THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 207/2021

In the matter between:

RENNIES TRAVEL (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES **RESPONDENT**

Neutral citation: *Rennies Travel (Pty) Ltd v SARS* (207/2021) [2022] ZASCA 83 (6 June 2022)

Coram: VAN DER MERWE, PLASKET and HUGHES JJA and TSOKA and MUSI AJJA

Heard: 3 May 2022

Delivered: 6 June 2022

Summary: Revenue – Value-Added Tax Act 89 of 1991 (VAT Act) – supplementary commission received by travel agency after achieving agreed sales targets of international airline tickets – constituted consideration for arranging transport of international passengers – receipts had to be zero-rated under s 11(2)*(a)* and *(d)* of VAT Act.

Practice – time for lodgement of notice of appeal – conflict between provisions of Tax Administration Act 28 of 2011 and rules of Supreme Court of Appeal – latter subordinate legislation – provisions of Tax Administration Act prevail.

ORDER

On appeal from: The Tax Court of South Africa, Johannesburg (Twala J presiding, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the tax court is set aside and replaced with the following:

'The additional VAT assessments in respect of the appellant's February 2012 to December 2016 VAT periods, to the extent that they impose VAT at the standard rate on supplementary commission paid to the appellant, are set aside.'

JUDGMENT

Van der Merwe JA (Plasket and Hughes JJA and Tsoka and Musi AJJA concurring):

[1] The appellant, Rennies Travel (Pty) Ltd, conducts a travel agency enterprise. Part of its business is to make arrangements for the international travels of its clients, including the sales of airline tickets for international flights. The appellant derives income in respect of this part of its business from three contractual sources, namely: a service fee charged to the client; a flat rate charged to the relevant airline in respect of the sale of an international airline ticket (standard commission); and additional or increased commission charged to the airline in the event of the appellant reaching targets of international airline ticket sales agreed with the airline (supplementary commission).

[2] The respondent, the Commissioner for the South African Revenue Services, determined that the appellant was liable for the payment of Value-Added Tax (VAT)

on the supplementary commission that it had earned during the period from February 2012 to December 2016 and accordingly issued additional VAT assessments to the appellant. The appellant maintained that the supplementary commission had been earned in respect of a supply of services that attracted VAT at zero per cent (zero-rated) under the Value-Added Tax Act 89 of 1991 (the VAT Act). This issue eventually came before the tax court (Twala J presiding). It held for the respondent, but granted leave to the appellant to appeal to this court.

Notice of appeal

[3] The tax court granted leave to appeal on 11 January 2021. The appellant lodged its notice of appeal to this court on 24 February 2021. Rule 7(1)*(b)* of the rules of this court (the SCA rules) provides that a notice of appeal shall be lodged within a month of the granting of leave to appeal. On the strength of this sub-rule, and having had regard to the *dies non* period provided for in rule 1(2)*(b)*, the registrar of this court reckoned that the notice of appeal had to be lodged by 16 February 2021. The registrar consequently advised the appellant that it had to apply for the condonation of the late lodgement of the notice of appeal. The appellant took the stance that the notice of appeal had been lodged timeously in terms of the provisions of the Tax Administration Act 28 of 2011. It nevertheless lodged an application for condonation conditional upon a finding that the notice of appeal had indeed been lodged out of time.

[4] The relevant provisions of the Tax Administration Act are the following. Section 134(1) essentially provides that a party who intends to appeal against a decision of the tax court must, within 21 business days after the date of the registrar's notification of the decision of the tax court, give a notice of intention to appeal. In terms of s 134(2) the notice of intention to appeal must state, inter alia, in which court the appellant wishes the appeal to be heard. Should the appellant wish to appeal to this court, the registrar must in terms of s 135 submit the notice of intention to appeal to the president of the tax court, who must grant or refuse leave to appeal. Section 137(1)*(a)* provides that should such leave to appeal be granted, the registrar of the

tax court must notify the appellant that the appeal must be noted within 21 business days of the date of that notice. In terms of s 138(3) the notice of appeal must be lodged within the period referred to in s 137(1)*(a)*, or within a longer period as may be allowed under the rules of the court to which the appeal is noted.

[5] The registrar of the tax court gave notice in terms of s 137(1)*(a)* of the Tax Administration Act on 2 February 2021. The appellant lodged the notice of appeal within 21 business days thereafter. It follows that the application of the provisions of the Tax Administration Act and the SCA rules would produce different results as to whether the notice of appeal was late. The SCA rules, however, were made by the Rules Board in terms of s 6 of the Rules Board for Courts of Law Act 107 of 1985. As such, they constitute subordinate legislation. It is trite that in the event of conflict, national legislation must prevail over subordinate legislation. (See 25 *Lawsa* 2 ed Part 1 para 294). Thus, the appellant's notice of appeal was lodged timeously and condonation was not required.

