

REPUBLIC OF SOUTH AFRICA



**IN THE TAX COURT OF SOUTH AFRICA
(HELD AT MEGAWATT PARK, SUNNINGHILL)**

CASE NO: VAT 1626

In the matter between

ABC (PTY) LTD

APPELLANT

and

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

RESPONDENT

J U D G M E N T

MALULEKE AJ

[1] This is an appeal against the Value Added Tax (“VAT”) assessment by the Respondent pertaining to the Appellant’s September 2013 VAT period in terms of which the Appellant claimed a VAT refund in the amount of R24 389 036.58. This resulted from the Appellant having accounted for VAT in its return by applying the direct attribution method as opposed to the apportionment method it previously applied in respect of the VAT period July 2008 to August 2013.

[2] The Respondent opposes the appeal on the basis that the Appellant in its business makes supplies that are partly taxable and partly exempt. It is the Respondent’s case that the apportionment method ought to have been applied in respect of the return submitted during

the relevant VAT period and rejected the Appellant's direct attribution self-assessment method in dealing with VAT. In addition to rejecting the VAT refund claimed by the Appellant, the Respondent imposed penalties and interest on the assessment. The Appellant prays for an order to have the assessment raised by the Respondent set aside with costs.

[3] It is convenient at this juncture to delve into the facts of this case which are briefly set out herein below. The Appellant, under the style and name of X Exchange, supplies and exchanges traveller's cheques and currencies to inbound and outbound travelers. It consists of three divisions being Head office, Treasury and Branch network each with separate operation function. Treasury is responsible for setting exchange rates for buying and selling foreign currencies to the customers. Treasury sets the rate of the currency and adds a margin thereon. Thereafter, the rate (inclusive of the margin) is displayed on the board in the branch for customers to buy and sell the currency. Branch network is responsible for the exchange and sale of foreign currencies to customers. When the customer buys or sells the currency, the branch processes the transaction and charges the customer commission or fee for its services. The transaction is concluded when the customer enters the branch and buys or sells the currency.

[4] It is alleged that the Appellant's revenue has always consisted of standard rate supplies and exempt supplies. For many years Appellant applied the apportionment method on the input VAT that it claimed on the basis that it provided both standard rate supplies and exempt supplies. At the time this was considered to be the appropriate method of dealing with its VAT. As a result, for the VAT periods July 2008 to August 2013 the VAT incurred on all goods and services supplied by the Appellant was apportioned based on the standard turnover-based method of apportionment. The rationale for this was that all VAT incurred on goods and services were acquired for making mixed supplies, i.e both standard rate supplies and exempt supplies. Issues came to a head during September 2013 VAT period when Appellant accounted for VAT in its returns on the basis of direct attribution method.

[5] The Appellant in its VAT returns for the relevant period made adjustments of R24 389 036.56 to claim the portion of Input Tax which it previously did not claim in full and reversed the portion of Input Tax previously claimed via its Treasury division for the tax periods June 2008 to August 2013. In its letter of 24 October to the Respondent, Appellant informed the Respondent that it has since reviewed its apportionment methodology and is now of the view that it can directly attribute the VAT incurred to specific divisions within its business. This, according to the said letter, was due to the fact that Appellant was in a position to identify segments of its business generating standard rate supplies and those generating exempt supplies and allocate expenditure to different segments. It is more appropriate to claim input VAT on all expenditure of the segments of the business that produces standard rate supplies

and not claim any input VAT for expenditure of those segments of the business that produce exempt supplies, the letter stated.

[6] The Appellant stated further in that letter that there are certain departments that serve as a support function for all the segments of the business. The expenditure for those support departments cannot be directly attributed to standard rate or exempt supplies. The letter concluded by stating that the proportion of these expenses that are deemed by Appellant to be in the course of making taxable supplies, will still be based on the proportion of standard rate supplies to exempt supplies. Appellant contended that on the basis that the VAT incurred by the Branches is wholly for purposes of making taxable supplies and the VAT incurred by the treasury division is wholly for the purposes of making exempt supplies, Appellant made adjustments of R24 389 036.58 in its September 2013 VAT period to claim the portion of Input Tax which was previously not claimed in full and reversed the portion of Input Tax claimed by the Treasury division for tax periods June 2008 to August 2013.

