DLA CLIFFE DEKKER HOFMEYR

TAX ALERT

23 August 2013

IN THIS ISSUE

VALUE-ADDED TAX (VAT) ON THE RETENTION OF FINES

An interesting judgment was handed down earlier this year in the United Kingdom's Court of Appeal (Civil Division) in the matter of *Vehicle Control Services Limited v The Commissioner for Her Majesty's Revenue and Customs* [2013] EWCA Civ 186.

The facts of the matter were briefly as follows.

The appellant provided parking control services to landowners. The appellant would put up warning signs on the land and keep an eye on the parking areas for unauthorised use. Where there is unauthorised parking (ie parking in contravention of the rules), the appellant would charge the infringing motorist a penalty fee for such unauthorised parking (ie fine the motorist), or clamp or tow the vehicle subject to a release charge. The appellant could retain all such charges derived from enforcing the rules.

The landowner would pay the appellant for these parking control services in the form of an upfront fee together with an annual fee for putting up signs. The appellant would also supply the landowner with permits (displayable discs), at a cost, which the landowner could issue to authorised users.

The warning signs display the various parking rules and warn of the applicable charges relating to unauthorised parking. The signs also contain the wording: "You are entering into a contractual agreement. Do not park in this area unless you fully understand and agree to the above contractual terms."

Generally, the appellant would issue the permits to authorised users on instructions from the landowner. These permits are attached to a letter from the appellant referring the motorist to certain terms and conditions, which include the parking rules. The letter also states that any breach of the terms and conditions will result in a penalty fee being charged, or clamping or towing of the vehicle.

The appellant could also alter the penalty fees.

In practice, where there is unauthorised parking, the appellant would place a notice on the windscreen of the offending vehicle indicating that the motorist has been charged a penalty fee. The appellant would then collect and retain such penalty fee. It should be noted that only permit holders were subject to penalty fee charges in respect of unauthorised parking, as opposed to persons who were not allowed on the premises at all.

The appellant was assessed by Her Majesty's Revenue and Customs (HMRC) for output VAT on the penalty fees charged on the basis that such charges constituted consideration received in respect of taxable supplies.

The appellant lost in the First Tier Tribunal as well as in the Upper Tribunal (Tax and Chancery Chamber) and appealed to the Court of Appeal (Civil Division).

continued

The appellant's argument was that, apart from the agreement between the appellant and the landowner, there was an agreement between the appellant and each motorist and that the penalty fee charged was a form of damages paid by the motorist for breaching the terms and conditions of that agreement. The appellant thus argued that the penalty fee was not consideration for any supply made to either the motorist or the landowner. Alternatively, the appellant argued that, if the payments were not in respect of breach of contract, they should be seen as compensation for trespassing.

HMRC argued that there was no contract between the appellant and each motorist, but only between the appellant and the landowner, and that the penalty fees charged could only be seen as consideration for the supply of services to the landowner. The appellant could in any event not contract with each motorist in respect of land of which it was neither the owner nor the lawful occupier.

The court held that, even though the appellant did not have any rights in respect of the land, it could nevertheless contract with each motorist on the same basis that it would be lawful for a seller to sell property to a purchaser, even though the seller was not the owner of the property.

On the facts the court found that a contract had been established between the appellant and each motorist holding a permit. The penalty fee charges that the appellant collected did not directly flow from the agreement with the land owner, but constituted damages in respect of breaching the contract between the appellant and the relevant motorist.

On the issue of trespassing, HMRC argued that the appellant did not have such rights in respect of the land so as to give it any action in respect of trespassing. However, the court held that the contract between the appellant and the landowner gave the appellant the right to eject trespassers by towing their vehicles and that the contract between the appellant and each motorist also gave the appellant that same right. The appellant could therefore sue in trespass, and if it imposes a penalty fee instead, such fee would constitute damages for trespass.

The court accordingly allowed the appeal on both grounds, and ruled that the penalty fees charged did not relate to any supply of goods or services, but constituted damages, which did not attract VAT.

Heinrich Louw

NEW BINDING PRIVATE RULING (BPR 151) - TAX CONSEQUENCES OF THE RENUNCIATION OF AN INHERITANCE

The South African Revenue Service (SARS) issued a Binding Private Ruling (BPR 151) on 13 August 2013 relating to the donations tax, capital gains tax and estate duty consequences of the renunciation (repudiation) of a right to benefit under a will.

The descendants of the testator were named as residuary heirs in the latter's will. Additionally, certain legacies were bequeathed to the surviving spouse by the testator in terms of the will.

The ruling suggests that the executor of the estate anticipated that estate duty would be levied on the net value of the estate, and consequently that the value of the estate exceeded the R3.5 million rebate for estate duty purposes. The descendants decided to renounce (repudiate) their right to benefit in terms of the will. Section 2C of the Wills Act, No 7 of 1953 (Wills Act) provides that where a descendant stands to benefit, together with the surviving spouse, in terms of the will of a testator and the descendant renounces his benefit, the benefit will vest in the surviving spouse.

The question posed by BPR 151, was whether renunciation in terms of s2C of the Wills Act, will trigger donations tax or capital gains tax consequences in addition to estate duty.

SARS ruled that the renunciation would not result in any donations tax or capital gains tax consequences. Furthermore, inheritances due to the surviving spouse would accrue, in terms of s4(q) of the Estate Duty Act 45 of 1955, by operation of law and by virtue of the proposed renunciations. Lastly, in terms of paragraph 67(2)(a) of the Eight Schedule to the Income Tax Act, No 58 of 1962, a deceased person must be treated as having disposed of an asset to his/her surviving spouse, and such disposal will not be subject to capital gains tax, where ownership of the asset is acquired through a testamentary bequest, or succession or a re-distribution agreement entered into by the heirs of the estate.

Interestingly, common law dictates that repudiation of a benefit received under a will, has the same effect as the beneficiary's death prior to the death of the testator *(Ex parte Marais & others 1953 (4) SA 620 (T) at 623)*. In other words, whilst beneficiaries always have the right to decide whether or not to accept a benefit accruing by virtue of a testamentary provision, they have no say regarding the treatment of the repudiated benefit (other than their awareness of the possible consequences of the repudiation). The vested personal right of the beneficiary against the executor falls away. Case law further dictates that repudiation operates retrospectively as from the moment of vesting of rights, which is usually upon the death of the testator *(Swift v Pichanick 1982 (1) SA 904 (Z); Kellerman v Van Vuuren 1994 (4) SA 336 (T))*.

Against this background, BPR 151 demonstrates that SARS does not appear to consider repudiation a disposal or a donation for tax purposes.

Danielle Botha

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

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

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

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

Danielle Botha
Associate
T + 27 (0)11 562 1380
E danielle.botha@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 1085
E heinrich.louw@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

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

Carmen Moss-Holdstock
Associate
T + 27 (0)11 562 1614
E carmen.moss-holdstock@dlacdh.com

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

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

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@dlacdh.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@dlacdh.com