VAT Act

[6] Section 7(1)*(a)* of the VAT Act at the relevant time provided:

'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) 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) . . .

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

[7] The VAT Act defines 'supply' and 'services' in wide terms. The definition of 'supply' includes 'performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected'. According to the main part of the definition of 'services' it means 'anything done or to be done'. Section 10

deals with the value of the supply of goods or services. In essence, that is the consideration for the supply, the definition of which, in turn, includes 'any payment made or to be made . . . whether in money or otherwise'.

[8] Section 11 provides for zero-rating as one of the exceptions referred to in s 7. Subsections 11(2)*(a)* and *(d)* are material to this matter. They read as follows:

'Where, but for this section, a supply of services, other than services contemplated in section 11(2)*(k)* that are electronic 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 per cent where-

(a) the services (not being ancillary transport services) comprise the transport of passengers or goods-

(i) from a place outside the Republic to another place outside the Republic; or

(ii) from a place in the Republic to a place in an export country; or

(iii) from a place in an export country to a place in the Republic; or . . .

(d) *(i)* the services comprise the-

(aa) insuring;

(bb) arranging of the insurance; or

(cc) arranging of the transport,

of passengers or goods to which any provisions of paragraph *(a)*, *(b)* or *(c)* apply; or . . .'

In short, in terms of these provisions the supply of the services of arranging of the transport of passengers for international travel is zero-rated.

Undisputed facts

[9] The additional assessments that I have referred to, were issued pursuant to a tax audit conducted by the respondent. They related to both the standard commission and the supplementary commission that the appellant had received in respect of the period in question from the three airlines mentioned below. The appellant lodged an objection to the additional assessments on the ground, *inter alia*, that these receipts had to be zero-rated under s 11(2)*(a)* and *(d)* of the VAT Act. The respondent rejected this objection and the appellant noted an appeal under the Tax

Administration Act. The hearing of the appeal was preceded by alternative dispute resolution proceedings. They resulted in a written settlement agreement between the parties in terms of which the standard commission in question would be zero-rated. In the result the appeal to the tax court concerned only the additional VAT assessments in respect of the supplementary commission and interest thereon.

[10] The appellant received payment of the supplementary commission in question in terms of three agreements (the incentive agreements). They were entered into with international airlines with a South African corporate presence. The incentive agreements were: a Retail International Supplementary Commission Agreement with South African Airways (SOC) Ltd (the SAA agreement); an Incentive Agreement with Air Mauritius SA (Pty) Ltd (the Air Mauritius agreement); and an Agent Incentive Agreement with Virgin Atlantic Airways Ltd (the Virgin Atlantic agreement). The standard commission was payable under separate agreements with these airlines.

[11] The only witness in the tax court was Mr Colin Mitchley. He previously served as the chief financial officer of the appellant and was called by the appellant. He explained the background to the incentive agreements in these terms:

'18. As regards the manner in which travel agents earn their income, the position has changed over time.

19. Up until about 2005, travel agents did not receive any fees or remuneration directly from customers. The entire income stream was earned by way of commissions paid by the suppliers or service providers (including airlines) with whom customers books.

20. The industry standard in South Africa was for airlines to pay agents a commission of 7% of the value of flights arranged on their carrier.

21. By 2005 an international trend was developing to reduce the agent commission. SAA, as the dominant market player in South Africa, followed this trend and announced that it would reduce the standard commission to 1%. Other carriers followed suit.

22. To ensure that the industry remained viable, travel agents started charging service fees directly to clients over and above the standard commissions earned.

23. At around the same time, there was an increase in volume-driven commission structures, which agents specifically negotiated on an airline-by-airline basis. Such

agreements were not unknown before 2005, but now they became prominent. They were based on meeting certain agreed targets of ticket sales revenue on that particular airline.

24. These types of arrangement – referred to as supplementary commission – also helped agents to make up what was lost when the percentage of standard commissions was reduced.

25. In summary, what was an income stream comprising a 7% standard commission has been replaced by a lower standard commission, a negotiated supplementary commission based on volumes of sales, and a fee charged directly to clients.'

The witness emphasised that despite this change of the remuneration structure, the appellant's services remained the same.

