THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 520/2020

In the matter between:

MUKURU AFRICA (PTY) LTD **APPELLANT**

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Mukuru Africa (Pty) Ltd v Commissioner for the South African Revenue Service* (Case no 520/2020) [2021] ZASCA 116 (16 September 2021)

Coram: PONNAN, MBHA, MATHOPO, MAKGOKA and HUGHES JJA

Heard: 30 August 2021

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Summary: Value-added tax (VAT) - apportionment of input VAT under s 17(1) of the Value-Added Tax Act 89 of 1991.

ORDER

On appeal from: Tax Court of South Africa, Western Cape (Savage J, sitting with assessors):

The appeal is dismissed with costs, including those consequent upon the employment of two counsel.

JUDGMENT

Ponnan JA (Mbha, Mathopo, Makgoka and Hughes JJA concurring)

[1] This appeal, against a judgment of the Tax Court of South Africa, Cape Town, is concerned with the apportionment of input value-added tax (VAT) under s 17(1) of the Value-Added Tax Act 89 of 1991 (the VAT Act).

[2] As it was put in *Commissioner for the South African Revenue Service v Tourvest Financial Services (Pty) Ltd*):

'. . . VAT incurred by a vendor: (a) wholly for the purpose of consumption, use or supply, in the course of making taxable supplies may be deducted in full as input tax; (b) wholly for the purpose of consumption, use or supply in the course of making exempt supplies, or for some other non-taxable purpose, may not be deducted as input tax at all; and (c) on goods or services acquired partly for the purpose of making taxable supplies and partly for the making of exempt supplies or some other non-taxable purpose (i.e. mixed supplies) must be apportioned in accordance with s 17(1), and is only input tax (and hence deductible) to the extent that it pertains to a taxable

supply.'[1]

[3] Section 17(1) (without its provisos) reads:

'Where goods or services are acquired or imported by a vendor partly for consumption, use or supply (hereinafter referred to as the intended use) in the course of making taxable supplies and partly for another intended use, the extent to which any tax which has become payable in respect of the supply to the vendor or the importation by the vendor, as the case may be, of such goods or services. . . is input tax, shall be an amount which bears to the full amount of such tax or amount, as the case may be, the same ratio (as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or section 41B) as the intended use of such goods or services in the course of making taxable supplies bears to the total intended use of such goods or services. . . .'

[4] Proviso (iii) to s 17(1) (proviso (iii)), does, however, limit in certain circumstances the extent to which the respondent, the Commissioner for the South African Revenue Service (SARS or the Commissioner), may determine a ratio with retrospective effect. It reads:

'where a method for determining the ratio referred to in this subsection has been approved by the Commissioner, that method may only be changed with effect from a future tax period, or from such other date as the Commissioner may consider equitable and such other date must fall –

(aa) in the case of a vendor who is a taxpayer as defined in section 1 of the Income Tax Act, within the year of assessment as defined in that Act; or

(bb) in the case of a vendor who is not a taxpayer as defined in section 1 of the Income Tax Act, within the period of twelve months ending on the last day of February, or if such vendor draws up annual financial statements in respect of a year ending other than on the last day of February, within that year, during which the application for the aforementioned method was made by the vendor.'

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[1] *Commissioner for the South African Revenue Service v Tourvest Financial Services (Pty) Ltd* [2021] ZASCA 61; 2021 (5) SA 86 (SCA) para 10.

[5] The appellant, Mukuru Africa (Pty) Limited (Mukuru), a registered vendor under the VAT Act, commenced business on 1 February 2014. Mukuru provides money-transfer and *bureau de change* services, as well as mobile phone credit. It makes both taxable and exempt supplies for VAT purposes and also incurs expenditure in acquiring goods and services for the purpose of use, consumption or supply in the making of those supplies. The input VAT incurred by Mukuru accordingly falls to be apportioned in terms of s 17(1) of the VAT Act (s 17(1)).

[6] On 20 February 2017, Mukuru applied to SARS for a ruling under s 41B of the VAT Act.[2] It requested approval for the use of a so-called 'transaction count (TC)' ratio to apportion its mixed-purpose input VAT deductions for the tax periods commencing 1 February 2014. On 24 July 2018, SARS approved the TC method for use by Mukuru (the July 2018 ruling). It did so for the period commencing 1 March 2016, but not in respect of the earlier period from 1 March 2014 to 29 February 2016. SARS took the view that proviso (iii) precluded it from approving the TC ratio for use in any period prior to 1 March 2016.

