R E P O R T A B L E

IN THE TAX COURT OF SOUTH AFRICA
HELD IN CAPE TOWN

BEFORE:

THE HONOURABLE MR. JUSTICE B. WAGLAY	**:**	**PRESIDENT**
MR. R.T. DE BEER	**:**	**ACCOUNTANT MEMBER**
MR. I.J. MOUTON	**:**	**COMMERCIAL MEMBER**

CASE OF:

NO : VAT 144

HEARD IN CAPE TOWN ON 19 OCTOBER 2005

JUDGMENT

WAGLAY, J.

1. Appellant is a major life insurance company in South Africa and its main activity is the provision of life insurance to both local and international recipients. In terms of section 2(1)(i), read together with section 12(a) of the Value-Added Tax Act, No 89 of 1991 (the Act), the local supply of life

insurance policies is exempt from value-added tax (VAT), whilst the international supplies thereof are zero-rated.

2. Appellant makes use of various overseas consultants and other suppliers of services, eg. business advisors and computer services, and contends that where such services, with the exception of telecommunication services, have been physically rendered outside of South Africa, no VAT is/was payable as the Act allows for the zero rating thereof. The Commissioner for the South African Revenue Service (the Respondent), however, contends that Appellant had received “imported services” as defined in section 1 of the Act and accordingly raised assessments for VAT on such services to the extent that such services were used or consumed in the Republic otherwise than for the purpose of making taxable supplies.

3. This then is an appeal against the VAT assessments raised by the Respondent in respect of the months of December 1997, December 1998, September 2000, June 2000 and December 2001.

4. The issue in dispute as recorded earlier is whether certain “imported services” of which Appellant was the recipient are zero-rated or subject to the standard rate of VAT.

5. s7 of the Act, which is the relevant section dealing with the imposition of VAT, sets out the rate of VAT and the three categories of persons who are liable for VAT. With regard to the imposition and the rate of VAT, s7 provides:

> "*7.**Imposition of value-added tax.**—(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax—*
>
> *(a)…*
>
> *(b)…*
>
> *(c)…*
>
> *calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be."*

6. The three categories of persons liable for VAT are:

   (a) the vendor who supplies goods or services in the course of his enterprise (s7(1)(a));

   (b) the person who imports goods into South Africa – on the value of the imported goods (s7(1)(b)); and

   (c) the person who imports services on the value of the imported services (s7(1)(c)).

7. The terms “vendor, “enterprise” and “imported services” are defined in the Act as follows:

(a) a “vendor” means “any person who is required to be registered under this Act . . . .”

(b) “enterprise” is defined as “. . . activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course of furtherance of which goods or services are supplied to any other person for a consideration . . . .” and

(c) “imported services” is defined to mean “a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilized or consumed in the Republic otherwise than for the purpose of making taxable supplies.”

8. The definition of “imported services” excludes any supply for use or consumption by a South African recipient in making taxable supplies. This exclusion arises because a recipient of a service who has acquired the service for making taxable supplies will in any event be entitled to claim the attributable VAT as an input credit and offset it against the output tax. The effect of imposing VAT would therefore be neutral**.** If however, the recipient of the service in South Africa does not make taxable supplies he

could not charge VAT and would therefore have no output tax against which the VAT payable for the service could be offset. In order to negative the advantage that a recipient of services will obtain where the services are VAT free because the services were obtained from a non-resident supplier, VAT is levied on the local recipient of "imported services" in terms of s7(1)(c).

