**IN THE TAX COURT OF SOUTH AFRICA**
**(CAPE TOWN)**

VAT CASE NO: 872

In the matter between:

**ABC (PTY) LTD** Appellant

And

**THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE** Respondent

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**JUDGMENT DELIVERED ON 2 DECEMBER 2013**

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**YEKISO, J**

[1] This is an appeal in terms of the provisions of section 33 of the Value Added Tax Act, 89 of 1991 ("the VAT Act"). The appeal is against the decision by the Commissioner for the South African Revenue Service ("the respondent") on 15 June 2010 to disallow the appellant's objection to the assessment raised by the respondent on 21 September 2009 in respect of the 2006 and the 2007 VAT periods of assessment. The appellant, ABC (Pty) Ltd, is a registered vendor in terms of the provisions of the VAT Act and conducts its business in Cape Town.

[2] The respondent conducted an audit into the tax affairs of the appellant and discovered that the appellant received sponsorships in kind from various sponsors but failed to declare output VAT on such sponsorships. Arising from such audit, the respondent raised an assessment and also levied interest on the assessment so raised.

[3] The assessment raised for the 2006 VAT period of assessment was in an amount of R508,227-51, whilst the assessment raised for the 2007 VAT period of assessment was in an amount of R258,802-53. The amount of interest levied on the 2006 VAT period of assessment was in an amount of R188,902-64, whilst the amount of interest levied on the 2007 VAT period of assessment was in an amount of R64,597-12. The amount in dispute in this appeal, comprising as it is of the assessments raised for the 2006 and the 2007 VAT periods of assessment, together with interest levied thereon, is in an amount of R1,020,659-80.

[4] The appellant admits that it was obliged to account for output tax on the aforementioned amounts for the relevant periods of assessment and failed to do so but, on the other hand, the appellant submits that it was, in principle, also entitled to deduct, from that output tax, input tax in respect of the supply of goods and services supplied to it by the sponsors during the relevant periods of assessment.

[5] On 9 November 2009 the appellant lodged an objection against the respondent's assessment. The respondent, in turn, disallowed the appellant's objection to the assessment, such objection having been disallowed on 15 June 2010. On 8 July

2010 the appellant filed an appeal against the respondent's disallowance of its objection.

[6] The main issue in dispute in this appeal is whether the appellant should be allowed to deduct input tax in respect of supplies made to it by the sponsors during the relevant periods of assessment despite the fact that the sponsors have not issued it with tax invoices in respect of those supplies. The dispute, as formulated by the respondent, revolves around the question as to whether the amounts sought to be deducted by the appellant, as an input tax deduction, qualify for such deduction in terms of the VAT Act.

[7] The respondent adopts the position that the amounts sought to be deducted as input tax deduction do not qualify for input deduction under the VAT Act, because the appellant did not comply with the substantive and procedural requirements to claim and to deduct input tax on those supplies and that the appellant's appeal, based as it is to the asserted principled entitlement to deduct input tax, cannot succeed.

**FACTUAL BACKGROUND**

[8] At all material times, the appellant carried on business as the owners and organisers of a world acclaimed Festival, the latter being an annual international festival annually held during the months of either March or April of any given year. In the course of organising such events, the appellant obtained sponsorships for its 2006 and 2007 edition of the festival from, amongst others, the following sponsors:

[8.1.] X (Pty) Ltd ;

[8.2.] V Corporation Ltd;

[8.3.] Y Ltd; and

[8.4.] G Entity.

[9] In terms of the sponsorship agreements, the sponsors agreed to contribute and did contribute to the organisation and bringing into fruition festivals for the years 2006 and 2007 by providing the appellant with certain services and cash payments. The services provided by the sponsors to the appellant included flight tickets on the X (Pty) Ltd flights; airtime to broadcast the festival promotions and advertisements on certain V (Pty) Ltd radio stations and television channels; and certain city or municipal services.

[10] In return for the sponsorships, the appellant agreed to provide and did provide the sponsors with certain services, these being festival stage branding, which entailed the sponsors' logos being displayed on the backdrop of the stage; festival venue branding, which entailed the sponsors' logos being displayed on the venue; the sponsors' logos to be displayed in all promotions, advertisements and events associated with the festival in all mediums of communications used; and corporate hospitality marquees, accommodation and festival tickets.

[11] The sponsors did not charge VAT on the supply of goods and services made or rendered to the appellant and no VAT was paid by the appellant on the sponsorships so received. The sponsors did not issue tax invoices to the appellant in respect of the services they provided to the appellant. The appellant, in turn, did not issue the

sponsors with tax invoices in respect of the services it provided to the sponsors in terms of the sponsorship agreements.

