IN THE TAX COURT JOHANNESBURG (MEGAWATT PARK)

CASE NO VAT 399

In the matter between:

XYZ PROPERTY FUND LIMITED **Applicant**

AND

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE **Respondent**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/~~NO~~	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
16/08/2010	_____
DATE	SIGNATURE

JUDGMENT

C. J. CLAASSEN J:

[1] XYZ Property Fund Limited is the Appellant in what I shall refer to as the main case. The Commissioner for South African Revenue Services ("SARS") is the Respondent in that appeal.

[2] Last week SARS filed a rule 24 application in terms whereof it sought a ruling from this Court that the appeal should be removed from the roll on the grounds that the input tax deductions, which are the subject of the appeal in the main case, have been allowed in full. It is contended that, by so doing, SARS in effect conceded the appeal and there is, therefore, no longer any *lis* between the parties.

[3] This matter was argued on the basis that the application in terms of rule 24 should be dealt with first, because if the application is granted it would dispense with the entire appeal. In such event, it would not be necessary to enter the merits of the appeal. Despite the fact that counsel on both sides traversed the matter far and wide, it seems to me that the application in terms of rule 24 can be decided on a fairly narrow basis. It would only be necessary to refer to common cause facts, as they appear from the papers in this matter.

[4] The Appellant is a property investment holding company. In June 2004 it issued what is known as "linked units", each comprising one share and one debenture, to raise capital for the acquisition of properties. These shares were thereafter listed on the Johannesburg Stock Exchange. The Appellant, whom I shall for convenience sake refer to as XYZ Property Fund, appointed ABCX [Pty] Limited to act as its promoter to assist in creating and issuing the linked units and acquiring the properties. ABCX issued four invoices pursuant to the promoter's agreement concluded between it and XYZ Property Fund. Invoice 86 dated the 2nd of July 2004, was for an amount of R40 727 516, plus VAT of R5 701 852.24. It subsequently issued three further invoices, numbers 122, 131 and 221. It is not necessary to refer to these latter three invoices, as the parties had agreed that the outcome of the Court's decision in regard to the VAT payable in terms of invoice 86 will also determine the outcome of the VAT payable in terms of the other three invoices. XYZ Property Fund initially claimed the

full amount of VAT, which it paid on the promoter's fees, as an input tax deduction, arising from invoice number 86. This return was submitted in July 2004. In January 2005 XYZ Property Fund voluntary, and of its own accord, reversed the said input tax deductions to the extent of R1 352 107.54 ("R1.3 million"). It did so on the basis that the VAT relating to the linked units did not qualify as input tax, as defined and/or understood by SARS. Accordingly, XYZ Property Fund treated the costs relating to the properties differently from the costs relating to the linked units. The effect of the aforesaid reversal was that XYZ Property Fund actually paid back to SARS the amount of R1 352 107.54, which it claimed as an input deduction in its tax return of July 2004. It is common cause that thereafter, during June 2005, XYZ Property Fund decided to reclaim this amount, which was reversed in January of 2005. It did so on the advice of its legal representatives, who decided that in terms of certain recent decisions, XYZ Property Fund would be entitled to such input tax deduction.

[5] On 15 September 2005, SARS issued the disputed assessment, disallowing the deduction of R5 701 852 as contained in the July 2004 return, not knowing that XYZ Property Fund had actually reversed portion of that amount to the extent of the R1.3 million, during January 2005. It subsequently raised a query with XYZ Property Fund in regard to the amount of R1.3 million, which then resulted in certain correspondence passing between the parties. This correspondence did not succeed in eradicating the confusion, as far as SARS was concerned, as to whether the amount was paid. SARS understood the position, at that stage, to be that the amount of R1.3 million was still being claimed in the July 2004 return.

