THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 59/09

In the matter between:

TCT LEISURE (PTY) LTD
Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES
Respondent

Neutral citation: *TCT Leisure v The Commissioner for the South African Revenue Services*(59/09) [2010] ZASCA 10 (12 March 2010).

Coram: HARMS DP, CLOETE *et*CACHALIA JJA

Heard: **19 February 2010**

Delivered: **12 March 2010**

Summary: VAT Act 89 of 1991; 'equity security' exemption s 12; the goods 'supplied' comprised preferent shares and other discrete rights; because the rights were not included in the shares, the 'equity security' exemption in s 12(a) was not applicable; the turnover from the sale of the rights was therefore subject to VAT.

ORDER

On appeal from: Special Tax Court (Durban) (Hurt J presiding):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

CLOETE JA (HARMS DP *et*CACHALIA JA concurring):

[1] The Holiday Club is an organisation which has for some time sold holiday accommodation commonly known as 'time-share' to members of the public. The organisation was restructured in 1995. Before that date, VAT was paid on the product it supplied and thereafter, it was not. The cardinal question in this appeal is whether VAT was payable in respect of the product sold after the restructuring.

[2] The various components of the organisation making up The Holiday Club from time to time, have varied. In 1993 Leisure Property Trust ('the trust') was formed. The trust acquired rights to accommodation introduced to it by TCT Leisure (Pty) Ltd (to which, without begging the question, I shall refer as 'the taxpayer') and in return for which the trust issued 'points rights' to the taxpayer. These points rights conferred a contractual right of occupation enforceable against the trust exercisable subject to defined conditions. The taxpayer sold the points rights to members of the

public. It was common cause before this court that these transactions constituted a 'taxable supply' on which VAT was payable; and VAT was in fact paid. The relevant provisions of the Value-Added Tax Act 89 of 1991 read:

'7(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 valued-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;
. . .
calculated at the rate of 14 per cent on the value of the supply concerned . . . .'[1]

[3] When The Holiday Club was restructured in 1995 a new company, Leisure Holiday Club Ltd ('LHC'), was formed. The trust became its sole ordinary shareholder. The taxpayer transferred properties and rights of use in properties comprising holiday accommodation, which it owned, to LHC for a consideration of R27,5m consisting of the issue to the taxpayer of 62 500 preference shares in LHC with a nominal value of one cent each ('the shares') and 62 500 'debentures'[2] with a face value of R439,99 each. These properties and rights of use in properties were then acquired by the trust from LHC; and the taxpayer began selling the shares (and possibly the 'debentures') which it had acquired in LHC, to members of the public. It is in respect of the turnover from these sales, for the financial years ending February 1998 to February 2002, that the Commissioner issued the revised assessments levying VAT which are at issue in this appeal.

[4] The Commissioner raised the assessments on the basis that

[1] Section 7(1) has been reproduced in its present form. The amendments to it from time to time since its commencement are irrelevant to the present appeal.
[2] It is not necessary for purposes of the appeal to decide whether this description is accurate.

the taxpayer dealt in 'timeshare interests' which were included in the definition of 'fixed property' in the VAT Act and, accordingly, that those interests were 'goods' and their supply fell within the purview of s 7(1) of the Act.[3] The basis of the assessments was unanimously upheld by the Special Tax Court, Durban (Hurt J presiding). Leave to appeal to this court was subsequently granted in terms of s 34 of the VAT Act read with s 86A(2)(b)(i) and s 86(5) of the Income Tax Act 58 of 1962.

[5] Because of the view I take it is unnecessary to consider the correctness of the basis of the order made by the Special Tax Court because even if the basis was incorrect, as contended by the taxpayer (and I express no view in this regard), the onus was on the taxpayer, in terms of s 37 of the VAT Act,[4] to prove that the turnover from the sales was nevertheless exempt. This the taxpayer sought to do by arguing that what was supplied to the members of the public were 'financial services' in the form of 'equity securities', as defined in s 2, which were exempt from VAT in terms of s 12(a) of the Act. Those provisions read inter alia:

'12. The supply of any of the following goods or services shall be exempt from the tax imposed under s 7(1)(a):

(a) The supply of any financial services . . . .'

