Case Number: 90/98

In the matter between:

THE SOUTH AFRICAN RUGBY FOOTBALL UNION Appellant

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

Coram: Hefer, Grosskopf, Zulman, JJA, Melunsky and Farlam AJJA

Heard: 2 September 1999

Delivered: 1 October 1999

Value-added tax - zero rating - Rugby World Cup tickets sold overseas.

J U D G M E N T

F H GROSSKOPF JA/ . . .

F H GROSSKOPF J A:

[1] The appellant ("Sarfu") claimed a refund of value-added tax ("VAT") in

terms of s 44 of the Value-Added Tax Act 89 of 1991. The respondent refused to make any refund and disallowed Sarfu's objection to his decision. Sarfu thereupon lodged an appeal to the Transvaal Income Tax Special Court. That court dismissed the appeal but granted leave to appeal to this court.

[2] The dispute arose from the presentation in South Africa during 1995 of the Rugby World Cup Tournament ("the tournament"). This took place in terms of a written agreement ("the agreement") concluded during July 1993 by Rugby World Cup Limited ("the Central Organiser"), Rugby World Cup (Licensing) BV ("RWC (L) BV") and Sarfu. The agreement granted the Central Organiser, a company incorporated under the laws of and having its principal place of business on the Isle of Man, the right to stage the tournament in South Africa. RWC (L) BV, a Dutch company with its principal place of business in Rotterdam, acquired the right to exploit the commercial rights in respect of the tournament. Sarfu, as the Host Union, undertook to make all the arrangements for the matches to be played. In return it would receive a management fee and a share of the profits.

[3] The arrangements for the matches included the printing of tickets but the Central Organiser had the final say over the ticketing policy. A separate Ticketing Policy Booklet ("the booklet") allotted up to 50% of the tickets for each match to the Central Organiser for the overseas market. (I shall refer to these tickets as "the overseas tickets".) The overseas tickets were divided equally amongst the Central Organiser, RWC (L) NV and the official tour operator ("Gullinjet"). Sarfu agreed to provide the Central Organiser with a total breakdown of all tickets available within each venue at which a match or matches would be played during the tournament whereupon the Central Organiser was entitled and obliged to specify the number of tickets it required in respect of each match.

[4] According to a document titled "Ticket Reconciliation for VAT purposes" prepared by Sarfu's chartered accountants Coopers & Lybrand, 109 050 overseas tickets were eventually disposed of for a total amount of R13 192 900,00. 20 538 of these were sent by courier to the Central Organiser at its London address. Their rand value, calculated according to their selling price to the eventual ticketholders, amounted to R2 324 970,00. This amount was debited to the Central Organiser's loan account. The other overseas tickets were collected from Sarfu by representatives of RWC (L) NV and Gullinjet in Johannesburg against payment of the selling price of those tickets. This was done to facilitate Sarfu's administrative responsibilities.

[5] VAT was paid on the amount of R13 192 900,00 in terms of S 7(1)(a) of the Act which read as follows at the relevant time:

"(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 State Revenue Fund a tax, to be known as the value-added tax -

(a) 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 on by him;

(b) .....

(c) .....

calculated at the rate of 14 per cent on the value of the supply concerned ....".

[6] Before I deal with the argument for Sarfu in support of its claim for a refund two preliminary observations are called for. The first is that the VAT was paid by "SARFU RWC 1995", a so-called "club" which was registered under that name as a "vendor" in terms of the Act. In the application for registration of SARFU RWC 1995 the Central Organiser and Sarfu were described as "partners" of a joint venture whose address was given as Ellis Park Stadium, Doornfontein in Johannesburg. The respondent does not object to the fact that Sarfu is claiming the refund.

[7] The second observation is that members of this court *mero motu* raised the question whether the supply of the overseas tickets was taxable at all and if so, whether the tax was levied on the correct amount. Counsel for the respondent informed us that the respondent had not considered these matters since Sarfu had never raised them, but that the respondent would abide the decision of the court. Later in this judgment I will deal more fully with this aspect of the matter but, because part of the reasoning in that regard also applies

to the question of zero rating, it is convenient to say at this stage that it is quite clear that the overseas tickets never belonged to Sarfu and that Sarfu delivered but did not sell them to the Central Organiser and the other two entities. When it was put in cross-examination to Mr Oberholzer who testified for Sarfu in the court *a quo* that the Central Organiser had in effect purchased the tickets from Sarfu he rightly answered:

> "Dit was hulle eie kaartjies gewees. Hulle kon dit nie by ons gekoop het nie."