[6] Eventually, in September 2005, XYZ Property Fund objected to the assessment issued by SARS wherein it disallowed the amount of R1.3 million as a tax deduction. XYZ Property Fund's objection is contained in a letter dated the 29th of September 2005. In paragraph 4 thereof, the grounds

of the objection are stated as being the following:

> "4.1. It does not seem as if any cognisance has been taken of the explanations of our client, and specifically its letter dated 2 June 2005. It has been clearly indicted that of the amount of R46 429 368, referred to in annexure 1 to your letter dated 15 September 2005, only an amount of R8 802 823, relates to the costs of creating and issuing the linked units. Furthermore, it was also indicated that the VAT of R1 352 107 was paid during January 2005, reversing the input credits previously claimed on the invoices relating to the costs of creating and issuing the linked units.
>
> 4.2. In any event, all of the amounts concerned qualify for the deduction of an input tax on the basis of goods or services acquired by our client, wholly for the purpose of consumption, use or supply in the course of making taxable supplies.
>
> 4.3. SARS, in its letter dated 9 May 2005, is relying on outdated authority.
>
> 4.4. In any event, the conduct of SARS is unconstitutional, especially insofar as it purports to retrospectively impose VAT.
>
> 4.5. Penalty and interest raised herein should be reversed.
>
> 4.6. In addition, an input tax claim of R1 352 107, which was made in the May 2005 VAT return, in respect of expenses incurred in creating and issuing the company linked units, should be refunded."

[7] The SARS then rejoined by stating that it disputes the payments of the amount of R1.3 million during January 2005, as well as all the other grounds of objection.

[8] In a letter dated 21 November 2005, XYZ Property Fund then lodged the appeal in the main case in terms of rule 63A of the VAT rules. In paragraph 5 of that letter it once again confirmed the grounds of objection and appeal as follows:

> "5.1. An amount of R1 352 170 was paid during January 2005.
>
> 5.2. All of the amounts concerned qualify for the reduction of input tax on the basis of goods or services acquired by our client wholly for the purposes of consumption, use or supply, in the course of making taxable supplies.
>
> 5.3. Of the amount of R46 429 368, only an amount of R8 802 823 relates to the cost of creating and issuing linked units. The balance of R31 910 543 relates to the cost of acquiring properties.
>
> 5.4. The amount of R20 316 relates to advertising results.

5.5. The legal fees are directly related to the making of taxable supplies."

[9] It would immediately be noticed that the grounds of objection in the letter dated 29 September 2005, have been somewhat truncated in the letter of 21 November 2005, when lodging the appeal. In particular, one can say that paragraph 4.1 of the former letter and paragraph 5.1 of the second letter, referred to the same question, namely whether or not the amount of R1.3 million was in fact paid by the reversal in the January 2005 return. Paragraph 4.2 in the first letter was copied *verbatim* in paragraph 5.2 of the letter lodging the appeal. Paragraph 4.3 of the former letter was left out, but the important aspect which was left out in the truncated grounds of objection and appeal, is the contents of paragraph 4.6 of the letter dated 29 September 2005. These letters are important for purposes of establishing the grounds for the rule 10 and rule 11 formulation of the parties' disputes in the appeal.

[10] Mr Brincker, on behalf of XYZ Property Fund, had some difficulty in explaining why the contents of paragraph 4.6, which referred to the May 2005 VAT return, was left out in the reformulation of the grounds of objection and appeal, contained in the letter of 21 November 2005. He submitted that the dispute emanating from the May 2005 VAT return, is covered in paragraph 5.2 of the letter of 21 November 2005, because of the words "all of the amounts concerned qualify for the reduction of input tax" used therein. I have some difficulty in accepting this interpretation of paragraph 5.2. As I have said previously, paragraph 5.2 in the letter of 21 November 2005 is merely a repetition of the contents of paragraph 4.2 of the letter of 29 September. The point of the matter is that, if it is correct that the dispute regarding the R1.3 million, referred to in the May 2005 VAT return, was to resort under the words "all of the amounts concerned qualify for the deduction", then the obvious question arises, why then was it necessary in the letter of 29 September, to mention that particular dispute separately in paragraph 4.6? To any reader it seems obvious that 5.2 and 4.2 are merely

"catch all" phrases, which do not specifically refer to specific issues, such as the issue arising from the May 2005 VAT return.

[11] I am, therefore, driven to the conclusion that on a proper reading of paragraph 5 of the letter of 21 November 2005, XYZ Property Fund never sought to include the dispute arising out of the May 2005 VAT return, as an issue in the appeal. I am fortified in this conclusion by the fact that the parties, thereafter, filed rule 10 and rule 11 pleadings, respectively. It is common cause that, in terms of XYZ Property Fund's rule 11 grounds of appeal, no mention whatsoever was made of any dispute arising out of the May 2005 VAT return. It would therefore seem to me that the issues currently placed before this Court excludes any reference to the disputed May 2005 VAT return. That being the case, the actual disputes between the parties, prior to the May 2005 VAT return, can only be established with reference to the VAT return of July 2004, and the reversal of the amount of R1.3 million as contained in the January 2005 VAT return. I am of the view that there is no longer any *lis* between the parties, for the simple reason that, whatever amount was claimed by XYZ Property Fund, was voluntary retracted in its reversal in January 2005. SARS thereafter conceded the situation with regard to these two VAT returns and, in effect, did not dispute any further issues with XYZ Property Fund.

[12] Mr Brincker attempted to include within the ambit of the current issues before this Court, the disputed May 2005 VAT return. He submitted that that was a proper claim for the amount of R1.3 million, and that it is indeed a dispute which is currently before this Court. It then becomes necessary to turn to the particular VAT return for May 2005, which was submitted on 24 June 2005. Opposite item 18, there is a manuscript inclusion, which reads as follows:

> "14% share issue expenses on listing now claimed as input deduction."

The amount of R1 352 107.64 is then included in the space provided opposite item 18. At the bottom, another manuscript inclusion reads as follows:

> "14% of share issue expenses incurred on listing, to be refunded by SARS. Not claimed previously as an input deduction."

[13] If one then looks at the amounts that appear in the return, it shows that the total output tax amounted to R4 035 460.78. This amount appears opposite item 13. Opposite item 15, the amount of input tax is reflected as R1 404 644.57. Opposite item 19, which is supposed to be the total input tax, the aforesaid amount again appears, without the addition of the amount of R1 352 107.64. Opposite item 20, the VAT payable is reflected as R2 630 815.72. This is repeated again opposite item 22. From this format of the amount due in terms of this VAT return, it is obvious that the amount of R1 300 000, was not deducted from the output tax, as an input tax. What appears is merely a statement of 14% share issue expenses in that amount, which is now claimed as an input deduction.

[14] The question is, how should an input deduction be claimed? Section 16(3) of the Value Added Tax Act, No 89 of 1991, states as follows:

> "Subject to the provisions of sub-section 2 of this section and the provisions of sections 15 and 17, the amount of tax payable in respect of a tax period shall be calculated by deducting from the sum of the amounts of output tax of the vendor, which are attributable to that period, as determined under sub-section 4, and the amounts, if any, received by the vendor during that period by way of refunds of tax charged under section 71B and C and 73A, the following amounts."

It is not necessary to refer the rest of sub-section 3.

[15] Suffice to say that the methodology prescribed in sub-section 3 expressly requires the input tax to be deducted from the sum of the output tax for that particular period. A mere manuscript inscription recording an intention to claim a certain amount as an input tax deduction without

actually deducting it, in my view, does not comply with the express provisions of section 16(3) of the Act.

