THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**: 503/11**

Reportable

In the matter between:

Commissioner for the South African Revenue Service **Appellant**

and

De Beers Consolidated Mines Limited **Respondent**

Neutral citation: ***Commissioner for SARS v De Beers*** **(503/2011) [2012] ZASCA 103 (1 June 2012)**

Coram: Navsa, Van Heerden, Leach JJA and McLaren and Southwood AJJA

Heard: 7 May 2012

Delivered: 1 June 2012

Summary: Value-Added Tax Act 89 of 1991 – meaning of 'enterprise' – meaning of 'imported services' – whether foreign advisory services utilized or consumed in the Republic for 'the purpose of making taxable supplies' – whether tax on local advisory services qualifies for deduction as 'input tax'.

ORDER

On appeal from the Tax Court, Cape Town (Davis J sitting with two assessors as court of first instance):

1. The appeal is upheld with costs, including the costs, attendant upon the employment of two counsel.
2. The cross appeal is dismissed with costs, including the costs attendant upon the employment of two counsel.
3. The order of the court below is set aside and substituted as follows: 'The appeal against the assessments made by the Commissioner for the South African Revenue Service is dismissed with costs, including the costs of two counsel.'

JUDGMENT

NAVSA and VAN HEERDEN JJA (LEACH JA and McLAREN and SOUTHWOOD AJJA concurring)

[1] The respondent, De Beers Consolidated Mines Ltd (DBCM), mines for and sells diamonds internationally. It is one of the world's best known diamond producers and sellers. During November 2000, a consortium approached DBCM and proposed a complex transaction, in terms of which a new company to be established by the consortium would become the holding company of DBCM as well as of a linked Swiss company, De Beers Centenary AG (DBAG). Effectively, the newly established company would become the new owners of De Beers' diamond operations and all associated holdings. The complexities of the transaction will be dealt with in due course.

[2] In considering the proposal by the consortium, DBCM engaged the services of NM Rothschild and Sons Ltd (NMR), a London-based company, as independent financial advisors, in order to advise its board on whether the consortium's offer was fair and reasonable. At the same time DBCM appointed a range of South African advisors and service providers, including attorneys, to assist in finalizing the proposed transaction.

[3] On 7 June 2001, after the transaction referred to above had been realised, NMR issued an invoice in the amount of US$19 895 965.00 for the services rendered by it to DBCM, which was settled by the latter at a Rand cost of R161 064 684.00. Over the period March 2001 to January 2002, the local suppliers of services in connection with the transaction rendered their invoices. They included value-added tax (VAT), in terms of the Value-Added Tax Act 89 of 1991 (the Act), which DBCM treated as input tax in making its own VAT returns.

[4] In an assessment of 18 October 2004, the appellant, the Commissioner for the South African Revenue Service (the Commissioner), determined that NMR's services were 'imported services' in terms of the Act and assessed the sum of R22 549 055.76 to be payable by DBCM as VAT in terms of section 7(1)*(c)* of the Act, which reads as follows:

'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 –

(c) on the supply of any imported services by any person on or after the commencement date,

calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.'

Furthermore, the Commissioner determined that the VAT charged by local service providers did not qualify as input tax and raised assessments, thereby, in effect, disallowing input tax in the amount of R7 021 855.48.

[5] On 1 February 2005, DBCM lodged an objection against these assessments. The objection was disallowed by the Commissioner on 8

September 2005. It was against that decision that DBCM lodged an appeal on 14 October 2005 in the tax court held in Cape Town.

[6] In the Tax Court the following orders were made by Davis J, sitting with two assessors:

'[T]he appeal against the assessments is upheld and the following order is made.

1. The assessments of respondent as set out in its letter of 18 October 2004 are set aside.

2. A revised assessment must be issued on the following basis:

2.1 The services provided by NMR do not constitute imported services because they were utilized and consumed by appellant for the purpose of making taxable supplies; in the course or furtherance of its enterprise of mining and selling of diamonds, being a service legally required of a listed company carrying on a continuing enterprise, in the circumstances faced by the appellant, and in light of a statutory obligation of providing advice to the independent unit holders, which advice thus constituted an activity performed in the course or furtherance of appellant's enterprise.

2.2 The VAT paid by appellant in respect of the local services is not a deductible input tax, save insofar as the services of WWB [Webber Wentzel Bowens] are concerned. In this case, this part of the assessment is referred back to the respondent in order to determine the appropriate ratio pursuant to which a percentage of these services will constitute a deductible input tax.'

[7] The present appeal is before us with the leave of the Tax Court. Before us the Commissioner appeals against:

(a) the finding of the Tax Court that the services rendered by NMR to DBCM did not constitute 'imported services'; and

(b) the finding of the Tax Court that a part of the VAT on local services rendered by WWB to DBCM constituted deductible 'input tax' in DBCM's hands.