[7] During 06 April 2016 Respondent raised additional assessments against the Appellant in terms of section 92 of the Tax Administration Act ("TAA") and disallowed the Input VAT claimed by the Branches to the extent that such VAT related to the making of exempt supplies or other non-taxable purposes. In addition, a percentage-based penalty and interest were imposed by the Respondent thereon. The Capital amount of the assessment amounted to R24 389 036.56, penalty adjustment imposed was R2 438 903.76 and interest amount imposed thereon was R5 588 214.31.

[8] On 18 May 2016 Appellant raised an objection to the assessment raised by the Respondent and on 14 November 2016 the Respondent partially disallowed the objection to the assessment. Only the part of the objection that related to percentage-based penalty was allowed and the Respondent made the relevant adjustment to the assessment. During 06 December 2016 the Appellant filed a notice of appeal against the partial disallowance of the objection.

[9] The dispute between the parties in these proceedings concerns the deductibility, for value-added tax ("VAT") purposes, of the VAT paid by the appellant in respect of the 52 branches in which it traded with its customers. The appellant maintains that this VAT paid by it was, in its entirety, "input tax" as defined in section 1 of the Value Added Tax ("VAT Act"), and therefore fully deductible from the "output tax" levied by it. Put differently this court must determine whether the Appellant was correct to apply direct attribution as opposed to apportionment method in respect of VAT incurred by its branches.

[10] It is convenient to evaluate the evidence of a witness given during the proceedings. Mr Y testified for the Appellant. He testified that he was the managing Director of the Appellant having joined the Appellant in 1997 and had been its Managing director since 2000. Since 2007 he, in addition, manages the ABC travel services as the Managing Director and has been Chief Executive Officer of the Appellant for the past 19 years. His testimony was that Appellant's business consists of 52 branches, with a staff compliment of approximately 240 members in total. That Appellant's business in essence comprise of three divisions, Head office, Treasury and the Branches. He testified that Branch expenses constitute largely rental and salary expenditures.

[11] Mr Y stated that Treasury sets the buy and sell rates in the branches daily. They make use of a system called Reuters and monitor what trades take place in South Africa and use that information in order to determine the rate at which the branches should exchange currency. He testified that the rate fluctuates several times in a day based on the movement of the Rand. He stated that the Rand is widely traded and one of the most volatile currencies in the world. It was his testimony that the treasury department comprise of two persons based at its head office in Johannesburg. That these persons are responsible for setting the exchange rates and, in addition, they monitor stock levels, borrowing levels and attended to closing out the position with the Bank as and when they deem it necessary.

[12] His testimony was further that the Appellant's trading stock consist of foreign currency notes. He gave an example that if he had \$100 000.00 notes that would constitute its stock. That the stock is imported from wholesale suppliers of notes overseas. Treasury sets pricing and the branches transact on those prices. That at the time of determining a price, a notional margin is included in the price, the actual margin is only determined after the customer leaves the branch and once the position is closed out with the bank. He testified that when the Appellant closes out its position with the Bank namely, exchanges currencies, no fee or commission is charged by the Bank. The Bank earns a margin, or profit, arising from the rate at which it is prepared to exchange currency with the Appellant but charges no fee or commission.

[13] To determine this dispute we must have regard to the applicable legislative framework and provisions of the VAT Act. In terms of section 1 of the Value-Added Tax Act, "Input Tax" is defined as:

“ **input tax**’, in relation to a vendor, means... tax charged under section 7 and payable in terms of that section... On the supply of goods or services... To the vendor... Where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are required by the vendor partly for such purpose, to the extent (as determined in accordance with the

provisions of section 17) that the goods or services consent at acquired by the vendor for such purpose”.

[14] “Taxable supply” is defined as:

“any supply of goods or services which is chargeable with tax under the provisions of section 7(1)(a) ...”.

[15] “Output tax” means as:

“tax charged under section 7(1)(a) in respect of the supply of goods and services by that vendor”.

[16] Section 7(1)(a) of Act provides that:

“subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the national revenue fund a tax, to be known as the Value-added-tax—

- (a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;
- (b) ...
- (c) ...
- (d) ...

Calculated at the rate of 15 percent on the value of the supply concerned or the importation, as the case may be.”

