18 MARCH 2016

TAX AND EXCHANGE CONTROL ALERT

IN THIS **ISSUE**

DECISION ON THE VAT TREATMENT OF THE SUPPLY OF STUDENT ACCOMMODATION

An interesting judgment was recently delivered in the High Court (Gauteng Division, Pretoria) in the matter of *Respublica (Pty) Ltd v Commissioner for the South African Revenue Service* (as yet unreported). The matter concerned the value-added tax (VAT) treatment of the lease of a building to a university for purposes of student accommodation.

CDH
CLIFFE DEKKER HOFMEYR

DECISION ON THE VAT TREATMENT OF THE SUPPLY OF STUDENT ACCOMMODATION

The Vendor applied to the High Court for a declaratory order to the effect that the supply by the Vendor to the University in terms of the lease agreement constituted a taxable supply of 'commercial accommodation'.

An interesting judgment was recently delivered in the High Court (Gauteng Division, Pretoria) in the matter of *Respublica (Pty) Ltd v Commissioner for the South African Revenue Service* (as yet unreported). The matter concerned the value-added tax (VAT) treatment of the lease of a building to a university for purposes of student accommodation.

The court held that the TAA did not oust the High Court's jurisdiction because the matter involved a question of law and there was no disputed assessment in respect of which the Vendor could object.

Facts

Respublica (Pty) Ltd (Vendor) owned an immovable property which it leased to the Tshwane University of Technology (University).

The property consisted of several units, each with a bedroom, living area, bathroom and kitchen.

In addition to leasing the property to the University, the Vendor supplied water, electricity, maintenance, building management, a common television area, and laundry services.

An amount for utilities was included in the monthly rentals charged to the University.

The University used the property for accommodating students during the academic year.

The lease agreement allowed the University to accommodate persons other than the regular students during break periods.

Issues before the court

The Vendor applied to the High Court for a declaratory order to the effect that:

- the supply by the Vendor to the University in terms of the lease agreement constituted a taxable supply of 'commercial accommodation' as defined in s1 of the Value-added Tax Act, No 89 of 1991 (VAT Act); and
- the consideration in money is deemed to be only 60% of the amounts charged to the University by virtue of the application of s10(10) of the VAT Act.

Jurisdiction

The South African Revenue Service (SARS) opposed the Vendor's application on the basis that the High Court did not have the necessary jurisdiction to hear the matter, and that the Vendor had to proceed in terms of the procedures set out in the Tax Administration Act, No 28 of 2011 (TAA).

However, the court held that the TAA did not oust the High Court's jurisdiction because:

- the matter involved a question of law; and
- there was no disputed assessment in respect of which the Vendor could object.

Decision

Commercial accommodation

SARS also opposed the Vendor's application on the basis that the supply made by the Vendor in terms of the lease agreement did not constitute 'commercial accommodation' as defined in the VAT Act.

CDH
CLIFFE DEKKER HOFMEYR

DECISION ON THE VAT TREATMENT OF THE SUPPLY OF STUDENT ACCOMMODATION

CONTINUED

SARS also argued that the word 'lodging' refers to temporary accommodation, and since the lease in question was for a period of five years, the lease could not be regarded as the supply of 'lodging'.

The term 'commercial accommodation' is defined in s1 of the VAT Act as follows:

> lodging or board and lodging, together with domestic goods and services, in any house, flat, apartment, room, hotel, motel, inn, guesthouse, boarding house, residential establishment, holiday accommodation unit, chalet, tent, caravan, camping site, houseboat, or similar establishment, which is regularly or systematically supplied and where the total annual receipts from the supply thereof exceeds R60 000 in a period of 12 months or is reasonably expected to exceed that amount in a period of 12 months but excluding a dwelling supplied in terms of an agreement for the letting and hiring thereof.

The term 'domestic goods and services' is defined as:

> goods and services provided in any enterprise supplying commercial accommodation, including:
>
> (a) cleaning and maintenance;
>
> (b) electricity, gas, air conditioning or heating;
>
> (c) a telephone, television set, radio or other similar article;
>
> (d) furniture and other fittings;
>
> (e) meals;
>
> (f) laundry

While it was common cause between the parties that the vendor supplied 'domestic goods and services' together with the property in terms of the lease, SARS disputed the fact that the Vendor supplied 'lodging' to the University.