DBCM cross-appeals against the finding of the Tax Court that the VAT charged to it by the providers of local services did not constitute deductible 'input tax'. Thus the question before us is whether the conclusions by the Tax Court set out in the preceding paragraph are correct.

[8] As will become evident the facts of the present case are unique and hardly likely to be duplicated. In any event, the conclusions reached are based on the curious facts of this particular case.

[9] The detailed background culminating in the present appeal is usefully set out in the judgment of Davis J as follows:

'. . . Prior to the implementation of the relevant transactions in May/June 2001, the shares in appellant were linked to depository receipts representing an interest in shares issued by De Beers Centenary Ag ("DBAG"), a Swiss company. A share in appellant and a depository receipt to which it was linked constituted a so-called linked unit. The linked units were listed on various exchanges including the Johannesburg Stock Exchange (JSE), the London Stock Exchange (LSE) and the Swiss exchange (SWX).

By way of summary, appellant's main trading activities were the mining and selling of diamonds from South Africa. DBAG and its subsidiaries owned diamond mining interests elsewhere in the world. The main trading activities of appellant were thus the mining and selling of diamonds. However, its subsidiaries operated further diamond businesses and also held an investment of 117 086 985 shares in Anglo American PLC ("Anglo"), an English company whose shares were and still are listed on the JSE, LSE and the SWX. It appears that another company in the De Beers group, Felton Holdings, owned a further 27 196 890 Anglo shares. This cumulative shareholding constituted approximately 35.4% of the issued share capital of Anglo.

Among the De Beers linked unit holders were Anglo, Central Holdings Ltd SA ("CHL") a company incorporated in Luxembourg and Debswana Diamond Company (Pty) Ltd ("Debswana"), a company incorporated in Botswana. These three companies held 32.3%, 2.6% and 5% respectively of the shares in appellant. Their combined stake of 39.8% represented 159 395 536 shares in appellant. The remaining 240 563 239 shares (60.2%) were held by a large number of institutional and other investors.

In November 2000 Anglo, CHL and Debswana proposed, as a consortium, that appellant enter into a transaction in terms whereof the other unit holders in appellant and DBAG would have their interests in appellant eliminated and a new company, to be established by the consortium, would become the holding company of both appellant and DBAG. This new company DB Investments (SA) (DBI) was to be incorporated in Luxembourg.

In November 2000, the boards of both De Beers companies resolved to establish an Independent Committee of Directors ("ICD") to consider and advise the boards as to whether the consortium's offer was fair and reasonable to independent unit holders and to assist in negotiations with the consortium. The ICD were authorised to appoint and consult with NM Rothschild and Sons Ltd ("NMR") as independent financial advisors, NMR being an English advisory services company.

At the same time, various advisors in South Africa were appointed, including HSBC Investment Services (Africa) (Pty) (Ltd) ("HSBC"), the firms of attorneys known as Webber Wentzel Bowens ("WWB") and Edward Nathan and Friedland ("ENF") together with the auditing and advisory firm Deloitte and Touche Advisory Services ("Deloittes"). All of these parties were referred to during the dispute as the local suppliers of local services.

After months of negotiations, on 30 April 2001 the consortium made a final and improved offer. NMR considered that this offer was fair and reasonable to independent unit holders. The ICD then advised the boards, that, in its opinion, the offer was fair and reasonable and the boards accordingly advised the independent unit holders.

In essence the final offer constituted the following:

The shareholding of the independent unit holders in De Beers (approximately 60.2%) would be eliminated through a distribution to them of Anglo shares, being all of the shares held by appellant in Anglo, together with some additional Anglo shares and cash, such that for each linked unit, the holder would receive 0.446 of an Anglo share, $15.35 in cash plus a further cash amount of $1.30 which constituted the final dividend of Anglo for the year ending 31 December 2000.

This final offer reflected an assumed total value of De Beers of $18.7 billion, of which $9.4 billion was attributed to the 35.4% shareholding in Anglo and the balance of $9.3 billion to De Beers' remaining assets.

The transaction was implemented through a scheme of arrangement pursuant to s 311 of the Companies Act 61 of 1973 ("the Companies Act"). The court granted leave to convene a scheme meeting on 3 April 2001 and the offer, as improved, was accepted by the requisite majority of independent unit holders at the scheme meeting on 4 May 2001. The scheme was then sanctioned by the court on 18 May 2001 and implemented shortly thereafter.

In effect, the scheme constituted a buy back leg and a cancellation leg. Briefly these can be described thus:

1. In terms of the buy back leg, appellant acquired from all unit holders including the consortium 1% of their shares in appellant in consideration for which it

distributed to them pro-rata 130 380 071 Anglo shares plus a dividend of $1.30 per share which was attributable to the Anglo shares.

2. In terms of the cancellation leg, the balance of the shares in appellant held by independent unit holders were cancelled in consideration for which the latter received $15.35 in cash together with a further allocation of Anglo shares, such that each unit holder received inclusive of the Anglo shares received under the buy back leg, 0.446 Anglo shares per linked unit. It is not necessary to traverse the mechanics of the calculations used to determine the shares so allocated. Suffice to say, the additional shares were in the amount of 28 872 400.

On 7 June 2001, NMR issued an invoice to appellant in the amount of $19 895 965 for the services rendered by it in connection with the transaction. This constituted a portion of NMR's total charges, in that the balance was invoiced to DBAG. Appellant settled this invoice at a rand cost of R161 064 684.

In the assessment of 18 October 2004 respondent determined that the NMR services were imported services in terms of the Act and assessed the sum of R22 549 055.76 to be payable by appellant as VAT in terms of s 7(1)*(c)* of the Act. Over the period of March 2001 to January 2002, the local suppliers rendered invoices to appellant for services rendered in connection with the transaction. These suppliers included VAT in their invoices and appellant treated this VAT as input tax in making its own VAT returns. In the assessment of 18 October 2004 respondent determined that the VAT did not qualify as input tax and raised assessments, thereby, in effect, disallowing input tax in the amount of R7 021 855.48.

Appellant lodged an objection against these assessments in a letter of 1 February 2005, which objection was disallowed by respondent on 8 September 2005. It was against these decisions that appellant noted an appeal on 14 October 2005.'

[10] It must be assumed that when the transaction was conceived and the consortium came into being, what was being sought was the acquisition of the whole of De Beers at the most advantageous price to the consortium. What complicated matters was the inter-relationship between certain of the negotiating parties. This is even more evident from the following further facts set out in the heads of argument filed on behalf of the Commissioner:

'3. To the facts summarised in paragraphs 3 to 13 of the judgment we add the following. CHL was a company controlled by the Oppenheimer family. The Oppenheimer family, apart from its 2.6% stake in De Beers through CHL, held about

8% of the shares in Anglo. Debswana was a company in which 50% of the shares are held by the Government of Botswana and 50% by DBAG.

4. The end result of the transaction was [a] that all the shares in DBCM and DBAG became owned by DBI [b] the listing of linked units in DBCM and DBAG ceased and [c] DBI had as its shareholders Anglo (45%), CHL (40%) and Debswana (15%). The transaction amounted to a takeover of De Beers by a consortium headed by Anglo with the backing of the Oppenheimer family (CHL) and the Government of Botswana (Debswana).

5. The buyback leg of the transaction (judgment § 13.1) eliminated the cross-shareholdings between De Beers and Anglo and was essentially an unbundling of the greater part of the Anglo shares held by De Beers. The cancellation leg (judgment § 13.2) was the means whereby the consortium bought out the independent unit holders' interest in what remained of De Beers' businesses after the unbundling of the Anglo shareholding.'

[11] An important factor is that the company to be established which would effectively succeed De Beers would not be a listed company. Mr Kell, a director of DBCM and a member of the ICD, described the effect of the transaction by stating that DBCM 'effectively went private'.

[12] Another feature of the proposal by the consortium was that it had not put any specific price for the acquisition of De Beers on the table. Consequently, the Independent Committee of Directors (ICD) engaged NMR and other London-based financial advisors, namely UBS Warburg, who had previously advised Anglo American PLC on its listing on the London stock exchange. This engagement was aimed at establishing a price that could be put to the De Beers board and the shareholders as being fair and reasonable. Furthermore, the buyback leg of the convoluted transaction where DBCM acted as a conduit for payment to shareholders and assumed obligations in that regard was designed to utilise s 311 of the Companies Act 61 of 1973 to give it legitimacy and for the additional reasons set out hereafter. The object of the exercise was to obtain high court approval for a scheme of arrangement in terms of s 311. In the unbundling leg the acquisition of 1 per cent shares in DBCM appears to have been necessary so as to to bring the shareholders into the arrangement as parties and to cut down on tax payable in the USA at

that time. The percentage buyback is illustrative of the artificiality of the scheme, which nevertheless was approved by the high court. It also enabled the transaction to avoid legal consequences in relation to Anglo American PLC shareholders in the USA.

[13] In addition, by resorting to a scheme of arrangement in terms of section 311 of the Companies Act, a lower threshold of shareholder approval was required namely, 75 per cent, as opposed to 90 per cent.

[14] Another feature worth mentioning in relation to the transaction is set out hereafter. The ICD had at one stage resolved, after taking advice from NMR, that the minimum asking price for DBCM's diamond business was the amount of $6.5 billion. The following is recorded in relation to a discussion held by the ICD about this recommended minimum price:

> 'We believe that this minimum level is defensible opposite the 60% outside shareholders. But it will not be without criticism given the exit multiples on the diamond business are not generous. Below this level it will be impossible to defend given that the original $7.1 billion was in itself a very conservative value.'