[17] Arising from the above definition are the words goods and services. The word “goods” as used in the Act means:¹

“corporeal movable things, fixed property, any real right in any such thing or fixed property, and electricity, but excluding—

- (a) money;
- (b) any right under a mortgage bond or pledge of any such thing or fixed property; and
- (c) any stamp, form or card which has a money value and has been sold or issued by the State for the payment of any tax or duty levied under any Act of Parliament, except when subsequent to its original sale or issue it is disposed of or imported as a collectors piece or investment article”;

¹ The underlining as used herein is not in terms of the Act but for my own emphasis.

and

“‘Services’ means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods, money or any stamp, form or card contemplated in paragraph (c) of the definition of ‘goods’.”

[18] In terms of the definitions of both “goods” and “services” it is clear that money is excluded from the definitions and this exclusion begs the question, what is money? In terms of section 1 “Money” is defined as:

- (a) coins (other than coins made wholly or mainly from precious metal other than silver) which the South African reserve bank has issued in the Republic in accordance with the provisions of section 14 of the South African Reserve Bank Act, 1989 (Act number 90 of 1989), or which remain in circulation as contemplated in the proviso to subsection (1) of that section, and any paper currency which under the said act is a legal tender;
- (b)
 - (i) any coin (other than a coin made wholly or mainly for from a precious metal) or paper currency of any country other than the republic which is used or circulated or is intended for use or circulation as currency;
 - (ii) any bill of exchange, promissory note, bank draft, postal order or money order, except where disposed of or imported as a collector’s piece, investment article or item of numismatic interest”.

[19] The above definition demonstrates that the exchange of currency is not a supply of goods or services. It is apposite to answer the question, which amounts are subject to VAT and which ones aren’t in terms of the Act? Section 10(2) of the Act provides that, saved as is otherwise provided, the value to be placed on the supply of goods or services shall be the amount of their consideration for such supply. In section 1 of the Act the word “consideration” is defined as follows:

“‘Consideration’, in relation to the supply of goods or services to any person, include any payment made or to be made... whether in money or otherwise... in respect of, in response to, or for the inducement of, the supply of any goods or services.”

[20] In terms of section 7(1)(a) the levying of VAT is subject to certain exemptions. These exemptions are found in section 12(a) of the Act which provides as follows:

“The supply of any of the following goods or services shall be exempt from the tax imposed under section 7(1)(a):

- (a) The supply of any financial services;...”

[21] The term financial services is defined in section 2(1), which must be read with the proviso thereto, to which it is subject. Section 2(1) provides *inter alia* as follows:

“For the purposes this of this Act, the following activities shall be deemed to be financial services—

(a) The exchange of currency (whether effected by their exchange of banknotes or coin, by crediting or debiting accounts, or otherwise);

...”

[22] The proviso to section 2(1), reads as follows:

“Provided that the activities contemplated in paragraphs (a),... Shall not be deemed to be financial services to the extent that the consideration payable in respect thereof is any fees, commission, merchants discount or similar charge, excluding any discount costs.”

[23] I shall now deal with the legal framework given in the preceding paragraphs above against the facts of this case together with the evidence of the witness. Counsel for the appellant submitted that the supply of money in the form of one currency in another currency is neither a supply of goods nor a supply of services. Counsel argued that that term currency used in the section 2(1)(a) is defined in section 2(2) to mean any bank note or other currency of any country other than when used as a collector’s piece, investment Attica, item of numismatic interest, or otherwise than as a medium of exchange. He then submitted, for present purposes, that the definition of currency in section 22 is virtually synonymous with the definition of money referred to above, which also refers to currency. Counsel submitted further that section 2(1)(a) of the act and the proviso thereto lie at the heart of the dispute before this court.

[24] This court was referred to the Supreme Court of Appeal decision in *The Commissioner for the South African Revenue Service v Respublica (Pty) Ltd*² in which Ponnar JA stated as follows:

“Respublica’s approach is contrary to the general principles (recognized in other VAT jurisdictions) that the VAT consequences of a supply must be assessed by a reference, first and foremost, to the contractual arrangement under which the supply is made.”

[25] In this regard counsel for the appellant submitted that the contracts between the appellant and its customers comprised the following terms: (a) agreement to exchange specified currencies; (b) at a particular rate of exchange nominated by the appellant (as determined by its Treasury division); and (c) the payment by the customers of a commission, typically at the rate of 1.5%. He argued that the witness Mr Y, testified that the customers

² [2018] ZASCA 109 (12 September 2018) at paragraphs 12 to 13.

would not know about any margin build into the exchange rate to be used, and the respondents counsel did not suggest otherwise during cross examination.

