THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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The Registrar, Supreme Court of Appeal

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Commissioner for the South African Revenue Services v Tourvest Financial Services (Pty) Ltd (Case no 435/2020) [2021] ZASCA 61 (25 May 2021)

Today the Supreme Court of Appeal (SCA) upheld an appeal by the Commissioner for the South African Revenue Services (SARS) against Tourvest Financial Services (Pty) Ltd (Tourvest) with costs, including those of two counsel.

The appeal concerned the value-added tax (VAT) liability of Tourvest. The question before the SCA was whether Tourvest, in conducting its enterprise of the exchange of currency through its branch network, made both taxable and exempt supplies (as SARS contended) or whether it only made taxable supplies (as Tourvest contended).

Tourvest, a licensed dealer in foreign exchange, trades under the name American Express Foreign Exchange. The business of Tourvest consists of 52 branches countrywide and a head office, with a centralised treasury division that procures stock of foreign currency and sets the exchange (buy and sell) rate at which the branches may transact with customers. In essence, Tourvest offers to sell foreign currency to the public at a rate in excess of the rate at which it acquires that currency and offers to buy foreign currency at a rate that is lower than the price at which it expects to sell that currency. In addition, Tourvest charges clients a commission, based on a percentage of the transaction value. VAT is levied on the commission.

Prior to September 2013, Tourvest completed its VAT returns on the basis that not all the VAT paid by it on acquiring goods and services for its branches constituted deductible input tax. It, instead, applied an apportionment in terms of s 17(1) of the Value-Added Tax Act 89 of 1991 (the VAT Act). Tourvest changed its stance in the September 2013 tax period and took the view that the goods and services obtained for their branches were used by it wholly in the course of making taxable supplies and not at all in the course of making exempt supplies. Accordingly, Tourvest concluded that no apportionment was required.

Tourvest contended that it had overpaid VAT in each tax period over the prior five years and claimed an input tax deduction of R24 389 036 - 58 in the September 2013 tax period, which was paid by the SARS to it on 19 November 2013. After a further audit on 5 April 2016, SARS issued an additional assessment adding back that amount, on the basis that the goods and services had been acquired by Tourvest for use in the course of making both taxable and exempt supplies and accordingly an apportionment of input tax was necessary. Tourvest successfully appealed to the Tax Court of South

Africa, Johannesburg, which set aside the additional assessment and ordered SARS to pay Tourvests' costs.

On appeal, the SCA held that, by virtue of the proviso to s 2(1) of the VAT Act, what would otherwise have been an exempt financial service was to an extent treated as a taxable supply (so that the commission carried VAT). This did not mean that the activity lost its exempt nature entirely. It remained an exempt supply for all other purposes, while the taxable component carried VAT. It followed that the proviso created a mixed supply out of an identified activity, rather than causing the activity to lose its exempt status in its entirety.

The SCA further held that the effect of the proviso in the present context was merely to add a taxable element to what was, and at its core remained, an exempt financial service. It turned the activity into a partly exempt and a partly taxable supply. That being so, any tax paid on goods and services acquired by the Tourvest must have been apportioned and only the part attributable to the taxable supply would be deducted as input tax. Therefore, the respondent's attempt to claim the entire VAT charge as deductible input tax had to fail.

Accordingly, Tourvest's deduction in the September 2013 VAT return of the full unclaimed VAT expense over the past 5 years was therefore impermissible. The inputs ought to have been apportioned and on this basis, the appeal to the SCA was upheld.

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