In response the consortium was not willing to pay more than $6.25 billion. The ICD's chairperson was mandated to attempt to extract a further $600 000 000.00. When these efforts failed the ICD, notwithstanding their prior emphatic resolution, nonetheless recommended to DBCM's board that the consortium's offer of $6.25 billion be accepted. When three large institutional shareholders of DBCM indicated their dissatisfaction, the consortium without any prior indication increased their offer significantly.

[15] It is necessary to record that from the outset, when the bid was first tabled, WWB's services were immediately engaged. All the of the other actors, including HSBC (the sponsoring brokers), but excepting Deloittes, were appointed in anticipation at the first meeting of the ICD in Johannesburg. Deloittes were appointed thereafter. Their collective purpose was to ensure that the transaction materialised without impediment. This they ensured.

[16] The features of the transaction referred to in the preceding five paragraphs, in our view puts the transaction in proper perspective and points to the real reason for the appointment of the foreign and local service providers.

[17] One of DBCM's objections to the imposition of VAT on the NMR transaction is based on what it considers to be the place at which the NMR services were consumed. Put differently, if it could rightfully be contended, on the basis of the definition of 'imported services' – dealt with in paragraph 19 hereafter - that the place of consumption was outside South Africa, the conclusion would follow that they could not be categorised as imported services. DBCM contended that since a number of meetings at which financial advice was received from NMR took place outside South Africa, VAT could, at the very least, not be imposed in respect of the proportion of the services related to those meetings. At this stage it is necessary to record when and where relevant meetings took place. Only two of the five substantive ICD meetings took place in London. DBCM's board met in South Africa to receive the ICD's recommendations as backed up by the NMR advice and to take decisions on the strength thereof. There were three such meetings, all held at Johannesburg. Because the court below had held that NMR's services were not imported services because they were consumed in the course of making taxable supplies, it was unnecessary for Davis J to consider and decide this issue.

[18] The first issue for decision is whether NMR's services were utilised or consumed by DBCM for the purpose of making taxable supplies in the course or furtherance of DBCM's enterprise of buying and selling diamonds. In this regard it is necessary to consider definitions and certain key concepts provided for in the Act. The definitions all appear in s 1.

[19] It will be recalled that the court below had held that the services provided by NMR do not constitute 'imported services' because they had been used by the appellant for the purpose of making taxable supplies, namely in

the course of furthering its enterprise of mining and selling diamonds. It is necessary first to consider the definition of 'imported services':

'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*.' (Emphasis added.)

[20] The court below had held that the services were required in the furtherance of DBCM's mining and diamond selling enterprise. It is thus necessary to consider the concept 'enterprise', which is defined as follows:

'*(a)* in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club;

(b) without limiting the applicability of paragraph *(a)* in respect of any activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern –

. . .

Provided that –

. . .

(v) any activity shall to the extent to which it involves the making of exempt supplies not be deemed to be the carrying on of an enterprise.'

[21] In turn, 'taxable supply' means any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(*a*), including tax chargeable at the rate of zero per cent under s 11.

[22] Considering 'the purpose' referred to in the definition of 'imported services', set out in paragraph 19 above, the primary question is whether NMR's services were acquired for the purpose of making taxable supplies.

[23] It was contended on behalf of DBCM that the provision of the services by NMR were necessarily attached to and accordingly a concomitant of appellant's mining or commercial enterprise as a public company. As the appellant had chosen to conduct its business as a public company which, while conducting its operations, had certain statutory obligations, it was submitted that these services were directly linked to its making of ongoing supplies. Thus, so it was argued, since these supplies can rightly be said to have been wholly utilised or consumed in the making of supplies, in the course or furtherance of appellant's mining or commercial enterprise, they did not fall within the definition of imported services. It was submitted that the Commissioner's attitude embodied a restrictive approach in construing DBCM's 'enterprise', limiting it to the nuts and bolts of the operational diamond business and excluding statutory duties imposed on the company in the interest of shareholders. Put simply, it was contended that NMR's services were acquired in the furtherance of DBCM's mining and diamond business.

[24] Furthermore, it was contended that DBCM acquired NMR's services as a necessary input giving rise to an overhead expense. The following extract from DBCM's heads of argument is relevant:

'[NMR's] services were utilised and consumed by [DBCM] for the purpose of making taxable supplies in the course of its enterprise because, once faced with this consortium offer, DBCM could not realistically continue to operate its enterprise, however widely or narrowly construed, without complying with its legal obligation to acquire the NMR services.'

[25] On behalf of the Commissioner it was submitted that the purpose in question is the purpose of the acquirer of the service and that, by its nature, the test is subjective. DBCM's reason for engaging NMR, so it was contended, was to acquire advice in relation to a take-over by parties to which it was related. Accordingly, its board had a duty to report to the independent

unit holders as to whether the offer was fair and reasonable and to obtain independent financial advice in that regard. Those duties were imposed by the Securities Regulation Code pursuant to s 440C of the 1973 Companies Act and by the Listing Requirements of the JSE.

