IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

..... DATE ..... SIGNATURE

CASE NO: 864/2014

In the matter between:

RESPUBLICA (PTY) LTD : APPLICANT

and

THE COMMISSIONER : RESPONDENT

FOR THE SOUTH AFRICAN

REVENUE SERVICES

JUDGEMENT

SEMENYA AJ:

[1] The applicant, Respublica (PTY) Ltd (Respublica) entered into a five year lease agreement expiring on 31st December 2016 with Tshwane University of Technology (TUT) in respect an immovable property situated at Erf 750 Kwaggasrand, province of Gauteng. The property in question was let to TUT for the sole purpose of accommodating its students.

[2] The property is divided into smaller units which are fully furnished with a kitchenette, bathroom and bedroom/ living area. Respublica supplies domestic goods and services in the form of water and electricity, maintenance costs, management of the building, a common TV room and laundry services.

[3] The monthly rental payable by TUT comprises of an amount of R1, 376,480, 00. It is recorded in the agreement that an amount of R275. 00 is payable for utilities and shall be included in the monthly bed rentals. The lease agreement allows TUT to

accommodate other people during school holidays referred to as holiday users.

[4] The dispute in these proceedings is between Resbuplica and The Commissioner for the Receiver of Revenue (SARS). The question being whether-

(a) In terms of the lease agreement, the letting of accommodation by Respublica to TUT, comprise a taxable supply of commercial accommodation for value-added tax purposes and Respublica is obliged to levy and account for VAT in accordance with the Value-Added Tax Act 89 of 1991 on the rental payment it receives as consideration; and;

(b) as a consequence of the letting of accommodation by Respublica to TUT, Respublica is liable to account for VAT on only 60% of the rental income it receives in accordance with the provisions of section 10(10) of the Value-Added Tax Act 89 of 1991 (the Act).

[4] The question arises from the wording of section 10(10) of the Act which provides as follows:

> *"Where domestic goods and services are supplied at an all-inclusive charge in any enterprise supplying commercial accommodation for an unbroken period of exceeding 28 days, the consideration in money is deemed to be 60 per cent of the all-inclusive charge."*

[5] In addition to section 10(10), the Act defines commercial accommodation in section 1 as:

commercial accommodation:

"(a) Lodging, board and lodging, together with domestic goods and services, in any house, flat, apartment, room, hotel, motel, inn, guest house, boarding house, residential establishment, holiday accommodation unit, chalet, tent, caravan, camping site, houseboat or similar establishment, which is regularly and systematically supplied and where the total annual receipt from the supply thereof exceed R60.000 in a period of 12 months or is reasonably expected to exceed that amount in a period of 12 months, but excluding a dwelling in terms of an agreement for the letting and hiring thereof;

(b) Lodging or board and lodging in a home for the aged, children, physically and mentally handicapped person; and

(c) Lodging and board and lodging in a hospice."

Furthermore domestic goods and services are defined as:

"(a) cleaning and maintenance;

(b) electricity, gas, air-conditioning or heating ;

(c) a telephone, television set, a radio or similar article;

(d) furniture and fittings;

(e) meals"

(f) laundry; or

(g) nursing services."

[6] Respublica seeks a declaratory order to the effect that its supply to TUT is that of commercial accommodation and that it is liable to account for 60% of the rental it receives.

[7] The respondent is opposing the application on the bases that this court lacks the necessary jurisdiction to hear the matter as such matters should be dealt with in terms of the Tax Administration Act 28 of 2011. It also contends that the merits of the application are not in favour the order sought.

[8] I agree with Respublica that the Tax Administration Act does not oust this court's jurisdiction to hear the application as this matter involves a question of law and also because there is no disputed assessment in respect of which it could raise an objection- **Metcash Trading Ltd v C: SARS 2001 (1) SA 1109 (CC)**

[9] The parties agree that the issue revolves around interpretation of the relevant sections of the Act.

[10] A proper manner of interpretation of statutes has been enunciated as follows in **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA): (Emdumeni)**

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] it was contended on behalf of SARS that the application cannot succeed based of the following:

11.1 That the dictionary meaning of the word "lodging," as it appears in the definition of commercial accommodation in the Act, should be interpreted to refer to a natural person . That on this basis, TUT, not being a natural person, cannot lodge in the premises supplied by the applicant.