9. Where an "enterprise" provides services it is obliged to register in terms of the Act and the charge to its customers will bear VAT, irrespective of the fact that the services may be of short duration. If a foreign service provider, who does not fall within the definition of "enterprise" and is not required to be registered in terms of the Act, were to provide short-term services to a South African recipient there would be no VAT chargeable. Where the South African recipient of the services from either the "enterprise" or the foreign service provider is registered for VAT, the fact that the recipient will be charged VAT is irrelevant because the South African recipient would be able to neutralize the VAT charged to it on the basis of input credit. Where the South African recipient is not registered for VAT – typically those institutions that do not make taxable supplies such as, for example the Appellant - the VAT charged by the "enterprise" becomes a cost because no input credit can be claimed. The services provided by a foreign service provider will therefore by cheaper because there would be no VAT charged on the costs of the services provided. Stated differently: If a foreign specialist is employed to provide research to

a South African company the foreigner's charge would be subject to VAT in terms of s7(1)(c). Absent s7(1) (c) the foreign service would attract no VAT. If a South African resident provides the services, the VAT would be charged such that in the absence of s7(1) (c), the South African supplier would be placed at a disadvantage.

10. While s7 deals with the imposition of VAT both in respect of who is liable for it as well as the rate of VAT, s11 sets out certain qualifications and s12 exemptions from the payment of VAT. In terms of s11 of the Act the supply of certain goods and supplies is subject to VAT at a zero-rate and in terms of s12 of the Act the supply of certain goods and services is exempt from VAT. Although no VAT is payable in either of these instances there is an important distinction in that the supply of exempted goods and services does not constitute the carrying on of an "enterprise", with the result that a supplier of exempted goods and services is not required to register for VAT and cannot claim input credits. In contrast, a supplier whose business involves the supply of zero-rated goods and services carries on an "enterprise" and must therefore register for VAT and claim a credit for input tax.

11. The supplier of zero-rated goods and services must therefore be registered for VAT (i.e. he is a vendor) and claim the VAT charged to him by his own suppliers as a credit against the VAT he has to pay to the Respondent.

12. s11(1) covers zero-rating for the supply of goods which would otherwise be charged with VAT at the rate specified in s7(1)(a) whilst s11(2) deals with zero-rating of the supply of services which would otherwise be charged with VAT at the rate specified in s7(1)(a). Reference to s7(1)(a) is a reference that was contained in the Act prior to 1997. This reference (to s7(1)(a)) was then amended to read s7(1). I shall at this stage refer to Act in its pre-1997 form.

13. While s11 and s12 deal with zero-rating and exemption from VAT of goods and supplies which would otherwise be charged with VAT at the rate specified in s7(1)(a), s14(5) deals with tax chargeable in terms of s7(1)(c). s14(5) provides:

> *"14(5) The tax chargeable in terms of section 7(1)(c) shall not be payable in respect of –*
>
> *(a) a supply which is chargeable with tax in terms of section 7(1)(a) at the rate provided in section 7;*
>
> *(b) a supply which, if made in the Republic, would be charged with tax at the rate of zero percent applicable in terms of section 11 or would be exempt from tax in terms of section 12;*
>
> *(c) . . . ; or*
>
> *(d) . . .".*

14. A reading of s14(5)(a) clearly signals a recognition that “imported services” as contemplated by s 7(1)(c) could simultaneously be “services” as contemplated by s7(1)(a). In order to fall under s7(1)(a) the “services” must be supplied by a “vendor” who carries on an “enterprise” and since the supplier of “imported services” must by definition be a person who is a non-resident or carries on business outside the Republic, such supplier could not be a registered “vendor” in the Republic. A non-resident, however, who regularly supplies services to persons in the Republic might be regarded as carrying on an “enterprise” at least partly in the Republic, and would therefore be obliged to register as a “vendor”. The services supplied by such a vendor to persons in South Africa who do not use the services received in making taxable supplies could fall under both s7(1)(a) and s7(1)(c).

15. In order, therefore, to afford protection where the supply of goods or services would attract VAT both under s7(1)(a) and s7(1)(c), s7(1)(a) becomes the VAT charging provision to the exclusion of s7(1)(c) in terms of s14(5)(a).

16. Section 14(5)(b) then provides for zero-rating and exemption similar to the provisions contained in s11 and s12 of the Act. The crucial prerequisite for the application of s14(5)(b) is that the supply must be one which “*if made in the Republic*” would have qualified for zero-rating or exemption under s11 or s12 of the Act.

17. Section 14(5)(b) therefore governs the zero-rating and exemption of those "imported services" which fall under s7(1)(c) while not simultaneously falling under s7(1)(a). "Imported services" that are made by registered vendors and fall under both s7(1)(a) and s7(1)(c) are governed by s14(5)(a) which makes s7(1)(a) exclusively applicable. s11 and s12 are directly applicable to those services that fall under s14(5)(a) and therefore under s7(1)(a). In respect of those services to which s7(1)(c) applies, s14(5)(b) sets out the circumstances in which those services will qualify for zero-rating or exemption from VAT.

18. s11 and s12 therefore cannot and do not apply to "imported services" falling under s7(1)(c) which is not by virtue of s14(5)(a) categorized under s7(1)(a).

19. **s11** only provides for the zero-rating of certain goods (ss(1)) and services (ss(2)) supplied by "vendors" referred to in s7(1)(a) and which would otherwise have been chargeable with VAT "calculated at the rate of 14 per cent…"(s7(1))**.** **s12** deals with the exemption of certain goods and services that would otherwise be chargeable under s7(1)(a). **s13** of the Act on the other hand deals with VAT on importation of goods (s7(1)(b)) and s13(3) contains the exemption provisions. **s14** deals with "imported services" (s7(1)(c)) and has its own exemption provisions (s14(5)). The structure of the Act thus provides for a logical flow – s11 and s12 apply

only to goods and services supplied under s7(1)(a), with imported goods being dealt with by s13 and imported services dealt with by s14.

20. Prior to the amendments brought about to s11 there was little dispute that s14(5)(b) applied to "imported services" which were classified under s7(1)(c) of the Act. s28 of Act 27 of 1997 however amended s11(2) to exclude sub-clause (a) from its reference to s7(1). Therefore while s11(2) as previously read stated that VAT was chargeable at zero-rate for services rendered by a "vendor" which would otherwise have been charged "*with tax under section s7(1)(a)*", the amended s11(2) now referred to VAT charged *"at the rate referred to in section 7(1)*".

21. It is this amendment that foreshadows Appellant's contention that the assessment raised by the Respondent should be set aside as the "imported services" received by it are zero-rated. Appellant concedes that prior to the amendment, it was clear that s11(2) only covered the zero-rating of services which would otherwise have been charged VAT at the standard rate under s7(1)(a). Appellant seeks to argue that with reference no longer being made to s"7(1)(a)" in s11(2) of the Act but only to s"7(1)", the scope of the application of s11(2) was widened so that s11(2) could no longer be said to apply only to the rate of VAT chargeable to goods and services supplied by "vendors" (7(1)(a)), but also to "imported services" rendered elsewhere than in the Republic as provided in s 11(2)(k).

22. s11(2)(k) of the Act, as amended provides as follows:

> *"(2) 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 –*
>
> *. . .*
>
> *(k) the services are physically rendered elsewhere than in the Republic or to a registered vendor in a customs controlled area;"* (emphasis added).

23. As stated above, prior to the amendment of s11(2) it was not open to the Appellant to invoke s11(2)(k) because s11(2) referred to s7(1)(a) which referred to a supply of services that would have been charged with VAT and further s7(1)(a) referred to the supply of goods or services by a "vendor". As the "imported services" relevant to this matter were not supplied by a "vendor" they would not be chargeable with VAT under s7(1)(a) and consequently s11(2)(k) had no application.