[26] Counsel for the appellant then dealt with the interpretation of section 2(1)(a) and the proviso to section 2(1), to which section 2(1)(a) is subject as follows: section 2(1)(a) deems the exchange of currency to be “financial services”, and financial services are exempt from VAT in terms of section 12(a) of the Act. It was his submission that, this is so because both sides of the transaction are equal to each other, given the exchange rate agreed to by the parties they cancel each other out and the composite transaction is regarded as “financial services” which are exempt in terms of section 12(a). He stated however that the provisional to section 2(1), which overrides section 2(1)(a), stipulates that the activity contemplated *inter alia* in paragraph a, i.e., the exchange of currency, shall not be deemed to be financial services to the extent that the consideration payable in respect thereof is any commission.

[27] It was the appellant’s submission that the only consideration, as contemplated in the proviso, payable by a customer to the appellant was the commission paid by the customer and received by the appellant. The appellant argued that the margin incorporated in the exchange rate used by the appellant as well as the two amounts of currency (in which the margin was also incorporated) was not consideration, as contemplated in the proviso for the following two reasons:

- 27.1 The defined meaning of “consideration” in section 1 is limited to supplies of “goods” and “services” and that the “exchange of currency” is neither a supply of “goods” nor supply of “services”;
- 27.2 The margin did not form part of the contract between the customers and the appellant, as it was unknown to the customers. All the customers knew, and agreed to, was the rate of exchange to be used in making the exchange.

[28] On this point the appellant argued that it stands to reason that if the customer were I asked what he/she or it paid the appellant for the exchange of currency, the answer could only be: the commission. The exchange of money for money, or currency for currency, was not consideration it was merely the replacement of one currency for another, for equal value. The appellant argued that the above submissions are consistent with their *dictum* referred to herein above of Ponnar JA, which emphasized the importance of the general principle that the VAT consequences of a supply must be assessed by reference, first and foremost, to the contractual arrangement under which the supply is made. The fact that the contract was silent as to any margin follows from the unchallenged evidence that the customers had no knowledge of the appellant’s profit margin, appellant argued.

[29] The appellant submitted that the commissions charged by it must be considered to be consideration as contemplated in the proviso to section 2(1). It submitted that this was common cause between the parties because the respondent accepted that the appellant was obliged to charge VAT on the commissions charged by it. The clear intent of the proviso is that consideration in the form of a commission removes the activity of the exchange of currency from being deemed financial services, and requires the vendor concerned to charge VAT as output tax which is payable to SARS (subject to any input tax that is deductible). The appellant submitted that its margin was not consideration as contemplated in the proviso to section 2(1). This was because the margins were not known to the customers and were known only to the appellant. They represented the appellants profit from the transaction, built into the rate of exchange used by the appellant, but nowhere in the Act is consideration regarded as synonymous with a vendor's profit. It would be a startling VAT proposition for a vendor's profit to be equated with the consideration paid to it by a customer, appellant submitted. It follows, that only the commissions where consideration for purposes of the proviso.

[30] The clear implications of the proviso is that to the extent that any consideration payable is not any fee or commission etc., the activity of exchanging currency remains deemed financial services that are exempt from VAT; whereas to the extent that the commission payable is a fee or commission etc., the activity of exchanging currency is removed from the category of being deemed financial services that are exempt from VAT. Appellant submitted that it followed that there had to be an element of consideration, in addition to any fee or commission etc., for there to be an element of the activity of exchanging currency that remained deemed financial services. Apart from being unknown to the customer, the appellant's profit margin was not a payment made in respect of, in response to, or for the inducement of, the exchange of currency. It was part and parcel of that exchange, and was furthermore, quite simply, the appellants initial profit arising from the exchange of currency with the appellants customer, of which margin the customer was ignorant. The margin was not a term of the contract - it was a result or consequence for the appellant of the terms of the contract, because it produced a profit for the appellant.

[31] Counsel argued that as the appellant's profit margins were not consideration for purposes of the proviso, whereas the commission is clearly one, it follows that there was no element of the activity of exchanging currency which remained deemed financial services that were exempt the exchanges of currency were entirely, for purposes of the Act a taxable supply in relation to which the appellant's Treasury division played no role. The appellant argued that because there was no other consideration as contemplated in the proviso apart from commissions that were subject to VAT, the VAT paid by the appellant in respect of its branches was paid wholly for purposes of making taxable supplies, and these qualified it in full as

deductible input tax which could be deducted from the output tax levied by the branches on the commissions charged by them.

