IN THE TAX COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case No.: **VAT 1345**

In the matter between:

XYZ CC Appellant

and

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE Respondent

Date of judgment: 28 July 2016

JUDGMENT

BOQWANA J

Introduction

[1] The issue in this matter is whether the appellant qualified for an input tax deduction in terms of section 17 of the Value-Added Tax 89 of 1991 ('the VAT Act'). The appellant is a Close Corporation, which carried on business in the courier industry. It is registered for Value Added Tax ('VAT') with the respondent.

[2] The question arose in consequence of the findings made pursuant to an audit of the appellant's tax affairs during July 2011 to August 2011 assessed tax periods. During the course of the audit, it was found that the appellant claimed input tax in respect of the acquisition of a 2007 Mercedes Benz 115 CDI Crew Cab vehicle

('the vehicle'). The claim was made on the basis that the vehicle was acquired for the purposes of making taxable supplies.

[3] The respondent disallowed the claim on the basis that the vehicle is regarded as a 'motor car' as defined in s 1 of the VAT Act, and accordingly a deduction of input tax is not permitted with respect to the acquisition of a motor car, in terms of s 17 (2) (c) of the Act, subject to certain limitations not relevant to this matter.

[4] The appellant objected to the assessment on the basis that the input VAT was claimed on a qualifying vehicle, which is not a passenger vehicle. According to it, the vehicle is used solely in the courier business to deliver all different kinds of packages and that no passengers are ever transported. It asked for the input VAT claim to be reconsidered. SARS considered the objection against the assessments and disallowed it. The issue was decided against the appellant on appeal by it to the Tax Board. The appellant is dissatisfied with the Tax Board's decision and the appeal was consequently referred to this Court in terms of s 115 of the Tax Administration Act 28 of 2011('the Tax Administration Act') for a hearing *de novo*.

[5] The appellant was initially represented by its directors, Mr X and Mrs X with Mr X being the spokesperson. Mr X indicated that the appellant sought to lead new evidence in its case. Mr Y who represented the respondent on the other hand, was of the view that issues were common cause and that the matter could be argued based on the law. Having considered the issues raised by the parties in their opening addresses, the Court deemed it necessary to postpone the matter and allow the appellant an opportunity to seek legal representation. It also directed the parties to meet and discuss whether any evidence would be led and if not a stated case be prepared. The matter was postponed to 21 June 2016.

[6] At the hearing of the matter on 21 June 2016, Mr J, a tax consultant represented the appellant. Mr J indicated that Mr X was bedridden and desirous of having this matter finalised as soon as possible due to his poor health. There were no objections from the respondent to Mr J representing the appellant.

[7] The parties submitted in a further pre-trial minute prior to the hearing of the matter wherein they indicated that evidence would be led. At the hearing of the matter on 21 June 2016, however, parties informed the Court that they had agreed that no evidence would be led and that the matter would be argued on the papers. Mr J confirmed that he had obtained instructions from his client that he would lead no evidence as earlier indicated. Parties agreed that the matter before Court turned on whether the appellant's vehicle was a motor car as defined in the VAT Act.

Evaluation

[8] Section 17 (2) (c) of the VAT Act stipulates as follows:

> '17 Permissible deductions in respect of input tax
>
> 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) …
>
> (b) …
>
> (c) in respect of any motor car supplied to or imported by the vendor: Provided that –
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> (i) this paragraph shall not apply where that motor car is acquired by the vendor exclusively for the purpose of making a taxable supply of that motor car in the ordinary course of an enterprise which continuously or regularly supplies motor cars, whether that supply is made by way of sale or under an instalment credit agreement or by way of rental agreement at an economic rental consideration;
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> (ii) for the purposes of this paragraph a motor car acquired by such vendor for demonstration purposes or for temporary use prior to a taxable supply by such vendor shall be deemed to be acquired exclusively for the purpose of making a taxable supply; and
>
> (iii) this paragraph shall not apply where –
>
> (aa) that motor car is acquired by the vendor for the purposes of awarding that motor car as a prize contemplated in section 16 (3) (d) in consequence of a supply contemplated in section 8 (13); or

(bb) the supply of that motor car is the ordinary course of an enterprise which continuously or regularly supplies motor cars as prizes to clients or customers (other than to any employee or office holder of the vendor or any connected person in relation to that employee, office holder or vendor) to the extent that it is in consequence of a taxable supply made in the course or furtherance of an enterprise;…'

[9] The effect of s 17 (2) (c) as found in *ITC 1596* (1995) 57 SATC 341(T) at 346, is that, in general, no input tax is deductible in respect of the VAT incurred by vendors on the acquisition of a 'motor car' and this provision disallowing input tax is only in respect of motor cars as defined in the VAT Act.