24. The Appellant's argument is however that the change in wording implies an intention to expand the services covered by s11(2) so as to include "imported services" which would otherwise be chargeable with VAT under s7(1)(c). According to the Appellant, since the Legislature previously went out of its way to limit application of s11(2) to s7(1)(a) of the Act, the

removal must be effected for some purpose. The purpose, it argues, is evident from the following:

(a) Reference in s7(1)(a) to the "*supply of services"* must not be read as excluding a supply of "*imported services*" because *"imported services*" means a *"supply of services…"* with certain characteristics as to the supplier, recipient and place of use or consumption. There is therefore no reason to suggest that the "*supply of services*" referred to in s11(2) should not include a "*supply of services*" which also constitute *"imported services".*

(b) The application of s11(2) is also not restricted to "*vendors*" and application of this to *"imported services*" would remove the anomalies that existed prior to the amendment.

25. The anomalies that the Appellant refers to are best demonstrated by way of the following example given by the Appellant:

> If a South African organization rendering exempt services, required services to be rendered to it outside South Africa and a South African enterprise tendered to supply those services, a zero rating would apply to the consideration in terms of section 11(2)(k).
> If a foreign organization were to tender to perform the same service, that foreign organization's charge (absent it being registered in terms of section 7(1)(a)) would be subject to VAT in terms of section 7(1)(c), with no zero rating applicable, since the supply would not have been made in South Africa as required by section 14(5)(b).

26. The inequitability of the provisions to a Foreign Service provider and prejudice to the South African recipient of the service distorts price comparisons. There is no logical distinction between services rendered outside South Africa by a foreign service provider and those rendered outside South Africa by a South African (VAT registered) service provider rendering identical service to a South African customer. The exclusion for zero-rating of services made in South Africa to a South African recipient was inconsistent, which inconsistency was addressed, Appellant argues, with the amendment that changed reference from "under section 7(1)(a)" to "at the rate referred to in section7(1)". The further effect of the amendment, so Appellant adds, is that the supplies of services outside South Africa by foreign service providers is brought within the ambit of the Act through s7(1)(c).

27. Central to Appellant's argument is that "imported services" that were physically rendered "*elsewhere than in the Republic*" are zero-rated in terms of s11(2)(k) even where they are rendered by non-vendors. Prior to the amendment of s11, s11(1) referred to zero-rating of <u>goods</u> which would otherwise have been charged with tax "under s 7(1)(a)" while s11(2) referred to zero-rating of <u>services</u> which would otherwise have been charged with tax "under section 7(1)(a)". Appellant contends that the deletion of the words "under s7(1)(a)" and replacement with "at the rate referred to in section 7(1)" is a signal that s11(2) now includes "imported services" otherwise chargeable with VAT under s7(1)(c).

28. The difficulty in accepting this argument is the fact that s11(2), as Respondent properly argues, is concerned with the rate of VAT and although the rate of VAT is specified in s7(1), the rate of VAT is not mentioned in sub-paragraphs (a), (b) or (c) of s7(1) but in the concluding part of the sub-section as a whole (see paragraphs 5 and 6 above).

29. The amended cross-reference in s11(1) to s7(1) cannot be seen as widening the scope of s11(1) but rather corrects the wording in s11(2). The fact that s11 was intended to remain applicable only to goods and services supplied by vendors under s7(1)(a) is apparent if one has regard to s11(3) of the Act. Section 11(3) states:

> *"(3) Where a value of zero percent has been applied by any vendor under the provisions of this section, . . . the vendor shall obtain and retain such documentary proof substantiating the vendor's entitlement to apply the said rate under those provisions as is acceptable to the Commissioner."* (emphasis added)

30. s11(3) thus makes it clear that it is only when goods or services are supplied by a vendor that s11 applies. If s11 had been intended to apply to "imported services" rendered by a non-vendor it would have been unnecessary to stipulate that the recipient of the service (who may not be a registered vendor) would have to obtain and retain the necessary documentation. In short s11(2) read with s11(3) appears only to apply to a vendor which is not the case with imported services under s7(1)(c).