[32] Appellant argued further that given that the exchange of currency by the appellant's branches was in terms of the proviso, hundred percent the making of taxable supplies because the commission payable was the only consideration as contemplated in the proviso, it follows that the goods or services required by the appellant where required wholly for the purposes of consumption, use or supply in the course of making taxable supplies, as contemplated in the definition of input tax. It follows that the full amount of the VAT paid by the appellant in respect of the goods or services required for consumption, use or supply at the branches was deductible as input tax. The full amount thereof was directly attributable to the making of taxable supplies because the commissions charged were the only consideration for purposes of the proviso. It follows further that the question of apportionment of the VAT paid by the appellant in respect of its branches does not arise, precisely because the full amount thereof was directly attributable to the taxable supplies made by virtue of the commissions paid by the appellant's customers. The result of this conclusion is that the respondent's assessment was incorrect, and falls to be set aside by this court, appellant argued. Appellant also argued that if the above conclusion is correct, the interest levied by the respondent must equally be remitted by the court.

[33] However, if the court is not with the appellant on the merits, appellant argued that it is relevant in relation to the interest levied by the respondent in the assessment, in the amount of R5 588 214.31, that it relates to the time period from the refund made by the respondent to the date of the assessment. This interest resulted from the respondent own act of making the refund in the first place, together with the fact that there was a delay of more than two years before the assessment was issued. That the interest was imposed notwithstanding the fact that the appellant's self – assessment had been verified by SARS prior to it making payment of the refund. Furthermore, SARS took more than two years to complete the audit, which it only commenced during March 2014, and then charged the appellant interest for that period. These were clearly circumstances beyond the control of the appellant. The appellant also mentioned that it had submitted an application for suspension of payment of the amount assessed in terms of section 164 of the Tax Administration Act (TAA), which application has, at the date of hearing of this appeal, still not being dealt with by the respondent, and remains pending.

[34] In concluding its argument the appellant submitted that both the respondent's grounds of assessment and its decision were unreasonable because the respondent merely resisted the appellants contentions, wishing to revert to the *status quo*, without articulating as it was required to, why the *status quo* was correct. Moreover, the respondent, apart from merely quoting the proviso to section 2(1), made no attempt to advance grounds as to why the initial

margin built into the appellant's rate of exchange constituted consideration as contemplated in the proviso to section 2(1). It accordingly requested the court to allow its appeal with costs.

[35] The respondent submitted at the outset that on the facts the appellant, although split up into two divisions, is actually one entity or person whose main business is the supply of the exchange of currency and that the split up is in essence artificial and bears no VAT consequences. The testimony by the witness to the effect that the activities, profits and expenses of both Treasury and the branches are interdependent and interwoven is a clear indication that the activities of the two divisions are inter-related and inseparable. The nature of the business carried on by the appellant is the making of supplies of the exchange of currency. The respondent submitted that the exchange of currency, being a financial service, is the underlying transaction in terms of which a margin is included. That over and above this, the branch earns a separate commission or fee as a result of that transaction. In other words, if the exchange of currency transaction did not take place at the branch, then the branch would not have been able to earn the commission or fee, nor would there have been any margin earned.

[36] According to the respondent the exchange of currency is a financial service, the supply of which is exempt from the provisions of section 12(a) read with section 2(1)(a) of the Act. The respondent submitted that it is common cause that the branches make a taxable supply in the form of commission or fee. The witness also conceded that the transaction in terms of which the exchange of currency and the commission is earned takes place at the branch. Inevitably treasury and branches share same clients at the branch. It argued that the fact that the transaction is concluded when the customer enters the branch and buys or sells the currency is admitted in the pleadings. The recordal or determination of the margin at a later stage does not detract from the fact that the exchange of currency or occurs at the branch and that is key.

[37] The respondent submitted that given these common cause facts and the concessions made, there can only be one conclusion and that is to the effect that branches make both taxable supplies and exempt supplies. It argued that it is worth noting that the margin earned on the exchange of currency is earned in respect of the exempt supply. Consequently, the appellant makes mixed supplies and therefore can only apply direct attribution to the extent that is possible in the branches to allocate expenses wholly to taxable purpose. Respondent argued that in the present case, based on the fact that both taxable and exempt supplies have been made in the branches, it was submitted that it is not possible to directly attributed such expenses at branch level. Therefore all these expenses must be apportioned in accordance with the provisions of section 17 of the VAT Act.