[16] I am fortified in the aforesaid conclusion, if reference is had to the *proviso*, which appears just before sub-section 4, which reads as follows:

> "Provided that (i) where any vendor **is entitled** under the preceding provisions of this sub-section **to deduct** any amount in respect of any tax period from the said sum, **the vendor may deduct** that amount from the amount of output tax attributable to a later tax period, which ends no later than five years after the end of the tax period, during which…" (Emphasis added)

This *proviso* expressly requires the **actual deduction** of any input tax from any output tax.

[17] In my view, the legislature clearly intended that VAT returns should be exact in so far as the amounts are concerned of the output tax and the input tax and the resultant amount after the latter is deducted from the former. It seems to me to be common sense that these documents, when captured on the SARS computer network, should clearly set out adjacent to item 22, the actual amount of VAT tax payable after the deductions have been made. If no such deductions were made in respect of certain amounts, then, in my view, it cannot be said that such amount was properly claimed.

[18] Thus, I am of view that the scope of issues, as defined by the pleadings, excludes any reference to the disputed deductions in the May 2005 VAT return, and that the VAT return itself, does not indicate that the disputed amount of R1.3 million was actually deducted as provided for by the Act. Mr Brincker also sought to persuade us that SARS seem to have thought that the amount of R1.3 million, is an issue in this particular appeal. Reference was made to a letter written by Ms Y, dated the 3rd of March 2006, wherein she states the following:

> "I would like to update you on the issues raised in relation to the above appeal…I

> confirm that the only remaining issue relates to the input tax on the listing costs. SARS' intention in this regard is to proceed to Court."

[19] Mr Brincker sought to interpret this letter as a concession on the part of SARS that the amount of R1.3 million, as contained the May 2005 VAT return, is in fact a dispute in this appeal. I cannot agree with such submission. At best, the letter of Ms Y is ambiguous. It does not specifically state that the reclaiming of R1.3 million, pursuant to the May 2005 VAT return, is in fact a dispute in the current appeal. More so, it refers to the only remaining issue, as relating to, "the input tax." That is exactly what the May 2005 VAT return does not do. It does not deduct the disputed amount as an input tax. I'm therefore of the view that that argument cannot prevail.

[20] Reference was also made to a letter by Ms Y, dated 12th February 2009, wherein she refers to how SARS treats VAT on the issue of linked. In sub-paragraph 3 of this letter, the following is stated: "May 2005 XYZ Property Fund claimed R1 352 107 in respect of the share issue." Mr Brincker sought to argue that this again is a recent codification of a dispute that is to be resolved by this Court. Again, I cannot agree with this submission. It merely states, as a summary, the way in which SARS dealt with the alleged amount. Whether or not that was correct is for a Court to decide, and not Ms Y.

[21] I am therefore of the view that only one conclusion can be arrived at, and that is that the May 2005 VAT return does **not** constitute part of the issues in the appeal before this Court. In any event, there is no request by XYZ Property Fund that this Court should regard it as a refund, pursuant to the provisions of section 44(2)(a) of the Act. Whether or not it constitutes a claim for a refund in terms of section 44, is not necessary to decide, since no reference was made in the pleadings that it should be regarded as a refund, pursuant to the provisions of section 44.

[22] For the aforesaid reasons, I am of the view that the application for removal of the appeal was well taken. It would seem to me that SARS is correct in its contention that there is in fact no longer any *lis* between the parties, if consideration is taken of the July 2004 VAT return, as read with the January 2005 VAT return. The application ought, therefore, to succeed.

[23] The only question remaining is one of costs. In my view counsel for SARS, Mr Rogers and Mr Bloomberg, correctly submitted that no cost order should be made and that each party pay their own costs.

[24] We, therefore, unanimously issue the following order:

> This appeal is removed from the roll. Each party is ordered to pay its own costs.

DATED THE 4TH OF MAY 2010 AT MEGAWATT PARK

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicant: Dr Brinker
Counsel for the Respondent: Adv O. Rogers SC
Adv Bloomberg
Commercial Member: Mr L. King
Accountant Member: Ms T. Fubu
Date of Argument: 4 May 2010