

TAX AND EXCHANGE CONTROL ALERT

IN THIS ISSUE

SOLD TO THE HIGHEST BIDDER...UNLESS YOU DIDN'T PAY VAT

Before buying anything, a purchaser should always be aware of all its obligations. This is one of the lessons to draw from the decision in *Sheriff of the High Court, Piketberg and another v Lourens*; In re: *Standard Bank of South Africa Ltd v Trustees for the time being of the Eila Trust and others* [2016] 4 All SA 239 (WCC). In this case the court had to decide, among other things, whether the sale of a property in execution could be set aside, where the purchaser had not met his obligations in terms of the Value-Added Tax Act, No 89 of 1991 (VAT Act), read with the conditions of sale.

CUSTOMS AND EXCISE HIGHLIGHTS

This week's selected highlights in the Customs and Excise environment.

SOLD TO THE HIGHEST BIDDER...UNLESS YOU DIDN'T PAY VAT

The respondent, Lourens (L), purchased property at an auction where it was sold in execution, but then refused to pay the VAT amount, R88,200, which was due in terms of the transaction.

The court stated that with regard to VAT, the issue for determination was whether the applicants, being the sheriff and the judgment creditor, had a duty to establish the VAT status on the property and disclose this information to L.



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Facts

The respondent, Lourens (L), purchased property at an auction where it was sold in execution, but then refused to pay the VAT amount, R88,200, which was due in terms of the transaction. This was despite the fact that clause 4.7 of the conditions of sale placed the obligation to pay transfer duty or VAT attracted by the sale on L as the purchaser and after the second applicant, the judgment creditor, had demanded the amount from L. As a result, the property could not be transferred into L's name. It was not in dispute that L inspected the property and the conditions of sale, and that at the auction L and his representative did not make enquiries about whether the first respondent, The Eila Trust (ET), whose property was being sold, was a VAT vendor. L's stated refusal to pay VAT was because it was not disclosed to him prior to the sale in execution.

The applicable legal provisions

In terms of s7(2) of the VAT Act, where the seller of a property is a VAT vendor, the seller is liable to pay the VAT on the purchase price to the South African Revenue Service (SARS). In terms of s9(15) of the Transfer Duty Act, No 40 of 1949 (TD Act), transfer duty will not be payable in respect of the acquisition of any property, where VAT is payable in terms of

that transaction provided that following requirements are also met:

- The seller has made a declaration to SARS in the prescribed format that the VAT has been paid to him and that he has accounted for the VAT; or
- That the seller has provided security to SARS where the VAT has not yet been paid; and
- SARS has issued a certificate stating that the requirements of s9(15) have been met.

Where the seller is not a VAT vendor, transfer duty will be payable by the purchaser in terms of s3 of the TD Act. The same principle will apply if neither the seller nor the purchaser are VAT vendors. From a VAT perspective, it is also important to keep in mind that the time of supply of the property is the date on which the property is transferred into the name of the purchaser or the date on which any payment is made by the purchaser, whichever date is earlier.

Judgment

The court stated that with regard to VAT, the issue for determination was whether the applicants, being the sheriff and the judgment creditor, had a duty to establish the VAT status on the property and disclose this information to L. It referred

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CONTINUED

The case should serve as a caution to persons who purchase property at an auction to always determine whether VAT or transfer duty will be payable on a transaction, depending on the parties involved.



to the principles mentioned above and stated further that there is "the notion that operates in respect of VAT transactions that the purchase price of the property is deemed to be VAT inclusive, except if the conditions of sale provide otherwise". This means that the seller as VAT vendor is liable to SARS for the output tax payable at the point of transfer.

On the facts, it emerged that the seller, ET was a VAT vendor and thus under normal circumstances, it would have had to account for VAT and pay the VAT out of the purchase price to SARS. However, it had to be taken into account that the property was sold at a sale in execution, which occurred at an auction, without the judgment creditor's or ET's involvement. As ET was unable to pay VAT to SARS, the obligation to pay VAT fell on the judgment creditor, as holder of rights over the property, to pay the VAT over to SARS. It was therefore correct for the judgment creditor to have demanded the VAT amount from L before transfer of the property could take place.

The court held that under the circumstances L should have established whether ET was a VAT vendor prior to the auction and rejected L's argument. In this regard, the only obligation that lay with the judgment creditor was to enquire whether any real rights attached to the property that was being sold in execution. According to the court, these factors were inconsequential to the main issue regarding the payment of VAT by L. In conclusion, the court held that L was obliged to pay VAT on the transaction to SARS before transfer of the property into its name could take place and since L didn't meet this obligation, the applicants were entitled to cancel the sale of the property in execution.

Comment

The case should serve as a caution to persons who purchase property at an auction to always determine whether VAT or transfer duty will be payable on a transaction, depending on the parties involved. Usually, a purchaser should ensure that they are able to pay VAT if necessary, so that there is no risk that the transaction can be set aside for this reason at a later stage.

Louis Botha

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CUSTOMS AND EXCISE HIGHLIGHTS

Please note that this is not intended to be a comprehensive study or list of the amendments, changes and the like in the Customs and Excise environment, but merely selected highlights which may be of interest.

In the event that specific advice is required, kindly contact our Customs and Excise specialist, Director, Petr Erasmus.



This week's selected highlights in the Customs and Excise environment:

1. Certain Schedules to the Customs and Excise Act, No 91 of 1964 (Act) have been amended with effect from:
 - 1 January 2017. The SARS explanatory memorandum provides as follows in this regard:

The amendments include the following:

 - the implementation of the HS 2017 in Part 1 of Schedule No. 1;
 - consequential amendment for HS 2017 in Part 2A and 2B of Schedule No. 1, Schedule Nos. 2, 3 and 6 to the Act;
 - the phase-down of the rates of duty for 2017 in terms of the EPA between the European Union (EU) and the Southern African Development Community (SADC) EPA States in Part 1 of Schedule No. 1; and
 - various technical amendments to the General Notes, Schedule Nos. 1, 4, 5 and 6 to the Act" (some of which are specified below).
 - 2 December 2016, as follows:
 - Amendment of TH3922.10 in Schedule 1 Part 1; and
 - Insertion of rebate items 460.15 for TH's 7210.61 & 7210.70 in Schedule 4;
 - 23 September 2016 – substitution of rebate item 620.24 (104.17.25) in Schedule 6;
 - 1 January 2013 – substitution of rebate item 410.03 for Chapter 87 in Schedule 4; and
 - 1 January 2012 – Substitution of Additional Note (2)(d) in Chapter 27 in Schedule 1 Part 1.
2. Draft amendment of rules (to the Act) to sections 13, 46A and 49 in respect of the:
 - Economic Partnership Agreement between the SADC EPA states, of the one part, and the European Union and its member states, of the other part;
 - Preferential Trade Agreement between the Common Market of the South (MERCOSUR) and the Southern African Customs Union (SACU); and
 - Form DA185.4A2 – Registration Client Type 4A2 – Exporter (Local or Foreign).

Due date for comments is 20 January 2017 and comments may be sent to: C&E_legislativecomments@sars.gov.za.
 3. More information is available upon request.

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