[38] The respondent submitted that, the appellant's contention that the activities of the appellant at the branches are not financial services as defined in section 2(1) of the Act is highly misplaced. This is because first and foremost the provision does not do use the words received by. It uses the words consideration payable. It argued therefore, that it does not matter who receives the consideration but rather for what supply is the consideration payable. The proviso deems activities of the exchange of currency not to be financial services "to the extent that the consideration payable in respect of such exchange of currency, is any fee or commission...". Put differently, what is contained in the proviso, is not a reference to any margin contemplated in section 2(1)(a). The respondent submitted that the words "to the extent..." as used in that section is a limitation of the extent to which financial services are, in terms of the proviso, not deemed to be financial services. The limitation applies only to the portion or part for which the consideration is a fee or commission and not to the entire supply of the exchange of currency. Were it not for the proviso the entire or whole supply of the exchange of currency including the fee or commission would have been deemed a financial services and therefore an exempt supply in totality. The proviso simply seeks to ring fence the portion of commission of fee from contamination by the exchange of currency, argued the respondent.

[39] The respondent argued further that the tax invoices appearing at pages 9 and 10 of the bundle of documents is a clear indication of the components referred to above and the portion or part of the commission or fee to which the proviso applies. It argued that based on the above, it was submitted that the purpose of incurring expenses in the branch is partly for use, consumption or supply for the purpose of making taxable supplies (to the extent that a fee or commission is charged for the exchange of currency). Counsel for the respondent wished to take the court into the brief history of how the proviso found its way into the VAT Act. Suffice to say that the court has taken note thereof and does not wish to regurgitate the submissions made in that regard in this judgement. That historical exposition in my view does not take the respondent's case any further.

[40] As regards the submissions made by the appellant in respect of interest imposed by SARS, the respondent argued that the reasons for the contentions provided by the appellant for the remission of interest do not constitute circumstances beyond a person's control as contemplated in section 39(7)(a). It argued that this is so because the appellant re-invented the wheel for a five year period and claimed input tax on a method (direct attribution) that is clearly not supported by the Act, despite pending litigation on the issue the appellant continue to claim input tax for subsequent that period on the basis of the method that is disputed, the appellant knew at all material times that due to the self-assessment nature of the VAT system; the appellant would be able to receive monetary credits or input tax credits on its periodic VAT assessment if it claimed as it did despite the continuing dispute on the matter. In addition, it

argued that the witness for the appellant testified that the appellant is still sitting with the R24 million that is the subject of this dispute. A prudent vendor and taxpayer would have returned or paid over the money to the respondent to avoid liability for interest on the basis of time-value of money principle. It further denied ever conducting any audit on the appellant. It was consequently submitted that the reasons submitted by the appellant for remission of interest should be rejected by this court. Finally, that the appellant has not discharged its onus in terms of section 102 of the Tax Administration Act (“TAA”) and that the court must dismiss the appellant’s appeal and confirm the Respondent’s assessment with costs.

[41] It is trite, in terms of section 102 of the TAA that:

“A taxpayer bears the burden of proving—

- (a) that an amount, transaction, event or item is exempt or otherwise not taxable;
- (b) that an amount or item is deductible or maybe set -off;
- (c) the rate of tax applicable to a transaction, event or item out last of taxpayer;
- (d) that and amount qualifies as a reduction of tax payable;
- (e) that a valuation is correct; or
- (f) whether a decision that is subject to objection and appeal under a tax act is incorrect.”

[42] It appears to me that this case concerns the exchange of currency. In a clear and simple sense the business of the appellant on the common cause facts and as per the witness’s testimony is the buying and selling of currency against payment of some fee or commission. For operational reasons the appellant established itself into two (2) divisions namely the 52 branches (across airports and shopping centers) and a Treasury division. Treasury is responsible for buying and selling the foreign currency required to run the business and to ensure that the nett foreign exchange position is within its limits. It does this by setting the daily buy and sell rates for the branches, by monitoring the rates continuously throughout the day while the services rendered at the branches involve customers buying and/or selling foreign currency notes in person at the branch. The services rendered at the branches include: exchanging foreign currency bank notes for ZAR notes, or purchasing foreign currency bank notes from the appellant, and pay by EFT, credit card, debit card or cash.