'2(1) For the purpose of this Act, the following activities shall be deemed to be financial services:

. . .

(d) the issue, allotment or transfer of ownership of an equity security . . .

. . .

(2) For the purposes of subsec (1) —

. . .

"equity security" means any interest in or right to a share in the capital of a juristic person . . . .'

[6] In the words of counsel who drew the heads of argument on

[3] In s 1 of the VAT Act, 'goods' are defined as meaning inter alia 'fixed property'; and 'fixed property' is defined as meaning inter alia 'in relation to a property time-sharing scheme, any time-sharing interest as defined in section 1 of the Property Time-sharing Control Act, 1983 (Act 75 of 1983), and any real right in any such . . . time-sharing interest.'

[4] Section 37 provides:

'The burden of proof that any supply . . . is exempt from or not liable to any tax chargeable under this Act . . . shall be upon the person claiming such exemption . . . and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong.'

behalf of the taxpayer:

'The essential question is whether the basis of the scheme was changed [in 1995] to one in which "shares" rather than "points" were sold.'

Put differently, in order to succeed, the taxpayer would have had to show that the occupation rights formed part of the bundle of incorporeal rights comprising the shares in LHC which the taxpayer sold to members of the public. The source of such rights could only be found in the memorandum or articles of association of LHC[5] or in any valid resolution passed in accordance with the memorandum and articles setting out the rights attaching to the shares to be issued pursuant to the resolution.[6]

[7] At the time LHC was incorporated, the terms governing the shares were set out in clause 3 of its original articles of association. That clause gave the right to shareholders to use the property of the company in the following terms:

'3(a) The preference shareholder shall:

1. Be entitled to use any property acquired by the company for leisure or holiday purposes in accordance with a schedule of use to be prepared by the directors of the company, which schedule shall ensure that each shareholder has equal access to the use and enjoyment of the property, determined pro rata to the number of shares held . . . .'

However by special resolution passed on 15 September 1995, which was before any shares at issue in this appeal were issued and therefore before the taxpayer sold such shares to members of the public, clause 3 was amended to exclude the paragraph just quoted.

[5] *Commissioners of Inland Revenue v Crossman & others: Commissioners of Inland Revenue v Mann & others* [1936] 1 All ER 762 (HL) at 787; *Wessels & 'n ander v D A Wessels & Seuns (Edms) Bpk & andere* 1987 (3) SA 530 (T) at 561G-H; *Letseng Diamonds Ltd v JCI Ltd & others; Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd & others* 2007 (5) SA 564 (W) para 17.

[6] Blackman et al *Commentary on the Companies Act* ad s 91 p 5–174-1; Morse et al *Palmer's Company Law* para 6.104.

[8] The articles of LHC did not provide that the shareholder would be entitled to an allocation of points rights pro rata to its shareholding ─ indeed, there is no link between the two in the articles (or memorandum) of LHC. Certificates issued to members of the public read as follows:

'Share Certificate

This is to certify that the undermentioned is the registered owner of fully paid Preferent Shares of one cent each in the abovementioned Company subject to the Memorandum and Articles of Association of the Company.

Points Rights Certificate

Subject to the payment of Membership and Reservation Fees, this certificate also entitles the holder to the equivalent user rights in Points in The Holiday Club.'

[9] Clause 1 of the standard sale agreement between the taxpayer and members of the public read:

'The Trading Company [the taxpayer] hereby sells to the Investor who hereby purchases in perpetuity upon the terms and conditions of this Agreement a share interest in the Company [LHC], referred to as Points Rights in the Scheme, which entitles him/her to be credited each year with the number of Points as determined in Schedule 2 hereto.'

Certain of the concepts are defined as follows:

'Points Rights – means a right for the Member to be credited each year with the number of Points specified in the Points Rights/Share Certificate;

Points/Shares – means the instrument by means of which the Member of Points/Shares becomes entitled to exercise the right to the Use and Occupation of Accommodation;

Scheme – means a property time-sharing scheme known as "The Holiday Club" pertaining to the Accommodation conducted in terms of the rules thereto;

Accommodation – means the property, immovable or otherwise, intended for use by any Member in any Resort, including the movables, and in respect of which the Accommodation is owned, leased, rented or otherwise available from time to time by the Trust and are accordingly included in the Scheme.'

From what I have previously said it is quite clear that it was not the 'share interest in the Company' (ie LHC) referred to in clause 1 of the standard sale agreement which entitled the member of the public 'to be credited each year with points rights' which, in turn, entitled the member to accommodation rights in terms of the scheme. The points rights conferred such entitlement. What was sold were shares and points rights. As Mr Fernandes, the company secretary of the taxpayer (called to testify on its behalf), correctly said in cross-examination:

'CROSS-EXAMINER: I'd just like to put it to you for any further comment you wish to make that after 1995, if you sold shares, what you sold were 1 cent preference shares and points.

MR FERNANDES: And?

CROSS-EXAMINER: And points, the same points that you'd been selling before you continued to sell but you tagged on to it a 1 cent preference share.

MR FERNANDES: Correct. The points for accommodation and the shares for ownership.'

The fact that the taxpayer as a matter of commercial practice only sold points together with shares (a fact much emphasized in the heads of argument and by counsel who represented the taxpayer

when the matter was argued in this court) does not result in a merger of the rights attaching to each, nor does it entitle the shareholder qua shareholder to exercise the right of a points holder or a points holder to exercise the rights of a shareholder.

[10] Counsel representing the taxpayer when the appeal was argued before this court relied on the decision of the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Gulf Harbour Development Ltd*.[7] In that matter one member of a group of companies sold to the public redeemable preference shares in another member that operated a golf club and related facilities. The rights attached to each share, which passed to the purchaser, included membership of the club. The issue was whether such sales were to be treated as a supply of financial services for the purposes of the Goods and Services Tax Act 1985. The high court had held that the supplier of a share in a company operating a country club was an equity security and that the transaction was, therefore, an exempt supply of financial services for GST purposes. The Commissioner's primary submission on appeal was that what was supplied in substance was membership of the golf club and that this supply should attract GST; that the equity security element was ancillary to, or incidental to, the supply of membership of the club; and alternatively, that there were two supplies in the transaction namely the supply of an equity security and the supply of membership of the golf club. The Commissioner's appeal was dismissed and the Court of Appeal held inter alia that how the offer was marketed and why people purchased the shares was irrelevant, in that everyone who buys a

[7] (2004) 21 NZTC 18, 915.

share in a company buys it to acquire the rights attaching to that share; that the share is in all cases a 'vehicle' for acquisition of the rights attached to it; and the fact that in this case the rights attached to the shares were rights to membership in the country club did not alter what the purchasers were acquiring. The high court's view that there was no evidence to support the supply of more than the shares was confirmed and the Court of Appeal held that the right to membership passed not as a discrete element, but as an incident of share ownership.

[11] In the present matter I have held that the right to occupy was supplied not as an incident of share ownership, but as a discrete element (in the form of points rights). The case is for that reason of no assistance to the taxpayer.

[12] It was in dispute whether, at the same time that shares and, as I have found, points rights were sold to members of the public, the 'debentures' acquired by the taxpayer in LHC were also sold. It is not necessary to resolve the dispute nor is it necessary to establish a value for the shares. The VAT Act makes express provision for a composite supply of goods which are subject to VAT and those that are not in s 10(22) which reads as follows:

'Where a taxable supply is not the only matter to which a consideration relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.'

But the Taxpayer conceded that if the rights to accommodation supplied to members of the public did not form part of the rights attaching to the shares, the full consideration paid by members of the public was subject to VAT.

[13] The appeal is dismissed with costs including the costs of two counsel.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS: K J Kemp SC (with him I Pillay)

Instructed by Cox Yeats, Durban;
McIntyre & Van der Post, Bloemfontein

RESPONDENTS: O L Rogers SC (with him Ms A A Gabriel)

Instructed by The State Attorney, Cape Town;
The State Attorney, Bloemfontein