Since the parties never intended the overseas tickets to be sold to and purchased by the Central Organiser and the other two entities a basic requirement of a sale was lacking (*McAdams v Fiander's Trustee & Bell NO* 1919 AD 207 at 223-224).

[8] Sarfu's case is that the supply of overseas tickets to the Central Organiser and the other two entities should have been zero rated. It relies on three subsections of the Act.

[9] The first subsection is s 11(1)(a), a provision dealing with a supply of goods. At the relevant time it read as follows:

> "(1) Where, but for the provisions of this section, a supply of goods would be charged with tax under section 7(1)(a), such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where -
>
> (a) the supplier has supplied the goods (being movable goods) in terms of a sale or instalment credit agreement and has exported the goods".

"Goods" is defined in s 1 of the Act as meaning -

> "corporeal movable things, fixed property and any real right in any such thing or fixed property, but excluding -
>
> (a) money;
>
> (b) any right under a mortgage bond or pledge of any such thing or fixed property; and
>
> (c) any stamp, form or card which has a money value and has been sold or issued by the State for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collector's piece or investment article".

S 11(1)(a) however refers only to those goods which are "movable goods". Although I have certain reservations I shall assume, but without deciding, that rugby tickets are movable goods.

[10] Sarfu relies on the provisions of s 11(1)(a) only in respect of those overseas tickets which were dispatched to the Central Organiser in London. It is common cause that those tickets were not supplied in terms of an "instalment credit agreement". The question is whether they were supplied in terms of a "sale", which is defined in s 1 as

> "an agreement of purchase and sale and includes any transaction or act whereby or in consequence of which ownership of goods passes or is to pass from one person to another".

I have already held that the overseas tickets were not supplied in terms of an agreement of purchase and sale and, because the Central Organiser was the owner of those tickets all along, it is quite clear that ownership did not pass in consequence of the transaction whereby they were dispatched to London. They were not supplied in terms of a "sale" as defined and s 11(1)(a) consequently does not assist Sarfu. In view of this finding it is unnecessary to deal with the export requirement of the subsection.

[11] Sarfu also calls in aid the provisions of s 11(2)(k) and (l) which deal with the supply of services and read as follows at the relevant time:

> "(2) Where, but for this section, a supply of services would be charged with tax under section 7(1)(a), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where -
>
> . . . .
>
> (k) the services are physically rendered elsewhere than in the Republic;
>
> (l) the services are supplied for and to a person who is not a resident of the Republic and who is outside the Republic at the time the services are rendered . . . ."

Par (k) is again relied on only in respect of the overseas tickets which were provided to the Central Organiser itself. The submission is that the actual handing over of these overseas tickets in London constituted a physical rendering of services elsewhere than in the Republic. The short answer is that Sarfu, who bears the onus in terms of s 37, has not shown that the courier who delivered the tickets in London was acting as its (Sarfu's) agent and not as the agent of the Central Organiser. At best for Sarfu the evidence is inconclusive with the result that there is no proof that the vendor physically rendered any services outside the Republic.

[12] For the argument founded on the provisions of s 11(2)(l) it is submitted that the services (i e the actual handing over of the tickets) were supplied for and to the Central Organiser, for and to RWC (L) NV and for and to Gullinjet who were not residents of the Republic and who were outside the Republic at the time the services were rendered.

In considering the provision of s 11(2)(l) it is necessary to look at the definition of "resident of the Republic" in s 1 of the Act. It means -

> "a person (other than a company) who is ordinarily resident in the Republic or

> a company which is a domestic company as defined in section 1 of the Income Tax Act: Provided that any other person or any other company shall be deemed to be a resident of the Republic to the extent that such person or company carries on in the Republic any enterprise or other activity and has a fixed or permanent place in the Republic relating to such enterprise or other activity".