[12] The appellant's VAT returns for the 2006 VAT period of assessment were submit to the respondent on 25 January 2007 and those in respect of the 2007 VAT period of assessment were submitted to the respondent on 25 January 2008. The appellant did not declare output tax on the value of the services supplied to it by the sponsors in its VAT returns for the relevant periods of assessment nor did it claim input tax on the value of the services supplied to it by the sponsors in any of its VAT returns. It was on the basis of an audit conducted into the tax affairs of the appellant that the respondent raised the assessments and levied taxes as indicated in paragraph 3 of this judgment.

[13] In the objection lodged with the respondent the appellant objected to the assessments in dispute and to other assessments relating to the disallowance of input tax claimed on certain entertainment expenses and rental of passenger vehicles. The appellant's objections to the other assessments and the penalties levied on the sponsorship output tax were allowed but its objections to the output tax on the sponsorship and interest levied thereon were disallowed.

[14] The appellant states in its submissions that it repeatedly demanded from the sponsors that it be provided with tax invoices to enable it to claim input tax deduction. When the sponsors failed to issue the appellant with the required tax invoices, the

appellant informed the respondent of the failure by the sponsors to provide it with the required tax invoices, coupled with a demand that the respondent, consistent with its responsibility to carry out the provisions of the VAT Act, forces the sponsors to issue the appellant with the required tax invoices. In paragraph 3.2.5 at page 13 of the dossier the appellant states that the respondent is obliged to carry out the provisions of the VAT Act and that, in view thereof, it is expected of the respondent to force the sponsors to issue the appellant with such tax invoices.

**INPUT TAX**

[15] In resisting the appeal the respondent makes a point in its submissions that the amounts which the appellant seeks to have deducted as input tax do not qualify as input tax as defined in the definition section of the VAT Act. In this regard, the respondent refers to the definition of input tax in the definition section of the VAT Act which, where appropriate, provides as follows:

> "Input tax, in relation to a vendor, means –
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> (a) tax charged under section 7 and payable in terms of that section by
>
> (i) a supplier on the supply of goods or services made by that supplier to the vendor; or
>
> (ii) … "

[16] The point made by the respondent in its submission is that the definition of "input tax" in the VAT Act contemplates two types of input tax, these being actual input tax and notional input tax. The submission goes further to point out that in this context, paragraph (a) of the definition of "input tax" deals with input tax actually charged and

payable or paid for the supply of goods or services to the vendor. The submission goes further to point out that the amount charged and payable within context of this definition is the actual input tax paid or payable on the supply of goods or services rendered to the vendor provided all the substantive and procedural requirement entitling a vendor to deduct input tax have been complied with.

[17] As the sponsors did not charge VAT on the supply of the sponsorship to the appellant, and no VAT was payable or paid by the appellant on those sponsorships, the amounts sought to be deducted by the appellant as input tax in respect of the sponsorships do not fall within the ambit of paragraph (a) of the definition of “input tax”. The submission is based thereon that the reason the amounts sought to be deducted do not satisfy the specific requirements of paragraph (a) of the definition of “input tax”, is that VAT must have been actually charged and paid or payable on the supply of goods or services rendered to the vendor for such deduction to be allowed. Based on these submissions the respondent submits that the amounts the appellant seeks to have deducted as input tax do not qualify as input tax in as much as no input tax has actually been charged and, accordingly, no input tax was paid or became payable for the supply of goods or services rendered to the appellant.

[18] The appellant does not suggest in its submission that it paid input tax in respect of the goods supplied and services rendered to it by the sponsors. As a matter of fact, the appellant does not assert that it was charged tax in terms of section 7 of the VAT Act in respect of supplies made to it by the sponsors or, that the amount sought to be

deducted is payable in terms of that section. All that the appellant asserts is that, in principle, it is entitled to deduct input tax which otherwise would have been charged for the supply of goods and services rendered to it by the sponsors.

[19] The reason the appellant cannot deduct input tax on the sponsorships received from the sponsors is because the sponsors did not provide the appellant with tax invoices on such sponsorships to enable the appellant to claim input tax deduction based on such sponsorships. It is for this reason that the appellant seeks what appears to be an order that the respondent forces the sponsors to issue the appellant with such tax invoices.

[20] Section 16(2) of the VAT Act provides that no deduction of input tax in respect of any supply of goods or services shall be made unless the prescribed document in relation to that supply has been provided and is held by the vendor making that deduction at the time that the relevant return is submitted. In this regard section 16(2) of the VAT Act, where appropriate, provides as follows:

> "(2) No deduction of input tax shall be made in terms of this Act in respect of a supply or the importation of any goods into the Republic unless –
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> (a) a tax invoice or debit note or credit note in relation to that supply has been provided in accordance with section 20 or section 21 and is held by the vendor making that deduction at the time that any return in respect of that supply is furnished; or

(b) a tax invoice in terms of section 20(6) or (7) is not required to be issued, or a debit note or credit note is in terms of section 21 not required to be issued."

