THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 141/04

In the matter between :

COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICE Appellant

and

BRITISH AIRWAYS Plc Respondent

Before:	**HOWIE P, STREICHER, NUGENT, VAN HEERDEN & PONNAN JJA**
Heard:	**15 MARCH 2005**
Delivered:	**29 MARCH 2005**
Summary:	**Value-added tax – passenger service charge levied on operators by Airports Company – whether VAT payable on recovery of charge from passengers.**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] Value-added tax, payable by the vendor, is levied by s 7 of the Value-added Tax Act 89 of 1991 upon the supply by any vendor of goods or services in the course of or furtherance of any enterprise. The ordinary rate at which the tax is levied is 14%, calculated upon the value of the supply concerned, but the supply of goods or services falling within s 11 is taxed at 0%. (The supply of goods or services in the latter category is colloquially said to be 'zero-rated.')

[2] British Airways Plc is an international air carrier that operates aircraft to and from this country. For purposes of the Act it is a vendor whose supply of a carrier service attracts value-added tax in terms of s 7 of the Act. Because the service is one for international carriage it falls within the terms of s 11 and is zero-rated.

[3] The fare that British Airways charges its passengers is the aggregate of various elements that are separately reflected on the passenger ticket. The bulk of the fare (for convenience I will call it the ordinary part of the fare) comprises an amount that is designed to recover its operating costs and its profit. The remainder of the fare comprises various smaller elements. This appeal concerns one of those latter elements that go to make up the composite fare.

[4] Airports in this country are operated by the Airports Company Limited that is established in terms of the Airports Company Act 44 of 1993. The

company is entitled to – and does – levy airport charges, which are defined in the Act to mean

‘amount[s] levied by the company –

(a) on an operator of an aircraft in connection with the landing, parking or takeoff of such aircraft at a company airport, including an amount determined to any extent by reference to the number of passengers on board an aircraft; or

(b) on aircraft passengers in connection with their arrival at or departure from a company airport by means of an aircraft.’

[5] The company levies a landing charge upon an aircraft operator – calculated with reference to the weight of the aircraft – whenever one of its aircraft arrives at a company airport. It also levies parking charges upon aircraft operators calculated with reference to the length of time that their aircraft remain parked at a company airport. Those charges are included by British Airways amongst its operating costs and are recovered in the ordinary part of its composite fare.

[6] A further charge is levied by the company upon aircraft operators, which is calculated with reference to the number of passengers that are on board an aircraft when it departs from a company airport. Referred to loosely as a ‘passenger service charge’ it is levied by the company to compensate it for the general airport services (baggage handling facilities, waiting lounges, check-in counters and the like) that it makes available to passengers at its airports. Because that charge is directly related to the number of passengers on a flight it is capable of being recovered by the operator directly from each

of the passengers. British Airways does that by reflecting the charge separately on the ticket as one of the elements that goes to make up the composite fare.

[7] The Commissioner for the South African Revenue Service contends that British Airways is liable to pay value-added tax at the ordinary rate (14%) on the element of its composite fare that constitutes the recovery of the passenger service charge levied on it by the company. British Airways contends that the element is part of its composite fare for the supply by it of international carriage, the whole of which is zero-rated under s 11 of the Act. Those respective contentions serve to define the question that arises in this appeal.

[8] The Commissioner assessed British Airways for value-added tax at the ordinary rate on that part of the international fares that accrued to British Airways during the period September 1993 to December 1998 that constituted the recovery of the passenger service charge that was levied on it by the company, together with interest. British Airways successfully appealed to the tax court (Goldblatt J and assessors) against the assessment and the Commissioner now appeals with the leave of that court.

[9] In support of his contention that the element of the composite fare that I have referred to was taxable at the ordinary rate, notwithstanding that the remainder of the fare was zero-rated, the Commissioner relied upon s 8(15) of the Act, which provides as follows:

'For the purposes of this Act, where a single supply of goods or services or of goods and services would, if separate considerations had been payable, have been charged with tax in part at the rate applicable under section 7(1)(a) and in part at the rate applicable under section 11, each part of the supply concerned shall be deemed to be a separate supply.'

[10] The section applies to a single supply of goods or services comprising parts that would each, if they had been supplied separately, have attracted a different rate of tax. In such cases each part of the single service is deemed to be a separate supply of goods or services – although in truth they are not – with the result that the separate parts each attract the tax that is levied by s 7 but at different rates (0% for that part of the service that, had it been separately supplied, would have fallen within s 11, and 14% for the remainder).

[11] A ‘single supply of services’ is only capable of notional separation into its component parts, as contemplated by the section, if the same vendor supplies more than one service, each of which, had it been supplied separately, would have attracted a different tax rate. If that was not so there would be no parts of the ‘single supply of services’ by the vendor capable of notional separation from one another.

[12] In this case, submits the Commissioner, British Airways supplies, as parts of a ‘single supply’, not only an air-carrier service in consideration for part of the composite fare (which is zero-rated in terms of s 11) but also airport services to its passengers in consideration for the charge that is

separately reflected on the ticket (attracting the ordinary tax rate in terms of s 7).

[13] I do not think that is correct. Section 8(15) does not purport to levy a tax upon a vendor for a service that it does not supply. The tax is levied by s 7 upon the supply of a service by a vendor, and not merely upon the receipt by the vendor of moneys that arise in some way from the supply of a service by another. The section does no more than apportion the rate at which the vendor is required to pay the tax that is levied by s 7 when the vendor has supplied different goods or services as a composite whole.

[14] It is true that British Airways passengers receive airport services before they board its aircraft and after they disembark, as submitted by the Commissioner's counsel, and that part of the fare that passengers pay arises from the provision of those services, but it does not follow that the services are supplied by British Airways. On the contrary, it is clear that the services to which the charge relates are supplied by the company. The charge that the company makes to British Airways is no more than a cost that British Airways has to bear in order to operate its carrier service, similar to those that it pays to land and park its aircraft, which it recovers from its passengers directly rather than indirectly.

[15] It was also submitted by the Commissioner's counsel that although the company supplies the airport services for which the passenger service charge is made, it supplies those services to British Airways, which in turn supplies

them to its passengers, whereupon the supply of the services by British Airways attracts the tax. I do not think the evidence provides any support for that submission. The services that passengers enjoy are supplied by the company and the tax accrues in terms of s 7 (and is payable by the vendor of the service) when that supply occurs. A further tax does not accrue when the vendor of another service (British Airways) does no more than bring to account and recover the charge that it was required to pay for the supply of that service by the company (whether it is supplied to the passengers themselves, or to the airline for the benefit of its passengers). The moneys that are recovered by British Airways are not a consideration for the supply by it of airport services simply because it does not supply them at all.

[16] That was the conclusion that was arrived at by the tax court and in my view the tax court was correct. The appeal against its decision is dismissed with costs including the costs of two counsel.

_____

R W NUGENT
JUDGE OF APPEAL

HOWIE P)
STREICHER JA)
VAN HEERDEN JA) CONCUR
PONNAN JA)