[10] A motor car is defined in s 1 of the VAT Act as follows:

'**motor car** includes a motor car, station wagon, mini bus, double cab light delivery vehicle and any other motor vehicle of the kind normally used on public roads, which has three or more wheels and is constructed or converted wholly or mainly for the carriage of passengers, but does not include-

(a) vehicles capable of accommodating only one person suitable for carrying more than 16 persons;
(b) vehicles of an unladen mass of 3500 kilograms or more;
(c) caravans and ambulances;
(d) vehicles constructed for a special purpose other than the carriage of persons and having no accommodation for carrying persons other than such as is incidental to that purpose;
(e) game viewing vehicles (other than sedans, station wagons, minibuses or double cab light delivery vehicles) constructed or permanently converted for the carriage of seven or more passengers for game viewing in national parks, game reserves, sanctuaries or safari areas and used exclusively for that purpose, other than use which is merely incidental and subordinate to that use; or
(f) vehicles, constructed as a permanently converted into hearses for the transport of deceased persons and used exclusively for that purpose; …'

[11] It is not in dispute that the appellant's vehicle is not a station wagon, mini bus or a double cab light delivery vehicle and that it is of the kind normally used

on public roads, which has three or more wheels. The only issue remaining is whether it is constructed or converted wholly or mainly for the carriage of passengers.

[12] The word '*mainly*' is not defined in the VAT Act. The court held in *ITC 1596 supra* at 346 that in the normal use of the word a quantitative measure of more than 50% is intended. It held that in a case where a double cab was not constructed wholly for the transportation of passengers but certainly for more than 50%, it would consequently be a 'motor car' in terms of the VAT Act. The test to be applied is an objective test and it was therefore irrelevant for what purpose the vehicle was acquired or for what purpose it was to be used. It further held that in order to determine whether the vehicle is intended mainly to be more than 50% for the carriage of passengers, the following factors must be taken into account: the total construction, assembly, appearance, space or surface of the vehicle (at 346).

[13] This test was approved in the subsequent case *ITC 1693* 62 SATC 518. In that case the court held that the objective facts showed that the vehicle in question which was a Nissan Double Cab had indeed been constructed and designed for the carriage of passengers and that was the decisive objective test. It was therefore irrelevant for what purpose the appellant purchased the vehicle or used it. Furthermore, the fact that the rear seats may not have been as comfortable as those in an ordinary motor car did not change the purpose for which the vehicle had been designed.

[14] In the present case the appellant contends that the vehicle is not a passenger vehicle as it was purchased and used solely in the courier business to deliver different packages. In its statement of case, it alleges that the characteristics of the vehicle show that it was constructed mainly for the transportation of goods. According to it, the vehicle has one row of seating to accommodate people who would help with the delivery of parcels or other goods (loading or offloading). It further alleges that the driver is not a passenger and therefore the floor space that the driver takes up should not form part of any measurement used in the test of

what the motor vehicle is. It contends that the floor area should not be the test; the test should be the load capacity and that is weighted towards the carriage of goods. According to it, there are Mercedes 115 crew cabs that are designed for the carriage of passengers and these have windows all around, more comfortable seats, carpeting and an air condition throughout. The seats are different from the passenger vehicle in that they are utilitarian when compared to the passenger vehicle and no passengers were ever transported. Mr J submitted that the appellant carried cargo for the Western Cape and has used the seats at the back to load goods for carriage.

[15] The case for the respondent is that the characteristics of the vehicle in question show that it was constructed mainly for the carriage of passengers, as there are two rows of seating for passengers, with access to the second row available through a dedicated, windowed, sliding door on each side. This proved that the conveyance of passengers was the intention for the second row of seats, rather than the transport of labour purely for the purpose of attending to cargo. Should the vehicle had been constructed mainly for the carriage of goods or cargo, the access doors would not have had windows, which are in place to allow passengers a view out of the vehicle.

[16] It further submits that the area occupied by the two rows of seats is to be regarded as the passenger area of the vehicle, with the residual space, apart from the engine compartment, regarded as the cargo area. As per this description, it will be indisputable, it contends, that the passenger area is larger than the cargo area.

[17] The issue of whether the appellant uses the vehicle to carry goods is not in dispute. No evidence was led as to how the vehicle was sold and for what purpose by the manufacturer. The purpose for which the vehicle was purchased is however irrelevant, so was its use. The SARS Interpretation Note 82 dated 25 March 2015 expands on the objective test to be used as follows:

> '…the objective test requires a one dimensional measurement of the length of the area designed for the carriage of passengers in relation to the dedicated loading space in a

> vehicle. In applying the objective test, one must determine which area measures more in length; the passenger area or the dedicated loading space. The engine area should be disregarded for the purposes of this determination. If the passenger area measures more than the dedicated loading space, the vehicle is constructed mainly (that is, more than 50%) for the carriage of passengers and will thus constitute a motor car as defined.
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> The dedicated loading space is the area that is constructed solely for a purpose other than the carriage of passengers. There are vehicles constructed within an area within the vehicle that serves a dual purpose of providing both loading and passenger space (that is, fold-up seats that provide a loading area when folded up). Due to the fact that this area can used to accommodate passengers, the entire area will be regarded as a space for the seating of passengers…'[1] (Own emphasis)