[43] It is common cause between the parties that the branches charge a commission/fee for rendering their service to the customers. It has been submitted before this court that the processing of foreign exchange transactions is administratively intense and time-consuming as forms needs to be completed, data needs to be captured in systems, and cash needs to be counted in addition to other regulatory requirements that are to be met before a transaction can be concluded such as FICA compliance and SARB requirements. It is the branch staff’s

responsibility to ensure that all transactions are in compliance with FICA and SARB regulations and to keep the paperwork in the branches for a period of time in the case of an audit or inspection. The witness testified that VAT at the applicable rate was charged by the branches for all commission/fees charged to customers.

[44] In order to avoid prolixity of this judgement I will get into what I think is the issue that has brought matters to a head. The determination of this case in my view turns on the correct interpretation of the proviso to section 2(1)(a) of the Act. The question that we ought to answer is whether the exchange of currency in this case falls within the definition of “financial services” in terms of section 12(a) of the VAT Act which provides that the supply of any financial services shall be exempt from the tax imposed under section 7(1)(a). I am inclined to agree with previous authorities cited herein above that when assessing the VAT consequences of a supply that must be assessed by reference, first and foremost, to the contractual arrangement under which the supply is made. What is crucial is the ascertainment of the legal rights and duties which are contractually created by the transaction into which the parties entered. Before us we have underlying contracts (between appellant and its customers) underpinning the transactions which are at the heart of the current dispute the features of which are: (a) the agreement to exchange specified currencies, (b) at a particular rate of exchange nominated by the appellant; and (c) the payment by the customers of a commission. It is clear that the so-called margin (notional or otherwise) is not part of this agreement as it is not known by either the appellant’s treasury department /branch and the customer when the transaction is closed at the branch. We have learnt in this case that the so-called margin is something that happens much later when trades are closed between the bank and the appellant’s treasury division at the end of the day. It will be very absurd and untenable to decide VAT consequences of transactions with reference to margins/profits earned by Vendors as opposed to relying on the true nature of the rights and obligations arising from a particular contract in deciding whether a supply is taxable or exempt. That logic is foreign to our jurisprudence as I cannot reconcile myself with it.

[45] Without undermining the legal and financial significance of this case to the parties in this dispute the issue for me is a simple matter of what the facts tell us. As will appear herein below I will deal with this issue on a confined basis. On the facts and the evidence before us we are dealing with an agreement between the appellant and its customers in terms of which the former sells currency to the latter for a commission/fee. We now ask the question whether the payment of commission/fee is “consideration” as contemplated in the proviso to section 2(1)? I am inclined to respond in the affirmative. On the facts and evidence before us this is the only payment that the customer makes to the appellant for the exchange of currency. The issue of a notional margin does not detract from the fact that the commission paid by the

customer is the only payment that was made for the exchange of currency and quite frankly irrelevant for purposes of deciding this case.

[46] We are with the appellant on the approach which it wishes this court to follow namely, that we must adopt the same meaning as that stipulated in the defined word “consideration”, but with reference to an “exchange of currency”, or “financial services”, rather than “goods” or “services”, because the word “consideration” is used in the proviso otherwise than in relation to “goods” or “services”. In my view the respondent should therefore not have difficulty with this proposition because it has accepted that the appellant was obliged to levy VAT on the commissions charged by it. I am therefore satisfied that the consideration in the form of a commission removes the activity of the “exchange of currency” from being deemed financial services and requires the Vendor concerned to charge VAT as output tax which is payable to SARS , of course subject to any input tax that may be deductible. The respondent’s argument that the appellant in the manner in which it has organized it’s business makes mixed supplies on the facts of this case has no factual or legal basis and must fail. I consequently also find that the appellant has met its onus of proof in terms section 102 of the TAA in that a proper case as set out in its Rule 32 statement of the grounds of appeal for an order that I am requested to make has been made.

[47] In the circumstances I find the respondent’s grounds of assessment and decision to be unreasonable, especially for insisting that the appellant reverts to and must continue to use the apportionment method and not the direct attribution method without any legal justification in circumstances where it was reasonable to expect it to.

[48] **I therefore make the following order:**

1. The appeal is upheld.
2. The respondent is to pay the costs of the appellant including the costs occasioned by the employment of Counsel.

MJ MALULEKE
ACTING PRESIDENT OF THE TAX COURT

Date of Hearing : **5 and 8 August 2019**

Date of Judgment : **3 March 2020**