[26] The argument on behalf of the Commissioner continued as follows. The fact that this was the reason for DBCM's engagement of NMR, rules out, as a relevant purpose, any of the incidental benefits which DBCM thought it might derive from the transaction. Whether DBCM's senior management thought that DBCM's diamond business would be better or worse after the takeover, did not affect their obligation to engage and obtain advice from NMR. In this regard the Commissioner urged us to take into account the peculiar features of how the transaction was structured and eventually implemented. Put simply, the Commissioner contended that NMR's services were unrelated to DBCM's core activities, which was the mining and sale of diamonds. NMR was not providing services directed at making any of DBCM's businesses better or more valuable. It was the interest of DBCM's departing shareholders and investors, rather than the interest of DBCM itself, that formed the focus of NMR's services. The Commissioner criticised the approach of the court below, namely that anything which a company is legally obliged to do by virtue of being a company is necessarily used as overhead expenses.

[27] In the case of a public company there is a clear distinction between:
(a) the enterprise with its attendant overhead expenses, and
(b) the special duties which are imposed on the company in the interest of its shareholders as individuals in consequence of the fact that a choice has been made to conduct an enterprise in a corporate form.
The duty imposed on a public company that is the target of a take-over is too far removed from the advancement of the VAT enterprise to justify characterising services acquired in the discharge of that duty as services acquired for purposes of making taxable supplies, especially in the circumstances of this case.

[28] In our view the submissions on behalf of the Commissioner, set out in the preceding paragraphs, are undoubtedly correct. The reliance by DBCM on a Canadian decision, namely *BJ Services Company Canada v The Queen* 2003 (TCC) 900 is misplaced. In that case a company had taken financial and legal advice in response to a hostile take-over bid. It was held that the expenses incurred in relation thereto were deductible for income tax purposes. First, it is an income tax case which fell to be decided on domestic income tax legislation and not specifically value-added tax. Second, the primary question before us focuses on the question of what the 'purpose' was of the acquisition of the services. Lastly, the facts were different.

[29] The same applies to an Australian case relied on by the Commissioner namely, the decision by the full court of the Federal Court of Appeal in *FCT v The Swan Brewery Co.* Ltd (1991) 22 ATR 295 (FCA). In that case the issue was the deductibility for income tax purposes of expenditure incurred by a trading company in obtaining professional services to enable the company to advise its shareholders in respect of a take-over offer of which it was the target. The court there was dealing with income tax legislation which required the expenses to be incurred in gaining or producing assessable income. It held that it could not be said that the expenditure in question could be relevant or incidental to that purpose, rather it was directed to duly informing the shareholders of the corporation of the true worth of their shares and the adequacy of the offer to acquire their capital interest in the corporation.

[30] In the present appeal we are enjoined to interpret and apply the legislation in question to the facts before us.

[31] DBCM attempted to persuade us that, on the evidence presented in the court below, a natural outflow of the protracted negotiation process were real advantages that redounded to the benefit of the diamond business. In this regard they pointed to a financial model, that had been produced by UBS Warburg and taken over by NMR, to value the diamond business, which they submitted was a useful management tool for DBCM prospectively. Furthermore, they indicated that the increased involvement of the

Oppenheimer family would be an obvious and marked advantage, which would boost morale and image. In addition, they submitted that the metamorphosis, from a listed company to a private one, would allow for less disclosure and greater flexibility with consequent advantages over competitors. It was also urged upon us to consider, in favour of DBCM, the negative effect of the cross-shareholdings between Anglo American PLC and DBCM. It was pointed out that, because of this, DBCM was under valued, which was a disincentive for its management. The transaction in question, so it was contended, negated that effect. These submissions were not only intended to persuade us that, overall, the transaction was for the purposes of making taxable supplies, but also, alternatively for the purpose of partially avoiding value added tax – in other words, apportionment of taxation.

[32] For the following reasons we are unpersuaded. First, it was conceded on behalf of DBCM that the financial model was not provided to it for the purpose of making taxable supplies. Second, preceding the transaction, DBCM had already commissioned and received a study into its operations which had formulated a strategy aimed at greater efficiency. It was common cause that the study referred to during evidence as the Bain Review and input received by DBCM's management were used extensively by NMR during the negotiations. Third, it was conceded by counsel on behalf of DBCM that it could scarcely be contended that the Oppenheimers had not been fully committed to Anglo American PLC and DBCM before the transaction. It can hardly be gainsaid that the Oppenheimers have always been publicly associated with DBCM. Fourth, management of an internationally renowned and successful company such as DBCM can surely not be said to lack incentive and suffer from low morale. Fifth, the disclosure by DBCM as a public company was, in any event, as demonstrated by the evidence in the court below, extremely limited.

