DLA CLIFFE DEKKER HOFMEYR

22 JUNE 2012

TAX ALERT

JUDICIAL REVIEW IN ENGLAND

There has been much controversy in South Africa about the Government's Gauteng Urban Tolling System, and the subsequent decision of Prinsloo J to refer it for judicial review. The Treasury will now appeal the decision to the Constitutional Court.

An interesting matter arose in England last week when the National Auditor found that Her Majesty's Revenue and Customs settling a matter with Goldman Sachs was within the bounds of acceptable administration. In the High Court, Justice Peregrine Simon referred the same decision to a judicial review that he felt was plainly in the public interest.

An NGO, UK Uncut Legal Action, had applied to court on the basis that the Revenue officials had given the multinational bank favourable treatment in the settlement of a tax dispute. Ingrid Simler QC arguing the matter for the NGO, argued that the deal should be quashed by the Courts.

James Eadie QC, arguing for the Revenue, had said that the National Auditor's investigation would settle the matter and it was the appropriate authority to consider whether the transaction between the head of Her Majesty's Revenue and Customs, Dave Hartnett and senior Goldman Sachs representatives should have been allowed.

Justice Simon ruled that despite the National Audit office report, it would not tackle the legality of the transaction. He said that there was public interest in the matter and that maladministration and legality were separate issues.

As it was reported in the Guardian, the Judge said that he did not think the Court would "quash" the agreement between Her Majesty's Revenue and Goldman Sachs – he left the door open for Uncut's lawyers to argue that the agreement be declared illegal.

Her Majesty's Revenue said that they would strongly contest this application. They believe that large business tax settlements are a vital part of how they run their business and that without them British Public Finance would be seriously damaged.

Alastair Morphet

ZERO-RATING AND THE STELLENBOSCH FARMERS WINERY LIMITED CASE

In our Tax Alert of 1 June 2012, we reported on the Supreme Court of Appeal (SCA) judgment handed down on 25 May 2012, involving Stellenbosch Farmers' Winery Limited (SFW) and the Commissioner for the South African Revenue Service (SARS). We elaborate on the SCA's finding on the VAT issue and particularly why the SCA found in favour of the taxpayer.

By way of a general background, SFW received compensation in the amount of R67 million from United Distillers plc (Distillers), a United Kingdom based company, for the early termination of the distribution agreement that was entered into between the parties. The main question that arose from the compensation for the early termination of the distribution agreement was whether the payment was subject to VAT at the standard rate of 14%, or whether the supply was capable of being zero-rated. On appeal to the SCA, the SCA upheld the finding of the Tax Court in relation to the VAT issue and confirmed that the amount was subject to VAT but at the rate of 0%. The reasoning behind the SCA's finding is as follows:

- Section 11(2)(l) of the Value Added Tax Act, No 89 of 1991 (VAT Act) provides that the services supplied to a person who is a non-resident of the Republic shall be charged at the tax rate of 0%. However, s11(2)(l)(ii) contains an important proviso that states that the services supplied and as contemplated in s11(2)(l) shall not be services that are supplied directly in connection with movable property situated inside of the Republic at the time that the services are rendered.

continued

DLA CLIFFE DEKKER HOFMEYR

- In essence, the proviso contained in s11(2)(l)(ii) contains a two-pronged approach in establishing the zero-rating of services supplied to persons not resident in the Republic. The first enquiry relates to whether the services supplied were not directly in connection with movable property. The second enquiry is in relation to the locality of the movable property and the timing of the services.

- In considering the first leg of the enquiry, the SCA confirmed the decision and reasoning of the Tax Court and emphasised that in the present circumstances it is the surrender of a right that constitutes the supply of the service and which is thus a constituent part of the services being supplied. Based on this it is illogical to think that the surrendering of the right "can at the same time constitute the movable property which is required by s11(2)(l) to be in direct connection with the very services being supplied". In other words, the movable property had to have been separate and distinct from the distribution right.

- Although the SCA considered the second leg of the enquiry unnecessary, it did however state in passing that the distribution right of the taxpayer was an incorporeal right that was situated in the place where the debtor resides. In this case the debtor was registered and thus resided in the United Kingdom.

- Based on the SCA's finding above, it was clear that the matter fell squarely within the ambit of s11(2)(l)(ii) of the VAT Act and hence the SCA held in favour of the taxpayer that the compensation amount received was subject to VAT at the rate of 0%.

Nicole Paulsen

CONTACT US

For more information about our Tax practice and services, please contact:

Emil Brincker
Director
National Practice Head
T + 27 (0)11 562 1063
E emil.brincker@dlacdh.com

Johan van der Walt
Director
T + 27 (0)11 562 1177
E johan.vanderwalt@dlacdh.com

Heinrich Louw
Associate
T + 27 (0)11 562 1187
E heinrich.louw@dlacdh.com

Alastair Morphet
Director
T + 27 (0)11 562 1391
E alastair.morphet@dlacdh.com

Ruaan van Eeden
Director
T + 27 (0)11 562 1086
E ruaan.vaneeden@dlacdh.com

Tessmerica Moodley
Associate
T + 27 (0)21 481 6397
E tessmerica.moodley@dlacdh.com

Natalie Napier
Director
T + 27 (0)11 562 1109
E natalie.napier@dlacdh.com

Andrew Lewis
Senior Associate
T + 27 (0)11 562 1085
E andrew.lewis@dlacdh.com

Ben Strauss
Director
T + 27 (0)21 405 6063
E ben.strauss@dlacdh.com

Andrew Seaber
Senior Associate
T + 27 (0)11 562 1768
E andrew.seaber@dlacdh.com

BBBEE STATUS: LEVEL THREE CONTRIBUTOR