In my view Sarfu has failed to prove that the three entities were not residents of the Republic at the time. On the contrary, the probabilities are overwhelming that each of them at the very least conducted its own activity and had a fixed place within the Republic relating thereto. The Central Organiser was indeed a member of the joint venture (SARFU RWC 1995) which was registered as a vendor in terms of the Act and plainly carried on an enterprise for some time before and during the course of the tournament with a fixed place of business at Ellis Park in Johannesburg. Gullinjet's letterheads show that a company, Gullinjet Sport Travel (Pty) Ltd, with two South African directors, had a fixed place of business at Standard Bank Centre in Cape Town from where it carried on an enterprise as the official tour operator for Rugby World Cup South Africa 1995. The position of RWC (L) NV is not so clear, but it certainly was physically represented in South Africa through accredited employees and agents to enable it to carry on its business of exploiting commercial rights at the various venues in South Africa for the duration of the tournament. (Cf *Dunlop Pneumatic Tyre Co Ltd v Actiengesellschaft für Motor und Motorfahrzeugbau Vorm. Cudell & Co* [1902] 1KB 342(CA).)

[13] Since the very first requirement of par (l) has thus not been met it is not necessary to deal with the requirement of actual absence from the Republic.

[14] For these reasons neither par (k) nor par (l) of s 11(2) applies. Sarfu's submission that the supply of the overseas tickets had to be zero rated cannot be sustained.

[15] Having disposed of the grounds on which Sarfu has claimed a refund, I revert to the question whether the supply of the overseas tickets attracted any tax at all and, if so, whether the tax was levied on the correct amount.

[16] Much time was spent at the hearing of the appeal on a debate about the real nature of the overseas tickets in order to ascertain whether they can be classified as "goods". It was largely a fruitless debate because, in regard to the questions with which we are now concerned, it makes no difference whether Sarfu in fact supplied "goods" or whether it supplied "services". And, since I have been persuaded that it did indeed supply "services", I will not waste further energy on the subject of "goods".

[17] According to s 1 of the Act "services" means -

> "anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (*c*) of the definition of 'goods' ".

As respondent's counsel pointed out Sarfu arranged for the printing of the tickets , collected them and kept them in safe custody, and eventually handed them over to the Central Organiser and the other two entities and received and retained the proceeds for subsequent distribution in terms of the agreement. I accept that all this constituted the supply of "services".

[18] But in terms of s 7(1)(a) the tax has to be calculated on the "value of the supply concerned" and s 10(2) provided at the relevant time that

> "The value to be placed on any supply of goods or services shall, save as is otherwise provided in this section, be *the value of the consideration* for such supply, as determined in accordance with the provisions of subsection (3), . . ."
>
> .
>
> (My emphasis.)

I need not dwell on the provisions of ss (3) because in the present case the value was simply taken to be the total selling price of all the overseas tickets, ie R13 192 900,00 which, as respondent's counsel rightly conceded, was plainly not "the value of the supply concerned". Bearing in mind that Sarfu supplied the services in connection with the overseas tickets in compliance with its obligations under the agreement I am far from convinced that it was supposed to receive, or in fact did receive, any consideration for that service. And even if it did, its consideration certainly bore no relation to the selling price of the tickets.

[19] What now remains is to decide how to rectify the position. It is plain that the value to be placed on the supply of services by Sarfu in respect of the overseas tickets will have to be determined and the tax reassessed. It is equally plain that the amount of any overpayment made to the respondent must be refunded. The order that I am about to make, including the order that each party is to pay his own costs of the appeal, ought to do justice to both sides.

The following order is made:

1. The appeal is allowed but each party is to pay his own costs.

2. The order of the court *a quo* confirming the assessment is set aside and replaced by the following order:

"(1) The Commissioner is to reassess the Value Added Tax payable by SARFU RWC 1995 on its supply of services in respect of the tickets sold overseas;

(2) The Commissioner is to pay SARFU the balance between the amount of R1 569 490,62 previously paid and the amount of the reassessed tax."

F H GROSSKOPF

Judge of Appeal

HEFER JA)
ZULMAN JA)
MELUNSKY AJA)
FARLAM AJA)

Concur