[33] It is now necessary to deal briefly with the contention on behalf of DBCM, that the advice obtained from NMR in large part related to shares held by DBCM in Anglo American PLC, which shareholding was integral to the diamond business enterprise. The object of this contention was to persuade

this court that the advice therefore was directly related to DBCM's business operations. Evidence was led in the court below that bankers with whom DBCM had to interact, in pursuing its business ends, took great comfort from DBCM's Anglo American PLC shareholding. DBCM submitted that it did not have a discrete non-enterprise activity of holding Anglo shares for investment, separate in any way from its diamond business.

[34] We are unconvinced that DBCM, with its international reputation and historical track record, required the comfort of the Anglo American PLC shareholding. Furthermore, in evidence before us, its officials could not point to any instance in which it required substantial borrowing on a short or long term basis. Additionally, unless one conducts business as an investment company, the investments one holds cannot conceivably be regarded on their own as constituting an enterprise within the meaning of that term in the Act.

[35] DBCM, in attempting to persuade us on this aspect, belatedly and tentatively suggested that, in considering the definition of 'enterprise'[1] referred to in paragraph 20 above, we should consider that there were two categories of enterprise encapsulated in paragraph *(a)* of the definition, the first of these being defined in that part of paragraph *(a)* which concludes with the word 'profit', while the second is to be found in that part of paragraph *(a)* commencing with the word 'including'. It was argued that once a vendor falls within the ambit of the definition of 'enterprise' (regardless of whether in the first or in the second category), any activity whatsoever of that enterprise forms an integral part and parcel of the enterprise, unless such activity is excluded in terms of paragraph (v) of the proviso thereof.

---

1. Although we have already given this definition, we cite it again for ease of reference, as follows:

'*(a)* in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club;

(b) without limiting the applicability of paragraph *(a)* in respect of any activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing or professional concern

. . .

Provided that –
. . .

(v) any activity shall to the extent to which it involves the making of exempt supplies not be deemed to be the carrying on of an enterprise.'

[36] The submission is wholly without merit. The word 'including' indicates that what follows is illustrative of what precedes it. There is no room for an interpretation that two categories of 'enterprise' are envisaged. Even though a company can engage in a number of different activities, the discrete 'investment category' sought to be relied upon in relation to DBCM's Anglo American PLC shareholding is, for the reasons stated above, untenable.

[37] We now turn to one of the other bases of objection to the Commissioner's assessment, namely place of consumption. What is required is a practical approach to that question. DBCM was a South African company, with its head offices situated in Johannesburg. That is where the ICD met initially and resolved to acquire the services of NMR and the local service providers. That is where the full board of DBCM finally met to receive and approve the recommendation by the ICD. The s 311 scheme of arrangement, without which the transaction could not have been executed, was approved and implemented in South Africa. The fact that some meetings were held with NMR outside of the country can hardly be used to justify the conclusion that the services were not consumed in South Africa. On the contrary, the compelling conclusion is that NMR's services were consumed in South Africa.

[38] We now turn to deal with s 1 of the Act where 'input tax' is defined thus:

'tax charged . . . on the supply of goods or services made . . . to the vendor . . . where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose.'

[39] At this stage, it is necessary to set out the rationale behind and method of application of VAT. On this aspect we can do no better than to cite an English case which deals directly with this aspect in *Customs and Excise Commissioners v Redrow Group plc* [1999] 2 All ER 1 (HL) at 9g-h:

'These provisions entitle a taxpayer who makes both taxable and exempt supplies in the course of his business to obtain a credit for an appropriate proportion of the input tax on his overheads. These are the costs of goods and services which are properly incurred in the course of his business but which cannot be linked with any goods or services supplied by the taxpayer to his customers. Audit and legal fees and the cost of the office carpet are obvious examples.'

These considerations apply equally to the VAT regime in this country and in other comparable jurisdictions.

[40] In line with the provisions of the Act and the authority above, technically three question arise, namely:

(a) Were the local services acquired by DBCM 'for the purpose of consumption, use or supply in the course of making taxable supplies' at all;

(b) If so, were they acquired 'wholly' for that purpose;

(c) If so acquired, but not wholly, to what extent they were acquired for such purpose, having regard to the provision of s 17 of the Act?

Where a vendor acquires goods or services partly for use in making a taxable supply and partly for use in a non-taxable supply, s 17(1) dictates an apportionment based on the ratio which the former intended use bears to both intended uses.

[41] On this issue the same questions arise as with the primary question dealt with at the outset. It is necessary to recount the identity of the providers of local services utilised by DBCM in realising the transaction in question and to indicate the role played by each. WWB's services related to legal advice on the transaction almost from its inception. They were instrumental in formulating and seeing through the s 311 scheme of arrangement. They advised and obtained tax rulings that the unbundling of the Anglo shares would benefit from the relief contained in section 60 of the Income Tax Act 113

of 1993, concerning the stamp duty implications of the 1 per cent buyback of DBCM's shares, and in relation to the exchange control requirements for the distribution of the unbundled Anglo shares. Deloittes gave advice on much the same matters. There is scant evidence about what HSBC actually did and how its fee was arrived at. As brokers (SA sponsors and UK sponsors) HSBC had to 'interface' with the JSE. ENF, a firm of attorneys, were required to provide a chairperson for the meeting of shareholders under the section 311 scheme of arrangement.