Essentially, the argument was that the University was not a natural person and could not 'lodge' in the building. Also, there was no legal connection between the Vendor and the students who would ultimately lodge in the units. The University was merely a tenant.

SARS also argued that the word 'lodging' refers to temporary accommodation, and since the lease in question was for a period of five years, the lease could not be regarded as the supply of 'lodging'.

The Vendor argued that the students were integral to the lease agreement and that the University leased the property primarily for their lodging. Also, the students were only temporarily accommodated in the premises because they vacated the premises during break periods.

The court agreed with the Vendor and held that the supply by the Vendor in terms of the lease agreement did constitute a supply of 'commercial accommodation' because:

- the purpose for which the property was leased by the University was for the lodging of students;
- it was not as such relevant that the University itself did not literally 'lodge' there;
- no legal connection is necessary between the Vendor and the actual end user (being the students); and
- the students did not occupy the premises for the entire five year lease period, and did not necessarily stay in the same rooms throughout the period.

DECISION ON THE VAT TREATMENT OF THE SUPPLY OF STUDENT ACCOMMODATION

CONTINUED

The court clearly preferred a purposive approach in its interpretation of the words in the definition of 'commercial accommodation' as opposed to a restrictive literal approach.

In coming to this conclusion, the court clearly preferred a purposive approach in its interpretation of the words in the definition of 'commercial accommodation' as opposed to a restrictive literal approach.

Unfortunately the court did not consider the exclusion that applies in respect of the supply of "a dwelling supplied in terms of an agreement for the letting and hiring thereof", which supply generally constitutes an exempt supply in terms of s12(c) of the VAT Act.

In practice, buildings are often leased to educational institutions for purposes of student accommodation on the basis that the supply constitutes an exempt supply of a dwelling. Based on this decision, property owners leasing such buildings to educational institutions may have to reconsider whether they are making an exempt supply of a dwelling or a taxable supply of commercial accommodation.

Section 10(10) of the VAT Act

Section 10(10) of the VAT Act provides that:

> Where domestic goods and services are supplied at an all-inclusive charge in any enterprise supplying commercial accommodation for an unbroken period exceeding 28 days, the consideration in money is deemed to be 60 per cent of the all-inclusive charge.

In respect of the application of s10(10) to the consideration payable in respect of the lease agreement, SARS argued that the monthly rental did not constitute an 'all-inclusive charge' because the amounts in respect of the utilities were paid separately from the rentals.

After considering the relevant lease agreement, the court held that the agreement clearly stipulated that the amounts payable for utilities were intended to form part of an all-inclusive charge.

Since the court had already held that the supply by the Vendor to the University constituted the supply of 'commercial accommodation', and since the period of the supply exceeded 28 days, the court held that s10(10) of the VAT Act was applicable.

Accordingly, the Vendor only had to account for VAT in respect of 60% of the actual consideration for the supply in terms of the lease agreement.

The court did not make any order as to costs.

Heinrich Louw

CDH
CLIFFE DEKKER HOFMEYR

OUR TEAM

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

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

Mark Linington
Private Equity Sector Head
Director
T +27 (0)11 562 1667
E mark.linington@cdhlegal.com

Dries Hoek
Director
T +27 (0)11 562 1425
E dries.hoek@cdhlegal.com

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

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

Lisa Brunton
Senior Associate
T +27 (0)21 481 6390
E lisa.brunton@cdhlegal.com

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

Mareli Treurnicht
Senior Associate
T +27 (0)11 562 1103
E mareli.treurnicht@cdhlegal.com

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

Yashika Govind
Associate
T +27 (0)11 562 1289
E yashika.govind@cdhlegal.com

Gigi Nyanin
Associate
T +27 (0)11 562 1120
E gigi.nyanin@cdhlegal.com

Nicole Paulsen
Associate
T +27 (0)11 562 1386
E nicole.paulsen@cdhlegal.com

Louis Botha
Candidate Attorney
T +27 (0)11 562 1408
E louis.botha@cdhlegal.com

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

CDH
CLIFFE DEKKER HOFMEYR