In deciding whether the rectification/revitalisation, rehabilitation and building of completely new houses fall under the Housing Subsidy, the enquiry must, of necessity, be directed at the meaning of the words "*housing subsidy scheme"* in order to understand what a housing subsidy scheme is and what it covers.

[14] It was submitted on behalf of the appellant that it, *inter alia*, relied upon the correspondence from C and the agreements it entered with C. From the said correspondence and agreements, it understood the services it rendered to C as falling under the housing subsidy scheme. In this regard, the letter from C to the appellant, dated 22 March 2005, reads as follows:

> "*(1) Kindly note that Housing X, on 03* March *2005, approved the National Housing Programme: Rectification of houses delivered between 15 March 1991 and 31 March 2002 ("the programme").*
>
> *(2) The implementation date of the programme is 1 April 2005 and all rectification work must be finalised on 31 March 2010.*
>
> *…*
>
> *(4) The rectification work will include all*
>
> *(a) …*

(b) Developer Driven Individual Subsidy houses approved and delivered as a project between 15 March 1994 and 31 March 2010

(c) Houses which have been vandalised after completion but before occupation by rightful ***housing subsidy beneficiary.*** **(my emphasis)**

…

(9) The cost of the rectification work must not exceed the cost of the elements as detailed in the detailed cost breakdown for the housing subsidy (own underlining) and a Provincial Housing Department, may in its discretion, after careful consideration, approve that a geophysical variation amount be applied, provided that this variation amount is justified."

[15] The appellant's counsel further referred to the document signed by the MEC for Local Government, approving a submission for the appointment of a service provider to rehabilitate and repair 610 houses damaged by storm in the area. Paragraph 21 of the approval records the following:

"A request has been received from Y Municipality for Emergence Assistance to rehabilitate / repair 610 houses of families affected by recent storms that swept through the area."

[16] Paragraphs 3.3 and 4.4 of the approval respectively read as follows:

> "*3.3 Some of the houses were totally destroyed and will need complete reconstruction".*
>
> *"4.4 The subsidy amount* of *the R54 650.00 is for all structures investigated or assessed as informal in nature. Where formal structures exist, that need repair, the rate of R32 065-92 will apply in terms of financial provisions."*

[17] The preamble to the agreement between the parties reads:

> *" C hereby appoints AB as Developer to undertake the construction of houses as an emergency case as per the MEC resolution dated 27 January 2009 subject to certain conditions and conclusions of a written agreement between C and AB."*

[18] The VAT treatment of the supply to the Department reads as follows:

> *"The Developer hereby acknowledges that services rendered in accordance with the provisions of the Housing Subsidy Scheme are zero rated for Value Added Tax in accordance with Section 11(2)(s) of the Value Added Tax Act, 89 of 1991".*

[19] From the evidence led, it transpired that one had to rely on the National Housing Code 2000 to get the definition of a housing subsidy scheme. The

Housing Act, which purports to deal with the housing subsidy, does not make provision for the definition of a housing subsidy scheme and neither does it make reference to the Housing Code 2000. The appellant further submitted that the National Housing Code was revised to include a housing subsidy scheme and project linked subsidies, consolidation subsidies and institutional subsidies.

[20] It emerged that there were more than six mechanisms in respect of housing subsidies, a fact which the respondent's witnesses did not dispute. Actually the three witnesses for the respondents contradicted each other in this regard. The SARS officer, Ms S, who gave the reasons for her assessment as being that the rectification or revitalisation as well as emergency assistance do not fall within the ambit of six mechanisms of the National Housing Code 2000, later conceded that there were more than six housing subsidy mechanisms. Further, that the rectification and the revitalisation programme would have fallen under the other mechanisms not mentioned by her in the letter of assessment.

[21] Ms S conceded that the purpose of the Housing Subsidy Scheme was not limited to the building of the new houses only as she advised in her letter of assessment. She based her decision on the principle of rectification, even on services which were rendered as emergency services falling outside the rectification process. She stated that she was not aware at that stage of the other programmes, in particular, the emergency housing programme. Her

reasons for assessment were based on incomplete information at the time she concluded the assessment.

[22] I find that there is no consistency, even amongst the government departments, concerning the interpretation and application of the provisions dealing with housing subsidy schemes/assistance. It is obvious that the Provincial Department, which drafted the contract, made it clear that the VAT treatment in respect of *services rendered in accordance with the provisions of the Housing Subsidy Scheme are* ***zero rated for Value Added Tax purposes.***

[23] The respondent's witness, Mr T, from the National Department of Housing, avers that the abovementioned term of the contract is an error on the part of C. For example, when asked whether different programmes fall under the National Housing Programme, he replied as follows:

> *"You will have to go to each problem to determine whether VAT applied, a zero rating applies or not, because they differ substantially. …"*

This is despite the contract stating clearly that for all the programmes involved the supplies in respect of them are zero-rated.

[24] Another example is the email correspondence from V of the office of the National Treasury which reads as follows:

"Colleagues see below the perennial problem with the VAT and 'RDP' housing. I think SARS is correct to argue that VAT should be imposed at the standard rate in this instance- it was for the repair of houses and should not qualify for zero rating in terms of s11(2)(t). Ulrike how far are we with the proposal that we drop this zero-rating provision and provide for more transparent additional on-budget support. The interpretation and administration of s11(2)(t) is very problematic."