[12] The material terms of the incentive agreements were not identical. The Air Mauritius agreement and the Virgin Atlantic agreement were so-called 'back to rand one' agreements. Each provided, in essence, that once the agreed target in respect of international airline ticket sales was reached, supplementary commission would be payable to the appellant in respect of all of these sales during the relevant period, in addition to the standard commission. The SAA agreement was not a 'back to rand one' agreement. In terms thereof, only supplementary commission would be payable in respect of sales of airline tickets after the target was reached. In other words, for airline ticket sales up to the target, only the standard commission would be earned and for sales thereafter, the appellant would only charge the supplementary commission.

[13] Both the SAA agreement and the Virgin Atlantic agreement contained provisions in respect of marketing campaigns to be conducted by the appellant. In terms of these provisions, such marketing campaigns would be executed in accordance with agreed plans and budgets. The appellant accordingly charged separate fees, as well as VAT at the standard rate, for its services in respect of marketing campaigns.

[14] In the pleadings in the tax court the respondent's case was that the appellant had received supplementary commission as incentives for promoting the sales of international airline tickets above agreed targets, the payment of which was conditional upon the appellant achieving the predetermined sales targets. The cross-examination of Mr Mitchley focused on this contention. The tax court, however, determined the matter on a basis that the respondent had not relied upon. It held that the supplementary commission had been paid for the supply of the services of marketing and promotion of the sales of airline tickets for international travel. It said that the supplementary commission was payable because of successful marketing and promotion campaigns. This approach was impermissible and wrong. As I have demonstrated, the SAA and Virgin Atlantic agreements contained separate provisions in respect of marketing and promotional services and the Air Mauritius agreement made no such provision.

Discussion

[15] It is convenient to commence the analysis by stating the obvious, namely that in the context of this case VAT could only be payable on a supply of services as defined in the VAT Act. If there was no such supply of services, there could be no liability for VAT at all. This takes care of the case of the respondent before the tax court, as well as the variation thereof presented before us. It will be recalled that in the tax court the respondent's case was that the supplementary commission was an incentive for promoting sales of airline tickets, the payment of which was conditional upon the appellant achieving the predetermined sales targets. In this court the respondent submitted that the incentive was earned on meeting the revenue targets and not for arranging the transport of passengers. But these contentions did not identify a supply of services for which the incentive was paid. The meeting of a revenue target is not a supply of services. That payment of supplementary commission was conditional upon reaching the targets, says nothing about the supply of services that it was paid for.

[16] So, what was the supply of services for which the supplementary commission was paid? The respondent correctly accepted that the services of arranging of the transport of international passengers were rendered through the sales of airline tickets. That formed the basis of the concession that the standard commission was zero-rated under s 11(2) of the VAT Act. The facts of this matter make clear that the supplementary commission was earned for exactly the same supply of services than the standard commission.

[17] Under the SAA agreement, the supplementary commission was the only consideration for the sales of airline tickets after the target had been reached. In terms of the Air Mauritius and Virgin Atlantic agreements the supplementary commission constituted additional consideration for the sales of airline tickets. Once the agreed threshold was reached, each ticket sold attracted both standard and supplementary commission. Put differently, in terms of these agreements the supplementary commission was paid for the sale of a particular volume of airline tickets. That the same services gave rise to more than one type of consideration could not alter the nature of the services. It follows that the supplementary commission falls to be zero-rated under s 11(2) of the VAT Act and that the appeal has to succeed. The order of the tax court should be altered to set aside the additional assessments in respect of the supplementary commission in question.

Costs

[18] Costs of the appeal should follow this result. The appellant asked to be awarded its costs in the tax court. It contended that the grounds of the additional assessments in respect of the supplementary commission were unreasonable as contemplated in s 130(1)*(a)* of the Tax Administration Act. The mere fact that the grounds of the additional assessments did not subsequently withstand scrutiny, could not render them unreasonable. I am not persuaded that there is a proper foundation for a finding that they were unreasonable. Consequently, there should be no order as to the costs in the tax court.

[19] For these reasons the following order is issued:

1 The appeal is upheld with costs.

2 The order of the tax court is set aside and replaced with the following:

‘The additional VAT assessments in respect of the appellant’s February 2012 to December 2016 VAT periods, to the extent that they impose VAT at the standard rate on supplementary commission paid to the appellant, are set aside.’

_____

C H G VAN DER MERWE

JUDGE OF APPEAL

Appearances:

For appellant:	M W Janisch SC
Instructed by:	Werksmans Attorneys, Johannesburg
	Symington & De Kok Attorneys, Bloemfontein
For respondent:	A E Bham SC with N K Nxumalo
Instructed by:	The State Attorney, Johannesburg
	The State Attorney, Bloemfontein