[18] The onus is on the appellant to show that the vehicle is not wholly or mainly constructed for the carriage of passengers. The appellant in this case has not discharged this onus. Much of the submissions made on its behalf attempted to show that the vehicle was used to transport goods as opposed to passengers. Mr J submitted further that the crew cab looked like a total load area and was conducive for carrying large goods. He confirmed that there were seats behind the front seat, which he referred to as 'utilitarian'. This submission in our view strengthens the respondent's view more than it assists the appellant. The usefulness presented by the design of the seats and the styling thereof as well as the alleged discomfort that passengers who use the seats might experience than in an ordinary motor car are all inconsequential. Those factors do not detract from the fact that the vehicle was constructed mainly for carriage of passengers for the purposes of the definition of a motor car in the VAT Act, if one applies the objective test suggested in cases referred above read with SARS Interpretation Note 82. Accordingly, if the area concerned can be used to load passengers, it would be regarded as a space for the seating of passengers regardless of it being used to carry cargo. This point was emphasised in *ITC 1693* as indicated supra, that the fact that the back seats may

[1] At 263

not be as comfortable as those in a normal vehicle did not alter the purpose for which the motor vehicle was designed (at 524).

[19] The respondent prepared a trial bundle, as agreed in the pre-trial minute with diagrams and dimensions of the vehicle as well photographs of the vehicle, which were not objected to by the appellant and accepted as documentary evidence. Mr J did not refer to these diagrams at all. These diagrams are important because they provide a picture of how a Mercedes Benz Vito 115 CDI Crew Cab is constructed. One of the diagrams depicts the side view of such a motor vehicle. The length of the vehicle from the beginning of the windscreen to the tailgate is shown to be 4210mm, which is made up of 3200mm + 1010mm. The load space is indicated as 1482mm in length, which means the passenger space would be 2728mm (i.e. 4210mm - 1482mm). This constitutes 65% of the vehicle length excluding the engine area. Therefore, if one has regard to SARS Interpretation Note 82, the one dimensional passenger space is greater than the load space and the vehicle should be regarded as a 'motor car'.

[20] If one were to determine the floor area, the width of the vehicle is 1396mm x 1482mm = 2 068 872mm^2 (load area). The passenger area would be 2728mm x 1396mm = 3 808 288mm^2. This would mean passenger area is greater than the load area and would constitute 65% of the vehicle floor area excluding the engine bay. Even if the driver's seat is excluded as per the appellant's contention, and a portion of the driver's seat is removed from the passenger area, the passenger area is still greater than the load area. A quarter of the passenger area (i.e. the driver's seat would be calculated as follows = 3 808 288mm^2 (passenger area) x 25% = 952 072mm^2. Therefore 3 808 288mm2 - 952 072mm^2 = 2 856 216mm^2 (remaining passenger area). It would still constitute 58% of the floor area. We are in agreement with the respondent that whilst an attempt has been made to calculate the portions dedicated to load and passenger areas, that approach is not the one to be followed in this case. The better approach is as suggested in the SARS Interpretation Note 82.

[21] In passing, in terms of s 12 of the Tax Administration Act, SARS must be represented by a senior official who is an admitted advocate or attorney. The same requirements are not applicable to the taxpayer as the taxpayer may be represented by an ordinary layperson[2] that may have no understanding of the law or court process. This may result in an imbalance as to the equality of arms. This is not to suggest that taxpayers should be prevented from being represented by laypersons so to speak as this might prove to be most efficient for them. What is being suggested is some form of a criterion in order to close the existing lacunae to ensure that the representatives have some expertise in the field of tax law. This issue we suggest should be addressed by the relevant authorities.

[22] As to costs, the respondent has applied for a cost order to be made against the appellant on the basis that its conduct was unreasonable. We are not convinced by the contention that the appellant was unreasonable in bringing this matter on appeal. Whilst the legal position of what constitutes a motor car seems to be settled, it is not clear to us whether the appellant clearly understood the law and carried on regardless. It is not apparent whether at any of the stages since the appellant's objection the relevant legal provisions were thoroughly explained to Mr and Mrs X who were laypersons. The appellant employed the services of a tax consultant only at the resumption of the hearing of this appeal after it was initially postponed. In our view, the appellant may have misconstrued and misinterpreted the law, and laboured under the misapprehension that if it purchased and used the vehicle to load cargo it could deduct input tax, which is not the case. Mr J stated his client was aware that if it lost the case, it must pay the costs. He seemed not to be *au fait* with the provisions of s 130 of the Tax Administration Act and seemed to labour under the impression that costs followed the result. We however do not believe that his submission went as far as to concede that bringing the appeal was

[2] Section 125 provides that: *'(1) A senior SARS official referred to in section 12 may appear at the hearing of an appeal in support of the assessment or 'decision'.*
(2) The 'appellant' or the 'appellant's' representative may appear at the hearing of an appeal in support of the appeal.'

unreasonable. For that reason, we are not persuaded that the appellant's conduct was unreasonable.

[23] In the result the following order is made:

1. The appeal is dismissed with no order as to costs.

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BOQWANA J

President

Assessors

Ms K Hofmeyr (Commercial Member)

Mr J N Louw (Accountant Member)

Concurring