[25] Although the above email correspondence makes reference to section 11(2)(t) it is an indication by the authorities that the VAT treatment relating to RDP houses provided under the Housing Subsidy Scheme was problematic. Mr V is expressing his opinion about the VAT treatment relying on his own interpretation without referring to any authority. It was stated, on behalf of the respondent, that Mr V from Treasury would have been mistaken to make reference to section 11(2)(t) instead of section 11(2)(s) which dealt with the housing subsidy scheme and grants as envisaged in section 11(2)(t).

[26] The testimony of Mr W, the witness for the respondent confirmed the lack of clear policies relied upon in respect of the interpretation attributed by the government departments, including SARS, in respect of the VAT treatment of the Housing Subsidy scheme. He referred to the confirmation from treasury that the rectification programme was not part of the subsidy scheme. He indicated that the confirmation might have been a verbal or telephonic confirmation as he was not directly involved with the enquiry. He further

refuted Mr T's testimony that there was a specific policy and or documentation which the Department provided SARS.

[27] He confirmed that there were differing views from SARS on the main aim of the zero rating VAT provisions. SARS, in this matter, went to the extent of requesting the Minister of Finance's office to clarify the position, an unusual practice. Upon being cross-examined about his own understanding of the programme, Mr T replied as follows:

> "*No I can't assist the court in the nuts and bolts of the actual housing subsidy program themselves."*

[28] As shown above, there is no cut and dry definition of what a housing subsidy scheme entails. It varies from one person's interpretation to the other, depending on the circumstances. Various documents have to be cross-checked and referenced to get to the answer which suits a certain individual at a particular moment. Some of the respondent's witnesses referred to unrecorded minutes of the meetings held as far back as 1996 and unwritten policies which are aimed at excising rectification and revitalisation programmes from the housing subsidy scheme. Even the witnesses for the respondent stated that one has to consult various Acts and non-existent policies as well as varying opinions to come to a conclusion that the rectification, revitalisation and building of new houses under the emergency programme is excluded from the housing subsidy scheme and, as such, the VAT is levied at standard rate.

[29] In **Natal Joint Municipal Pension Fund v Endumeni Municipality**[1] at paragraphs [18] it was stated:

"[18] …*The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one*

[1] 2012 (4) SA 593 (SCA)

they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

[30] *In casu*, the VAT Act refers to the Housing Subsidy Scheme mentioned in the Housing Act but not defined. In neither of these Acts is the term "*Housing Subsidy Scheme*" defined. A taxpayer is then required to seek the terms of reference from further official documentation. It is not an ideal situation for a taxpayer to seek clarity from more than one source outside the Act in order to determine the VAT rate applicable. In addition, the unambiguous language of the agreement between the parties on VAT treatment appears to be an official declaration by a government department and a policy maker to the taxpayer. Having regard to all the pieces of information and evidence led in this matter, the explicit clause in the agreement dealing with VAT treatment is to the effect that the payments are in terms of a housing subsidy scheme.

[31] In **Badenhorst v CIR**[2] it was held

"*In the case of ambiguity arising during the interpretation of fiscal legislation, the contra fiscum rule will be applicable. Should a taxing statutory provision reveal an ambiguity, the ambiguous provision must be interpreted in a manner that favours a taxpayer. When a taxing provision*

[2] 1955 (2) SA 207 (N) 215

is reasonably capable of two constructions, the court will adopt the construction that imposes a smaller burden on the taxpayer."

[32] Having regard to the circumstances surrounding the interpretation adopted by various role players in this matter, including the undertaking by C , that the VAT treatment of the appellant's supply is zero-rated, I accept the appellant's explanation. The appellant submitted that, within the context of this matter, the Department's intention was to utilise the money appropriated through the Housing Subsidy Scheme (housing in emergency circumstances) as provided for in Chapter 12 of the National Housing Code, to undertake the projects. The amount used to fund the project was acquired from the money allocated to the Housing Subsidy Scheme. I find that the services rendered by the appellant to C were in terms of the Housing Subsidy Scheme and, as such, attract VAT at zero-rate.

[33] The appellant submitted that it suffered prejudice because of SARS' interpretation leading to the refusal to pay the VAT refund. As a result, the appellant lost contracts and tenders in the process as it could not obtain a Tax Clearance Certificate from SARS. The appellant's business operations were negatively impacted leading to the closure of the business. Furthermore, SARS caused filing delays resulting to the late hearing of this matter. The appellant, therefore, persuaded this court to order the respondent to pay the costs of this appeal. The respondent submitted that the appellant also contributed to the delays in respect of the late filing and its resultant

consequences. I therefore find that SARS's grounds of assessment were not unreasonable due to the confusion regarding interpretation.

[34] In the result:

34.1 SARS is ordered to revise the assessment for the VAT periods from 07/2008 to 09/2010 and to refund the appellant the sum of R38,162,303.07 with interest at 9.0% from the date of this order;

34.2 Each party to pay its own costs.

NP MALI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPELLANT: ADV H MPSHE

INSTRUCTED BY : MMS INCORPORATED ATTORNEYS

FOR THE RESPONDENT: ADV O MOKGATLE

INSTRUCTED BY : SOUTH AFRICAN REVENUE SERVICE

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