[42] The same reasoning in relation to NMR's services applies in respect of the provider of local services. In short, the services were acquired for the purposes of dealing with the proposal by the consortium. In regard to the special features of the transaction in question, as set out in paragraphs 10 to 15 above, it is worth reiterating that, from the outset, the intention was to ensure that the scheme conceived by Mr Oppenheimer materialised.

[43] In light of the conclusions set out above, the following order is made.

1. The appeal is upheld with costs, including the costs attendant upon the employment of two counsel.
2. The cross appeal is dismissed with costs, including the costs attendant upon the employment of two counsel.
3. The order of the court below is set aside and substituted as follows:

   'The appeal against the assessments made by the Commissioner for the South African Revenue Service is dismissed with costs, including the costs of two counsel.'

M S NAVSA

JUDGE OF APPEAL

B J VAN HEERDEN
JUDGE OF APPEAL

SOUTHWOOD AJA (LEACH JA and McLAREN AJA concurring)

[44] I have had the advantage of reading the judgment of my colleagues Navsa and Van Heerden JJA and I agree with the order proposed in their judgment. My reasoning is closely aligned with that of my colleagues but emphasises the interaction between the definitions in the Value Added Tax Act 89 of 1991 (the Act) and the necessity of applying these definitions to the facts of the case. In order to decide this case it is fundamental that both the services rendered and the enterprise be identified and that the court make factual findings as to what the services and the enterprise consist of. Once this is done the questions raised become capable of a clear answer.

[45] The Act provides for the imposition of VAT on goods and services and contains a number of definitions, which must be borne in mind when the Act is applied. The charging provision is s 7, the relevant parts of which read as follows:

'(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 and services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(b) on the importation of any goods into the Republic by any person on or after the commencement date; and

(c) on the supply of any imported services by any person on or after the commencement date,

calculated at the rate of 14 percent on the value of the supply concerned or the importation, as the case may be.

(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid by the vendor referred to in that paragraph, the tax

payable in terms of paragraph (b) of that subsection shall be paid by the person referred to in that paragraph and the tax payable in terms of paragraph (c) of that subsection shall be paid by the recipient of the imported services.'

The Act therefore creates in s 7(1) three categories of persons liable for VAT: the vendor described in paragraph (a) of subsection (1); the person who imports goods into the Republic; and the recipient of 'imported services'. As will appear later, if the recipient of 'imported services' is a 'vendor' and utilizes or consumes the services in the course of making 'taxable supplies', no VAT liability is incurred. In terms of s 10 the value of the goods or services supplied is the consideration for such goods which is usually the cash amount paid for the goods or services.

[46] For purposes of s 7(1)*(a)* it must be determined who a 'vendor' is and what an 'enterprise' is. In terms of the definition, 'a vendor' is a person who is required to be registered under the Act and in terms of s 23 every person who carries on an 'enterprise', and is not registered, becomes liable to be registered at the end of the month where the total value of taxable supplies made by that person in the prescribed period has exceeded R1 million or at the commencement of the month where there are reasonable grounds for believing that the total value of the taxable supplies to be made by that person in the prescribed period will exceed R1 million. The relevant parts of the definition of 'enterprise' read as follows:

'Enterprise means–

(a) in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club.

Provided that–

… (v) any activity shall to the extent to which it involves the making of exempt supplies not be deemed to be the carrying on of an enterprise'

[47] Once registered as a vendor, a person becomes obliged in terms of s 27 and s 28 to furnish returns to the Commissioner for each relevant period and to calculate and pay over to the Commissioner the VAT which has become payable under the Act for that period. The Act provides in s 16 how the VAT is to be calculated and specifically for the deduction of 'input tax'. For present purposes 'input tax' means the tax charged under s 7 and payable in terms of that section by a supplier on the supply of goods or services made by that supplier to that vendor

'where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of s 17) that the goods or services concerned are acquired by the vendor for such purpose'.

A 'taxable supply' is 'any supply of goods or services which is chargeable with tax under the provisions of s 7(1)*(a)*, including tax chargeable at the rate of zero percent under section 11.'

[48] To be entitled to deduct 'input tax' in the calculation of his VAT payable, a vendor must be registered in terms of the Act, must be carrying on an 'enterprise' and must have paid VAT on goods or services which the vendor acquired wholly for the purpose of consumption, use or supply in the course of supplying goods or services which are chargeable with tax under the provisions of s 7(1)*(a)* of the Act (i.e. goods or services supplied in the course or furtherance of the 'enterprise'). The Act also provides in s 17 for the method whereby the deductible 'input tax' is calculated where the goods or services are acquired partly for consumption, use or supply in the course of making taxable supplies.