11.2 That there is no *nexus* between Respublica and the students upon which it can be argued that the students are lodgers in the leased premises.

11.3 That TUT should be regarded as a tenant and not as a lodger.

11.4 That since the dictionary meaning of lodging is "temporary accommodation", it cannot be said that a contract between TUT and Respublica, which is for a period of five years, qualifies to be of lodging.

11.5 That utilities are paid separately from the rental, and cannot be considered to be part of all-inclusive charge as envisaged in section 10 (10) of the Act.

[12] Respublica on the other hand argued that it supplies commercial accommodation on the following bases:

12.1 That the students are an integral part of the lease agreement and are required to abide by its terms. The premises are let to TUT for the sole purpose of accommodating its students.

10.2 That the students only occupy the rooms during the term and go to their respective homes during holidays making their stay a temporary one.

12.3 That there is no clause in the Act that stipulates that a lodger can only be a natural person.

12.4 That Respublica does provide domestic goods and services to the students.

12.5 That SARS interpretation of the phrase "commercial accommodation" is too restrictive and that the application is not about the meaning of the word "lodging".

[13] As the issues revolve around the interpretation of the Act, I am of the view that the correct approach would be to interpret its relevant sections in conjunction with the agreement between Respublica and TUT.

[14] In my view, SARS's reliance on the sterile dictionary meaning of the word lodger and lodging is faulty as it ignores the purpose for which the property was let to TUT being to accommodate students. That the students are indeed lodging in the property is not in dispute. I agree with Respublica that a *nexus* between the lessor and the end user is not a requirement for the supply of commercial accommodation.

[15] The argument that the lease was for a fixed period of five years and not temporary in line with the meaning of the word lodging cannot stand as it loses sight of the purpose for which the agreement was made. It is an undisputed fact that the students go home during holidays and do not occupy the same room during their stay with TUT. The students do not occupy the property continuously for the entire period of the lease.

[15] TUT students stay in the premises for a period longer than 28 days.

[16] The agreement between Respublica and TUT clearly stipulates that the amount of R275.00 payable for utilities is part of the all-inclusive charge. I see no reason why I should disregard their intention as per the agreement.

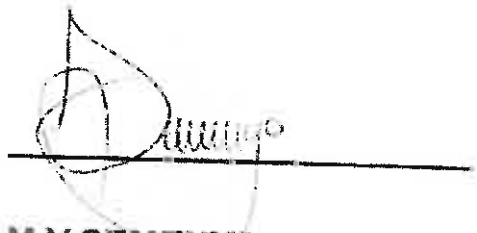
[17] It is common cause that Respublica supplies domestic goods and services as defined in the Act for use by the lodgers.

[18] The method of interpretation suggested by SARS is indeed restrictive and if applied, will result in absurdity. It cannot be said that the legislature imagined a situation where educational institutions would be in a position to own sufficient properties to accommodate all their students. A need to outsource this function from those who deal in property will always arise. I am of the view that the words used in the definition of "commercial accommodation" must be read in conjunction with the purpose for which the property was let to TUT. It would result in the most sensible meaning which is in the interest of commerce-Emdumeni. A literal manner of interpretation alone, as suggested by SARS will not make the co-business of TUT and other educational institutions

easy. It also overlooks the expenses landlords incur in maintaining buildings occupied by students.

[19] The following order is made:

1. It is declared that the letting of accommodation by Respublica to TUT in terms of the lease agreement comprises of a taxable supply of commercial accommodation for value –added tax purposes and Respublica is obliged to levy and account for VAT in accordance with the Value-Added Tax 89 of 1991 on the rental payments it receives as consideration
2. Respublica is liable to account for VAT on only 60% of the rental it receives in accordance with section 10 (10) of the Act.



M.V SEMENYA

ACTING JUDGE OF THE HIGH OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

FOR THE APPLICANT: ADV. JC VILJOEN

INSTRUCTED BY:LIEZENBERG MALAN

FOR THE RESPONDANT: ADV.

INSTRUCTED BY:BOSMAN ATTORNEYS

DATE OF HEARING:

DATE OF JUDGMENT: