

Case: Commissioner for SARS v Marshall NO

7 October 2016

In brief

The Supreme Court of Appeal (SCA) handed down judgment on 3 October 2016 regarding the supply of services by a welfare organisation. The issue pertained to whether the supply was a deemed supply in terms of section 8(5) of the Value-Added Tax Act No. 89 of 1991 (VAT Act) and hence subject to VAT at the zero rate.

This judgement will impact welfare organisations specifically making supplies to a public authority, as well as municipalities and other associations not for gain.

In detail

In brief, the respondents were the seven trustees of the South African Red Cross Air Mercy Service Trust (the Trust), a non-profit organisation that is an approved public benefit organisation and a South African VAT vendor.

The Trust provides an aero-medical service (i.e. specialised intensive care, emergency medical rescue and ambulance services) in South Africa based on agreements entered into with provincial government health departments.

As consideration for the Trust's services, the provincial government pays the Trust based on the tariff schedule.

The Trust applied to the Commissioner for the South African Revenue Service (the Appellant) for a binding private ruling requesting confirmation that the payments it received in respect of these services qualified for zero-rating in terms of section 11(2)(n) of the VAT Act as it constituted a deemed service in terms of section 8(5) of the VAT Act.

The Trust successfully applied to the Gauteng Division of the High Court, Pretoria for a declaratory order to confirm its interpretation. SARS appealed the decision directly to the SCA.

The issue on appeal was whether section 8(5) of the VAT Act applies only to services deemed to

have been rendered, or also to services actually rendered and as a result, that the consideration received from the departments in respect of the supply of the services should be zero-rated in terms of s 11(2)(n) of the Act).

The SCA referred to the *Natal Joint Pension Fund case* to set out the principles applicable in the process of ascertaining the meaning of legislative provisions. These include a review of the language used, the context of the provision, and the purpose the provision is intended to serve.

Adopting this approach, the Court stated that the word 'deemed' is intended to imbue a person or thing with features or qualities he or it does not, in reality, have. The word 'deemed' is therefore not appropriate where the person or thing actually has those features.

Furthermore, with regard to the use of the word 'payment' in section 8(5), the legislature must have intended that a payment contemplated in section 8(5) would be different from consideration as defined. Payment therefore includes an unrequited payment such as a grant, subsidy or donation to a designated entity (i.e. welfare organisation).

After reviewing the context and language of the provisions, the Court highlighted aspects of the

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Trust's argument as addressed in Interpretation Note 39 (IN 39).

IN 39 sets out the rationale behind the VAT treatment of public authorities prior and post April 2005.

On this basis, the zero-rating provisions would only apply to the extent that payment received by the Trust would not constitute consideration for a taxable supply in terms of section 7(1)(a) of the VAT Act.

The takeaway

While the zero-rating of services is most favourable for any transaction in the VAT system, there is no reason why, where PBOs engage in commercial activities they should be treated any differently from other commercial entities.

Let's talk

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On this basis, the Court held that the payment received by the Trust from the provincial health department, for the actual supply of services was taxable under section 7(1)(a) of the VAT Act and falls outside the scope of section 8(5) of the VAT Act.

Accordingly, the deeming provision is not applicable to the Trust and the consideration received would not qualify for zero-rating in terms of section 11(2)(n) of the VAT Act and to hold otherwise would be in contradiction of the fundamental architecture of the VAT Act as well as impact negatively on the fiscus.

The order of the court a quo was set aside and dismissed with costs accordingly.

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