TAX

IN THIS ISSUE

SAVE THE DATE

Emil Brincker is hosting an overview of the 2015 Budget on Wednesday, **25 FEBRUARY 2015**.

Please look out for more information on this seminar.

TEMPORARY RENTAL OF UNITS – EXTENSION OF CUT-OFF DATE

Property developers acquire and develop fixed property for the purposes of making taxable supplies and are subject to value-added tax (VAT) on the sale of their properties. It sometimes occurs that due to market conditions or various other factors, developers are forced to temporarily let newly constructed units to earn rental income, whilst the properties are still held for purposes of sale in the future.

Where developers are unable to sell their units and decide to find a tenant to temporarily let the property in order to earn rental income, they were previously required to account for VAT on the market value of the property, as the change in use of the property from making taxable supplies to exempt supplies, resulted in a deemed supply. Specifically, when a developer temporarily changed the use of properties held for resale (taxable supplies) by letting them as dwellings to tenants (exempt supplies), s18(1) of the Value-Added Tax Act, No 89 of 1991 (VAT Act) provided for a change in use adjustment and the developer was obliged to pay VAT on the deemed supply of the property as at the date that it was applied for exempt purposes.

However, due to the fact that many developers found themselves in situations where they had a VAT liability and no income from an actual sale to cover the liability, s18B of the VAT Act was introduced with effect from 10 January 2012 to provide relief to developers who had temporarily let newly constructed units. The relief was in the form of a suspension of the liability to declare output tax in respect of the change in use adjustment. Developers that experienced difficulties in selling residential properties developed as trading stock were therefore allowed to temporarily rent those properties during the relief period without having to declare output tax on the adjustment relating to the change in use from the taxable to exempt supplies.

More specifically, in terms of s18B(3) of the VAT Act, residential property would be deemed to be supplied by the developer for its open market value at the earlier of the following dates:

- a period of 36 months after the conclusion of the agreement for the letting and hiring of the accommodation in the dwelling; or
- the date that the developer applies that fixed property permanently for a purpose other than that of making taxable supplies.

The relief period commenced when the property was rented for the first time after 10 January 2012 and was only available as long as the developer continued to have the intention of selling the property. Output tax would be payable on the open market value of the property as at the earlier of the cut-off date or the date that there was a permanent change of use or intention from taxable supply to non-taxable supply relating to the properties concerned (whichever date occurs first).

Section 139 of the Taxation Laws Amendment Act, No 24 of 2011 provided that the cut-off date for this relief would be 1 January 2015.

It is important to note that s111 of the Taxation Laws Amendment Act, No 43 of 2014, which was promulgated this week, has extended the cut-off date for the relief period from 1 January 2015 to 1 January 2018.

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CONFUSION REGARDING INTERPRETATION

An interesting judgment was handed down in the Tax Court on 9 December 2014 in the matter of *AB CC v The Commissioner of the South African Revenue Service* (VAT case number 1005, as yet unreported).

In this matter, a registered vendor for purposes of Value-added Tax (VAT), made certain supplies to an entity, C, entailing the rectification and rehabilitation, as well as the construction of new, low-cost housing. The vendor levied VAT at the standard rate of 14% in respect of the supplies, received payment from C, and paid the VAT to the South African Revenue Service (SARS).

The vendor subsequently realised that the services supplied by it could be zero-rated in terms of s11(2)(s) of the Value-added Tax Act, No 89 of 1991 (VAT Act). The vendor submitted revised returns, resulting in a refund owed to it. However, SARS did not accept the revised returns and assessed the vendor for the full amount. The vendor objected to the assessments, but the objection was disallowed by SARS, who maintained that the services did not fall within the scope of s11(2)(s) of the VAT Act. The vendor then appealed to the Tax Court.

Section 11(2(s) of the VAT Act, as read with s8(23) of the VAT Act, as they read at the time, provided that taxable supplies of goods or services made by a vendor, for which payment is made in terms of the Housing Subsidy Scheme referred to in s3(5)(a) of the Housing Act, No 107 of 1997 (Housing Act), shall be deemed to be a supply of services to a public authority or municipality, and shall be zero-rated.

The vendor submitted that the payments were made in terms of the Housing Subsidy Scheme, and that the zero rate applied, while SARS argued that the payments were not made in terms of the Housing Subsidy Scheme, and that the standard rate applied.

The main difficulty was that the term 'Housing Subsidy Scheme' was neither defined in the VAT Act nor in the Housing Act. The Tax Court therefore had to determine the meaning of the words through other sources, and applying the rules of statutory interpretation.

Firstly, the court noted that the agreement in place between C and the vendor specifically recorded that "[the vendor] acknowledges that the services rendered in accordance with the provisions of the Housing Subsidy Scheme are zero rated for Value Added Tax purposes". The court took this to be "an official declaration by a government department and a policy maker to the taxpayer".

Secondly, certain correspondence between C and the vendor made reference to 'subsidy houses', 'housing subsidy beneficiary' and 'housing subsidy'.

Thirdly, the court looked at the mechanisms contained in the National Housing Code, and it transpired that there were additional housing subsidy mechanisms that existed that were not initially taken into account by SARS.

Fourthly, the various witnesses for SARS were not consistent in their understanding of what the words 'Housing Subsidy Scheme' mean.

The court noted that it "is not an ideal situation for a taxpayer to seek clarity from more than one source outside the Act in order to determine the VAT rate applicable".

It further appears that the court also applied the *contra fiscum* rule in that it quoted from *Badenhorst v CIR 1955 (2) SA 207 (N) 215:*

"In the case of ambiguity arising during the interpretation of fiscal legislation, the contra fiscum rule will be applicable. Should a taxing statutory provision reveal an ambiguity, the ambiguous provision must be interpreted in a manner that favours a taxpayer. When a taxing provision is reasonably capable of two constructions, the court will adopt the construction that imposes a smaller burden on the taxpayer."

After taking into account all the relevant facts and circumstances, the court accepted the vendor's version to the effect that the payment for the services were made in terms of a Housing Subsidy Scheme, and specifically as provided for in the National Housing Scheme, despite there being no consistent definition for the words "Housing Subsidy Scheme".

The court did however find that SARS's grounds of assessment were not unreasonable in light of the uncertainty in respect of the interpretation of the legislation, and ordered each party to pay its own costs.

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