[21] Section 16(3)(g) of the VAT Act, on the other hand, entitles a vendor to claim, as a deduction, "any amount of input tax in relation to any supply in respect of which sub-section (2) of this section has operated to deny a deduction and the vendor has obtained, during the tax period, the prescribed document in relation to that supply"

[22] Section 16(3) of the VAT Act provides that where a vendor is entitled to claim a deduction in terms of section 16(3) such vendor may claim that deduction against output tax attributable to a later tax period which ends no later than five years from the tax period during which the tax invoice for that supply should have been issued.

[23] In turn, section 20(1) of the VAT Act provides that a supplier, who is a registered vendor, making a taxable supply to a recipient, must issue a tax invoice within 21 days of the date of that supply.

[24] Section 20(2) of the VAT Act, in turn, reads as follows:

"(2) Where a recipient, being a registered vendor, creates a document containing the particulars specified in this section and purporting to be a tax invoice in respect of a taxable supply of goods or services made to the recipient by supplier, being a registered vendor, that document shall be deemed to be a tax invoice provided by the supplier under sub-section (1) of this section where –

(a) the Commissioner has granted prior approval for the issue of such documents by a recipient or recipients of a specified class in relation to the taxable supplies or taxable supplies of a specified category to which the documents relate; and

(b) the supplier and the recipient agree that the supplier shall not issue a tax invoice in respect of any taxable supply to which this sub-section applies; and

(c) such document is provided to the supplier and a copy thereof is retained by a recipient: provided that where a tax invoice is issued in accordance with this sub-section, any tax invoice issued by the supplier in respect of that taxable supply shall be deemed to be tax invoice for the purposes of this Act."

[25] The appellant complains that it cannot deduct input tax on the VAT output as the sponsors refuse to issue the appellant with tax invoices despite repeated demands by the appellant that they issue it with such tax invoices. In terms of section 20(1) of the VAT Act the sponsors had to issue the appellant with such tax invoices within 21 days of the supply of goods or services. That the sponsors failed to do so, did not leave the appellant without remedy. The appellant could have, in terms of section 20(2) of the VAT Act, created a document deemed to be a tax invoice under those circumstances contemplated in paragraphs (a), (b) and (c) of section 20(2) of the VAT Act. The appellant is entitled to claim input tax for the period of assessment in which it was in possession of a valid tax invoice. The appellant was not in possession of a valid tax invoice during any one of the VAT periods of assessment and it is on that basis that the appellant cannot deduct input tax from the amount assessed as output tax.

**THE APPELLANT'S REMEDIES**

[26] The fact that the sponsors did not issue the appellant with a tax invoice did not leave the appellant without a remedy. As has already been pointed out, because of failure by the sponsors to issue the appellant with tax invoices, the appellant could very well have created a document, deemed to be a tax invoice, on the basis of any one of those circumstances contemplated in section 20(2)(a), (b) and (c) of the VAT Act. Refusal by the sponsors to issue the appellant with the required tax invoices could very well have been met by an appropriate court order compelling the sponsors to issue the appellant with the required tax invoices. All these are options were and probably are still open to the appellant.

[27] As correctly pointed out in the submissions on behalf of the respondent, if the appellant genuinely believed that it is entitled to the input tax deduction on the merits, but for the sponsors' refusal to issue the appellant with the required tax invoices, the appellant's appropriate remedy would have been to approach the sponsors to agree to it issuing the recipient-issued invoices and to make an application to the Commissioner in terms of section 20(2) of the VAT Act. Upon such agreement with the sponsors and the approval by the Commissioner, the appellant would then issue the recipient-issued invoices and use them to support its input tax deduction as contemplated in section 16(3)(g) of the VAT Act.

[28] There is an obligation on registered vendors, which includes the appellant, to comply with the provisions of the VAT Act. The appellant cannot, now that it failed to comply with the provisions of the VAT Act in the first place, contemplate any form of

relief in terms of which the respondent is ordered to force the sponsors to issue the appellant with the required invoices.

[29] The relief provided for in section 20(7)(b) does not assist the appellant either. The relief contemplated in section 20(7) specifically states that there must be sufficient records available to establish the category of supplies before the Commissioner may disregard the requirement that a tax invoice be issued.

[30] The transactions which form the basis of the assessments raised are barter transactions. The appellant supplied the sponsors with services on which it was liable for VAT output. The details of the services supplied are clear from the contracts and other documentary evidence. In exchange for the services supplied or rendered to the sponsors, the appellant received certain supplies from the sponsors including cash. This is a contentious mix of supplies and the category of supplies received is uncertain. In as much as one can make a determination of the category of supplies constituting the basis of liability for output tax, one cannot make a similar determination on the category of supplies constituting a basis of liability for input tax.

[31] In my view, the appellant has failed to make out a case for the relief it seeks in this appeal. In the result, the following order is made:

[31.1.] The appeal is dismissed;

[31.2.] The assessments, as raised by the respondent, are confirmed;

[31.3.] The appellant is ordered to pay the respondent's costs of this appeal.

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N J Yekiso, J