



# Tax

# Alert

12 April 2021

## Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

### Matthew Besanko

Cape Town  
+27 (0) 21 529 2027  
[m.besanko@pwc.com](mailto:m.besanko@pwc.com)

### Rodney Govender

Durban  
+27 (0) 31 271 2082  
[rodney.govender@pwc.com](mailto:rodney.govender@pwc.com)

### Juan Swanepoel

Johannesburg  
+27 (0) 11 797 4747  
[juan.s.swanepoel@pwc.com](mailto:juan.s.swanepoel@pwc.com)

## Value-added tax: the importance of contracts and VAT

### In brief

A recent tax court case considered the nature of services provided by a company and concluded that the international commission received was in respect of marketing and promotion services and is not related to the arranging of international transport services.

### In detail

On 11 December 2020, the Tax Court of South Africa (Gauteng Local Division) delivered judgment in the matter of ABC (Pty) Ltd v the Commissioner for the South African Revenue Service (case no VAT 1715). The matter involved an appeal against additional assessments raised by SARS.

ABC had received income in connection with contracts concluded with three different airlines that had a local presence in South Africa. In terms of these contracts, ABC was required to sell airline tickets to passengers on behalf of the airlines, and earned commission on these sales.

Prior to 2005, travel agents earned standard commission on the sale of each ticket at a flat rate of 7%. In 2005 however, the fee structure was changed to a flat rate commission of 1% (or 0% in some instances), with an

additional commission (an "international supplementary commission") being payable on the achievement of certain sale thresholds determined on the basis of each individual contract.

ABC was of the view that the services it provided in relation to the international supplementary commission constituted the arranging of international transport and, as such, qualified to be zero-rated.

The Commissioner, however, adopted the position that the incentive payments were made in relation to the marketing and promotion of tickets, and accordingly raised additional assessments subjecting the international supplementary commission to VAT at the standard rate.

After unsuccessfully objecting against the additional assessments, ABC appealed to

the Tax Court.

### **Issue at hand**

At issue was the application of section 11 of the VAT Act, and whether ABC had correctly zero-rated its services. Put simply, the Court had to determine whether ABC's services constituted the arranging of international transport.

### **ABC's argument**

ABC argued that VAT is levied on the supply of services (and not the consideration received in respect thereof). It contended that the international supplementary commission was in respect of the volume of airline tickets sold, which constituted the arranging of international transport, and therefore qualified to be zero-rated. ABC was of the view that it merely sold tickets, and did not provide additional services. In this regard, it argued that the contracts with the airlines did not give rise to an obligation to perform any extra services other than the sale of the airline tickets. The marketing and promotion activities were conducted and paid for separately and taxed accordingly, and did not constitute additional services to the airlines.

### **Commissioner's view**

The Commissioner argued that there were two different contracts that needed to be considered separately, namely:

- the contracts concluded between ABC and the passengers entitling the passengers to seats on an airline; and
- the contract concluded between ABC and the airlines entitling ABC to receive incentive payments based on the volume of sales concluded.

The Commissioner contended that the international supplementary commission, which was dependent on the volume of sales, was not in relation to the entitlement of passengers to travel and, consequently, that the income was not in relation to the arranging of transport for passengers.

### **Judgment**

The Tax Court outlined the current jurisprudence regarding the interpretation of legal documents, particularly on the requirement to interpret contracts in light of their surrounding context.

The Court reviewed various clauses of the

contracts concluded between ABC and the airlines, and considered the nature of the incentive payments. It concluded that a common thread between these contracts was that ABC was appointed to market and promote the selling of the airline tickets. The trigger point for the incentive payment was the meeting of certain thresholds regarding the volume of sales.

The Court rejected ABC's contention that its services were solely for the sale of the airline tickets, and held that the marketing and promotion aspect of its service was paid for by way of the international supplementary commission payment, and that such payment was not earned for the transport of passengers.

The Court therefore agreed with the SARS assessments and dismissed the appeal. The Court did not, however, award costs in favour of the Commissioner, on the basis that the appeal was not considered unreasonable by the Commissioner.

### **Takeaway**

The decision illustrates the trend of the Courts to pay closer attention to the interpretation of contracts. It is more important than ever for parties to contracts to pay close attention to the details of the contracts and ensure that their intention is properly reflected. Parties to contracts should ensure that there are no clauses which give rise to ambiguity.

Should the tax consequences of a supply be called into question, the terms of the contract will be the main consideration.

This Alert is provided by PricewaterhouseCoopers Tax Services (Pty) Ltd for information only, and does not constitute the provision of professional advice of any kind. The information provided herein should not be used as a substitute for consultation with professional advisers. Before making any decision or taking any action, you should consult a professional adviser who has been provided with all the pertinent facts relevant to your particular situation. No responsibility for loss occasioned to any person acting or refraining from acting as a result of using the information in the Alert can be accepted by PricewaterhouseCoopers Tax Services (Pty) Ltd, PricewaterhouseCoopers Inc. or any of the directors, partners, employees, sub-contractors or agents of PricewaterhouseCoopers Tax Services (Pty) Ltd, PricewaterhouseCoopers Inc. or any other PwC entity.

© 2021 PricewaterhouseCoopers ("PwC"), a South African firm, PwC is part of the PricewaterhouseCoopers International Limited ("PwCIL") network that consists of separate and independent legal entities that do not act as agents of PwCIL or any other member firm, nor is PwCIL or the separate firms responsible or liable for the acts or omissions of each other in any way. No portion of this document may be reproduced by any process without the written permission of PwC.