[49] As far as VAT on 'imported services' is concerned, s 7(1)*(c)* and s 7(2) simply provide that the recipient of the imported services must pay the VAT. Liability for VAT is obviously dependent upon whether the services concerned fall within the definition of 'imported services' in the Act: i.e. whether it is

'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.'

Thus, if the services are not utilized or consumed in the Republic, or, if utilized or consumed in the Republic they are utilized or consumed for the purpose of making 'taxable supplies', the services would not be imported services. Accordingly, a vendor who acquires 'imported services' for the purpose of making 'taxable supplies' will not be liable for VAT on the cost of the 'imported services'.

[50] This means that the same question must be answered in both the appeal and the cross-appeal; i.e. whether the services acquired by DBCM were required for the purpose of consumption, use or supply in the course of making 'taxable supplies', which means supplying goods or services in the course or furtherance of the 'enterprise'. In addition, the appeal requires a consideration of whether the 'imported services' were utilized or consumed by DBCM in the Republic.

[51] The primary question requires that there be clarity as to the nature of the 'enterprise' because the purpose of acquiring the services and whether they were consumed or utilized in making 'taxable supplies' can only be determined in relation to a particular 'enterprise'. What the 'enterprise' consists of is a factual question. There must be a particular activity which complies with all the requirements in the definition. There is no doubt that DBCM's 'enterprise' consisted of mining, marketing and selling diamonds. DBCM contends however that the 'enterprise' includes any other activity in which it was involved, including holding shares in its subsidiaries and its portfolio of listed shares such as the Anglo shares. DBCM also contends that the definition of 'enterprise' incorporates two separate definitions which would mean that it would provide for two categories of 'enterprise'. According to the argument, these are to be found in paragraph (a) of the definition. The first concludes with the word 'profit' and the second commences with the word 'including'. This belated and somewhat tenuous argument (raised for the first

time in oral argument) is clearly without merit. The purpose of the words following 'including' is to make certain that the specific categories of activity referred to are included in the definition of 'enterprise'.

[52] In the circumstances of this case, where DBCM is not a dealer in shares, the holding of shares and receipt of dividends by DBCM does not fall within the definition of 'enterprise' and this must therefore be disregarded. It must be found that DBCM's 'enterprise' for the purposes of the Act, consisted of mining, marketing and selling diamonds.

[53] The question to be answered therefore is whether NMR's services were acquired for the purpose of making 'taxable supplies' in that 'enterprise'. The answer is clearly no. DBCM acquired NMR's services because DBCM was the target of a take-over by parties to whom it was related and DBCM's board had a duty to report to independent unit holders as to whether the consortium's offer was fair and reasonable and to obtain independent financial advice in that regard. In order to do this NMR was obliged to determine the value of DBCM's diamond business and then express an opinion that the consideration offered for the shares was fair and reasonable in the light of that evaluation. Such services were not acquired to enable DBCM to enhance its VAT 'enterprise' of mining, marketing and selling diamonds. The 'enterprise' was not in the least affected by whether or not DBCM acquired NMR's services. They could not contribute in any way to the making of DBCM's 'taxable supplies'. They were also not acquired in the ordinary course of DBCM's 'enterprise' as part of its overhead expenditure as argued by DBCM. They were supplied simply to enable DBCM's board to comply with its legal obligations.

[54] The parties' reliance on foreign precedent in this regard is misplaced. DBCM relied on *B J Services Company Canada v The Queen* 2003 (TC) 900 and SARS relied on *FCT v The Swan Brewery Co Ltd* (1991) 22 ATR 295 (FCA) which reached conflicting conclusions on substantially the same issue but in relation to provisions of the Canadian and Australian income tax statutes. The tests to be applied in terms of the relevant statutes differ from

those of the Act; the facts differed from the facts of the present case and the cases did not deal with VAT or its equivalent in the two countries. The answer in the present case must be obtained by applying the provisions of the Act to the facts.

[55] The same reasoning regarding the making of 'taxable supplies' applies to the VAT paid on the services provided by the South African service providers. The services were provided for multiple purposes which included: enabling DBCM to comply with its statutory obligations to its unit holders; providing DBCM with tax advice on the implementation of the transaction; and obtaining the necessary court and unit holder approval in terms of s 311 of the Companies Act. The services were not acquired for the purpose of making 'taxable supplies' by an 'enterprise' which mines, markets and sells diamonds.

[56] I therefore agree with the order of my learned colleagues.

B R SOUTHWOOD
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: O L Rogers SC
Instructed by
The State Attorney,
Cape Town
The State Attorney,
Bloemfontein.

FOR RESPONDENT: T S Emslie SC (with him M W Janisch)
Webber Wentzel Attorneys,
Cape Town
Symington & de Kok,
Bloemfontein.