

## INTERPRETATION NOTE: NO. 85

DATE: 27 March 2015

**ACT** : VALUE-ADDED TAX ACT NO. 89 OF 1991  
**SECTIONS** : SECTION 11(2)(I)  
**SUBJECT** : THE *MASTER CURRENCY CASE* AND THE ZERO-RATING OF SUPPLIES MADE TO NON-RESIDENTS

### *Preamble*

In this Note unless the context indicates otherwise –

- “**Master Currency case**” means the judgment handed down by the SCA in *Master Currency (Pty) Ltd v Commissioner for South African Revenue Service* (155/2012) [2013] ZASCA 17; [2013] 3 All SA 135 (SCA) dated 20 March 2013;
- “**SCA**” means the Supreme Court of Appeal of South Africa;
- “**section**” means a section of the VAT Act;
- “**VAT**” means value-added tax;
- “**VAT Act**” means the Value Added Tax Act No. 89 of 1991; and
- any other word bears the meaning ascribed to it in the VAT Act unless the context indicates otherwise.

## 1. Purpose

This Note discusses the impact of the judgment of the SCA in the *Master Currency* case on the interpretation and the application of section 11(2)(I), with particular reference to the principles highlighted by the SCA.

## 2. Judgment of the SCA in the *Master Currency* case

### 2.1 Factual background

The *Master Currency* case concerned an appeal by Master Currency (Pty) Ltd (the appellant) against the dismissal of its appeal by the Johannesburg Tax Court about revised VAT assessments relating to the October 2003 to January 2005 tax periods.

The appellant operated two *bureaux de change* in the duty free area at O.R. Tambo International Airport (previously Johannesburg International Airport) in the Republic. Shops located in the duty free area are able to supply goods free of certain taxes and duties to departing passengers.

The appellant rendered services to non-resident passengers whereby they presented their South African rand to the appellant, who would convert the rand into foreign currency. In doing so, the appellant would calculate the exchange rate margin, and charge a commission and transaction fee. The relevant amounts would all be

indicated on an invoice presented to the passenger when the services were rendered.

The dispute between the parties related to whether the appellant was, (on the currency exchange services rendered), obliged to levy and pay VAT at the standard rate of 14%, as per section 7(1)(a), or at the rate of 0% by virtue of section 11(2)(l) (as the appellant contended).

## 2.2 SCA decision

The SCA dismissed the appeal by the appellant against the decision of the Johannesburg Tax Court and found that the services supplied by the appellant in the duty free area at an international airport were subject to VAT at the standard rate and therefore correctly assessed by the Commissioner.

(The complete facts of the *Master Currency* case and the arguments of both the Commissioner and the appellant may be found in the reported judgment and are therefore not repeated in this Note.)

## 3. The law

The relevant sections of the VAT Act are reproduced in the **Annexure**.

### *Basic principles of section 11(2)(l)*

Section 11(2)(l) provides for services supplied by a vendor to a person who is not a resident of the Republic (non-resident) to be zero-rated subject to certain conditions. This section has three subparagraphs directing the circumstances which specifically prohibit the zero-rating otherwise intended by section 11(2)(l).

The supply of services to a non-resident must be tested against all three of these exclusions in order to qualify to be zero-rated.

## 4. Principles enunciated by the SCA in the *Master Currency* case

### 4.1 The application of section 7(1)(a) is not geographically limited

The appellant contended that the VAT Act does not apply to the supply of goods and services in duty free areas and that judicial notice should be taken of the clear and well-established fact that there are duty free areas at many airports where commercial transactions by non-resident passengers are free from government duties.

The SCA confirmed that section 7(1)(a) is applicable to all supplies made by vendors in the course or furtherance of their enterprises conducted within the Republic, as per its definition in section 1(1), which includes duty free areas.

### 4.2 Exclusions in section 11(2)(l) must be considered independently

The appellant contended that the rendering of its services were zero-rated under section 11(2)(l)(ii)(aa) because they were supplied directly in connection with movable property that was being "exported". It was submitted that qualifying under section 11(2)(l)(ii)(aa) was sufficient to secure a zero-rating, and that section 11(2)(l)(iii) cannot be applied independently to disqualify the zero-rating under section 11(2)(l)(ii).

This contention was rejected by the SCA on the basis that section 11(2)(l) defines services to non-residents which are zero-rated, and subparagraphs (i) to (iii) are exceptions to such zero-rated services which are self-standing and can independently disqualify such zero-rating.

#### 4.3 Services supplied in connection with movable property

The court considered the current construction of section 11(2)(l) and concluded that services supplied to non-resident persons who were present in the Republic at the time the services were rendered, cannot be zero-rated under the provisions of section 11(2)(l) except if the circumstance of section 11(2)(l)(ii)(bb) is applicable.

In other words, in order to qualify for the zero-rating under section 11(2)(l)(ii)(aa), the supply must pass the criteria set in section 11(2)(l)(iii), that is, neither the recipient of the services nor any other person should be in the Republic at the time the services are rendered.