31. A further difficulty which confronts Appellant is the role of s14(5)(b) within the structure of the Act; in particular the basis by which a zero-rated or an exemption can be claimed in the present case. s14(5)(b) is a self contained provision which exclusively governs the zero-rating and exemption of those "imported services" which fall under s 7(1)(c) while not at the same time falling under s7(1)(a). As such s14(5)(b) is thus exhaustive of the circumstance in which "imported services" falling under s7(1)(c) qualify for zero-rating and exemption. s14(5)(a) and (b) have formed part of the Act since its inception. s14(5)(b) was plainly intended to be the exclusive source of zero-rating and exemption for imported services otherwise chargeable under s7(1)(c), since s11(2) in its original form referred explicitly to services rendered under s7(1)(a) i.e. <u>services rendered by registered vendors;</u> the removal of "(a)" from "s7(1)(a)" in s11(2) does not alter the role of s14(5)(b) as the exclusive governing clause in respect of zero-rating and exemption of imported goods which fall under s7(1)(c).

32. In my view, the amendment, in fact, has no effect at all on the meaning and scope of s14(5)(b). If the intention of the Legislature was to enact further grounds of zero-rating and exemption i.e. beyond those grounds stipulated in s14(5)(b) there would, I believe, have been an alteration to the wording of s14(5)(b). Accepting Appellant's argument that the amendment to s11(2) now provided that "imported services" rendered physically outside the Republic were zero-rated by virtue of s11(2)(c), that

would render s14(5)(b) redundant since s14(5)(b) assumes that what is being dealt with is “imported services” rendered physically outside the Republic. If “imported services” were zero-rated by reason of s11(2)(k) there would be no need for s14(5)(b) to provide for zero-rating of “imported services” rendered outside the Republic.

33. Section 14(5)(b) is exhaustive in relation to “imported services” that are otherwise chargeable under s7(1)(c) and s11(2) governs services rendered by a “vendor” under s7(1)(a). As the prerequisite imposed by s14(5)(b) is that the supply, “*if made in the Republic”,* would qualify for zero-rating under s11 or for exemption under s12 of the Act, s14(5)(b), as Respondent correctly states, deals with ‘imported services” physically rendered outside the Republic – though used or consumed by recipient in the Republic.

34. s14(5)(b) thus requires one to ascertain whether that same service, if made in South Africa by a registered vendor, would qualify for zero-rating or exemption under s11 or s12 respectively. The examples given by Respondent are illustrative:

(a) If a non-resident who is not a registered vendor gives advice overseas to a recipient who pays him from donor funds as contemplated in s11(2)(q), the imported service will qualify for zero-rating under s14(5)(b) read with s11(2)(q) because

the advice, if it had been given in South Africa by a "vendor", would have qualified for zero-rating under s11(2)(q).

(b) Similarly, if a non-resident who is not a registered vendor gives advice overseas to a body corporate or housing development scheme as contemplated in s12(f), the imported service would qualify for exemption under s14(5)(b) read with s12(f) because the advice, if it had been given in South Africa by a "vendor", would have qualified for exemption under s12(f).

35. A recipient of imported services falling under s7(1)(c) is required to invoke s14(5)(b) which exclusively governs zero-rating of "imported services" otherwise chargeable with VAT under s7(1)(c). The requirement that the supply must be one which "*if made in the Republic*" would have qualified for zero-rating and exemption under s11 and s12 respectively depends on the service having been made <u>outside</u> the Republic (such as in s11(2)(k)) and cannot be applied to "imported service" under s14(5)(b) because in invoking s14(5)(b) the question that needs to be asked is this: would the service have qualified for zero-rating or exemption "*if made in the Republic"?* In asking this question one preserves the very basis on which such zero-rating or exemption rests, namely, that a service "*made in the Republic"* cannot qualify for zero-rating under s11(2)(k) since zero-rating under s11(2)(k) is only available where the service was "*physically rendered elsewhere than in the Republic*".

36. Appellant argues that this application of the provisions of the Act would create an inequity or anomaly, since a South African vendor rendering service outside the Republic to a person who consumes the service in the Republic could claim zero-rating under s11(2)(k) whilst a recipient of the same service from a foreign supplier would have to account to the Respondent for VAT in terms of s7(1)(c). In my view this is not correct, as can be demonstrated by the following:

(a) The zero-rating which a "vendor" can claim under s 11(2)(k) is not confined to services rendered outside South Africa for consumption by recipients within South Africa. Indeed, its primary field of application is in respect of services rendered by "vendors" outside South Africa to recipients (including South Africans) who consume the services outside South Africa. In other words, a South African "vendor" who happens on occasion to render a service outside South Africa to a person who consumes the services either inside or outside South Africa, can claim a zero-rating under s11(2)(k).

(b) "Imported services", on the other hand, are confined to services consumed <u>within</u> the Republic (for purposes of making non-taxable supplies). In respect of such services, a South African "vendor" who happens on an isolated occasion to render a service outside South Africa (but not as part of a business carried on by him in the foreign country) will be able to claim zero-rating (by virtue of s7(1)(a) read with s11(2)(k).

(c) If, however, the South African "vendor" as a regular feature of business renders services outside South Africa, his foreign activities will not form part of this "enterprise" as a South African "vendor" (see paragraph s 7(1)(a) and the definition of "enterprise"). The services rendered in the course of the foreign activities of such a supplier would constitute "imported services" since they would be rendered by the person not in his capacity as a South African "vendor" but as a supplier who *pro tanto* "*carries on business outside the Republic*". This would be so even if the foreign service were rendered for the benefit of the supplier's very own South African enterprise (see s14(4) of the Act).

(d) Accordingly, a South African "vendor" who also carries on business in a foreign country and renders services there for consumption by persons within South Africa will, like his foreign counterpart, find that the South African recipients of his services will have to pay VAT in accordance with s7(1)(c).

(e) If the South African "vendor" does not carry on business in the foreign country but merely renders an isolated service there, the supply in the foreign country would not fall within the definition of "imported service", and to that extent his service would, unlike his foreign counterpart, not attract VAT under s7(1)(c). However, this is not an anomaly. The concept of "enterprise" is geographically confined and entails an element of continuous activity. Even within South Africa a South African who renders an isolated service does not have to levy VAT, whereas a South African "vendor" who conducts an enterprise has to charge VAT on precisely the same service. This differential treatment (which is an

> inherent part of the Act) is not materially different from a situation where an isolated service rendered by a South African "vendor" in a foreign country does not attract VAT as an "imported service", whereas the same service rendered (whether by a South African or a foreigner) as part of a foreign business does attract VAT.

37. Finally Respondent pointed to the explanatory memorandum which accompanied the Taxation Laws Amendment Bill of 1997, where the change in reference from s7(1)(a) to s7(1) was described as "textual". To the extent that the explanatory memorandum can afford interpretive guidance, textual change implies only a change in wording rather than substance. That the amendment sought to s11(2) was purely textual or cosmetic is further evident from the amendment simultaneously made to s11(1). Section 11(1) deals with the zero-rating of the "supply of goods". In the context of s7(1) a "supply of goods" can only fall under sub-paragraph (a) since sub-paragraph (b) deals with the importation (and not the "supply") of goods, while sub-paragraph (c) deals with "imported services" (and not "goods"). Accordingly, the amended cross-reference in s11(1) to s 7(1) (rather than s7(1)(a)) cannot have intended to widen the scope of s11(1) but merely to improve its wording.

38. For all of the above reasons I am satisfied that the "imported services" in the present matter were correctly assessed as being chargeable with VAT under s 7(1)(c) and that the ground of zero-rating invoked by s 11(2)(k) is not applicable.

39. In the result the appeal is dismissed.

WAGLAY J

for the Appellant : DJM Clegg of Ernst & Young

for the Respondent : Owen Rogers SC assisted by T. Masuku