This view confirms that although the three sub-paragraphs are self-standing and independent, the supply of a service to a non-resident must be tested against all the exclusions autonomously in order to qualify to be zero-rated. The analysis by the SCA was that subparagraph (ii) deals with services supplied directly in connection with movable property situated inside the Republic. Those services are standard-rated unless they fall under subparagraphs (aa) or (bb). The mere fact, however, that a service may fall under subparagraph (ii)(aa) does not preclude it from being excluded by subparagraph (iii). That is, the supply of the service to a non-resident would be subject to 14% VAT if the non-resident (or other person) is in the Republic at the time the service is rendered, irrespective of whether the movable goods in respect of which the service is rendered are subsequently exported. The wording of subparagraph (iii) confirms this by definitively excluding subparagraph (ii)(bb).

In section 11(2)(l)(ii)(aa) the phrase used is “exported to the said person”. The appellant argued that “export” means both the carrying out of something out of a country as well as the sending of commodities out of a country.

The court concluded that the most common meaning of “export” is the sending of goods out of the country, and that to call the non-resident recipient the “exporter” in the circumstances of this case unduly strains the meaning of the word. It noted that the property is rather “exported” by the supplier to the non-resident, and that the use of the words “exported to the said person” leaves no doubt that the ‘said person’, that is, the non-resident, is not the exporter. The court held that this interpretation was supported by the opening words of section 11(2)(l) before its amendment in 1998<sup>1</sup> which stipulated that the recipient of the services supplied under section 11(2)(l)(ii)(aa) had to be outside the Republic at the time the services were rendered.

To satisfy the phrase “exported to”, the supplier must –

- ensure delivery;
- consign; or
- deliver,

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<sup>1</sup> By virtue of section 89 of the Taxation Laws Amendment Act No. 30 of 1998.

the movable property to the non-resident.<sup>2</sup>

## 5. Conclusion

Services supplied by a vendor to a non-resident will be zero-rated under section 11(2)(l) unless one or more of the exclusions listed in subparagraphs (i) to (iii) of that section apply.

Although the *Master Currency* case and this Note only deal with two of these exclusions, the supply of services to a non-resident must be tested against all three exclusions in order to qualify to be zero-rated.

The *Master Currency* case clarified that the second exclusion is limited in its application to services supplied in relation to movable property that is exported to the non-resident [refer to section 11(2)(l)(ii)(aa)]. The last exclusion, however, which has a much wider application, will disqualify the supply from being zero-rated if the non-resident is in the Republic at the time the services are rendered other than in circumstances contemplated in section 11(2)(l)(ii)(bb).

**Legal and Policy Division**  
**SOUTH AFRICAN REVENUE SERVICE**

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<sup>2</sup> For the purposes of Regulation No. R316 with regard to the application of paragraph (d) of the definition of “exported” in section 1(1), the non-resident must also be a “qualifying purchaser”.

## Annexure – The law

### Section 1(1) – Definitions

“**exported**”, in relation to any movable goods supplied by any vendor under a sale or an instalment credit agreement, means—

- (a) consigned or delivered by the vendor to the recipient at an address in an export country as evidenced by documentary proof acceptable to the Commissioner; or
- ...
- (d) removed from the Republic by the recipient or recipient’s agent for conveyance to an export country in accordance with any regulation made by the Minister in terms of this Act

“**Republic**”, in the geographical sense, means the territory of the Republic of South Africa and includes the territorial waters, the contiguous zone and the continental shelf referred to respectively in sections 4, 5 and 8 of the Maritime Zones Act, 1994 (Act No. 15 of 1994);

“**resident of the Republic**” means a resident as defined in section 1 of the Income Tax Act: Provided that any other person or any other company shall be deemed to be a resident of the Republic to the extent that such person or company carries on in the Republic any enterprise or other activity and has a fixed or permanent place in the Republic relating to such enterprise or other activity;

### Section 7 – Imposition of value-added tax

(1) 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) on the importation of any goods into the Republic by any person on or after the commencement date; and
- (c) on the supply of any imported services by any person on or after the commencement date,

calculated at the rate of 14 per cent on the value of the supply concerned or the importation, as the case may be.

### Section 11 – Zero-rating

(2) Where, but for this section, a supply of services would be charged with tax at the rate referred to in section 7 (1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where—

- (k) ...
- (l) the services are supplied to a person who is not a resident of the Republic, not being services which are supplied directly—
  - (i) in connection with land or any improvement thereto situated inside the Republic; or
  - (ii) in connection with movable property (excluding debt securities, equity securities or participatory securities) situated inside the Republic at the time the services are rendered, except movable property which—
    - (aa) is exported to the said person subsequent to the supply of such services; or

(bb) forms part of a supply by the said person to a registered vendor and such services are supplied to the said person for purposes of such supply to the registered vendor; or

(iii) to the said person or any other person, other than in circumstances contemplated in subparagraph (ii) (bb), if the said person or such other person is in the Republic at the time the services are rendered, and not being services which are the acceptance by any person of an obligation to refrain from carrying on any enterprise, to the extent that the carrying on of that enterprise would have occurred within the Republic; or