[7] Mukuru objected. SARS initially treated the objection as invalid and refused to entertain or decide it. On 12 June 2019, Mukuru launched an application with the Tax Court seeking, *inter alia*, an order compelling SARS to consider and decide the

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[2] Section 41B headed 'VAT class ruling and VAT ruling' provides:
'(1) The Commissioner may issue a VAT class ruling or a VAT ruling and in applying the provisions of Chapter 7 of the Tax Administration Act, a VAT class ruling or a VAT ruling must be dealt with as if it were a binding class ruling or a binding private ruling, respectively: Provided that –
(a) the provisions of section 79(4)*(f), (k),* (6) and 81(1)*(b)* of the Tax Administration Act shall not apply to any VAT class ruling or VAT ruling;
(b) an application for a VAT class ruling or a VAT ruling in terms of this section shall not be accepted by the Commissioner if the application--
(i) is for an advance tax ruling that qualifies for acceptance in terms of Chapter 7 of the Tax Administration Act; and
(ii) falls within a category of rulings prescribed by the Minister by regulation for which applications for rulings in terms of this section may not be accepted.'

objection. Mukuru's application succeeded before Binns-Ward J. Following upon the order of Binns-Ward J, SARS considered and disallowed Mukuru's objection. Mukuru then appealed to the Tax Court.

[8] In accordance with the rules of the Tax Court, SARS filed its statement of grounds of assessment in terms of rule 31 and Mukuru its statement of grounds of appeal in terms of rule 32. The parties agreed that the matter could be determined on the basis of: (i) the common cause facts in the rule 31 and rule 32 statements; (ii) the facts that were common cause on the application papers before Binns-Ward J; and, (iii) certain further additional admissions. It was thought unnecessary to lead *viva vice* evidence. Both parties, accordingly, closed their respective cases and proceeded to argument before the Tax Court.

[9] The Tax Court (*per* Savage J, sitting with assessors) dismissed Mukuru's appeal on 15 November 2019. The further appeal by Mukuru to this Court is with the leave of the learned judge.

[10] The primary issue in the appeal is whether SARS (as it contends and the Tax Court held) was precluded by proviso (iii) from granting approval for use of the TC ratio by Mukuru in respect of the period 1 March 2014 to 29 February 2016.

[11] Section 17(1) of the VAT Act does not stipulate a ratio. That is to be determined by way of a ruling from SARS as contemplated in Chapter 7 of the Tax Administration Act 28 of 2011 (the TAA) or s 41B of the VAT Act. When SARS issued the July 2018 ruling, there was already in existence a ruling as envisaged in Chapter 7 of the TAA, namely Binding General Ruling 16 (BGR16). BGR16, which determined a ratio for the purpose of s 17(1), was first issued by

SARS on 25 March 2013 (with effect from 1 April 2013) and re-issued on 30 March 2015 (with effect from 1 April 2015).

[12] The ratio fixed by BGR16 is described as the standard turnover-based method (the STB method) of apportionment. The STB method, which is the default method of apportionment, applies to all vendors who have not obtained an alternative ruling from SARS.

[13] Relying on what was styled a 'condition' in BGR16, Mukuru argues that, given the nature of its business, it was not 'fair and reasonable' for it to use BGR16. Accordingly, so the argument went, BGR16 did not apply to it. The 'condition' reads:

'1 The vendor may only use this method if it is fair and reasonable. Where the method is not fair and reasonable or inappropriate, the vendor must apply to SARS to use an alternative method.'

Mukuru proceeds to argue that because BGR16 did not apply to it, the July 2018 ruling did not constitute a change to an existing apportionment method and therefore, proviso (iii) does not preclude the retrospective operation of the July 2018 ruling.

[14] The 25 March 2013 iteration of BGR16, *inter alia*, provides:

'**1 Purpose**

This BGR reproduces the statement in paragraph 8.4.3 of the *Value-Added Tax Guide for Vendors (VAT 404)* under the heading "Formula: Turnover-based method of apportionment", which comprises a BGR under section 89 of the TA Act.

2 Background

The Guide, which is updated annually, sets out the apportionment method which must be used to calculate the amount of VAT to be deducted as input tax in respect of the acquisition of goods or services for a mixed purpose. This BGR updates references to section 76P of the Income Tax Act, No. 58 of 1962 with references to the TA Act and incorporates subsequent amendments to sections

of the VAT Act.'

[15] The Value Added Tax Guide for Vendors (VAT 404) (the Guide) predates BGR16 by ten days. Paragraph 8.4.3 of the Guide records in part:

'The only approved method which may be used to apportion VAT incurred for mixed purposes without specific prior written approval from the Commissioner, is the turnover-based method. This method applies by default in the absence of a specific ruling obtained by the vendor to use another method as there is usually a fairly good correlation between the turnover of a business and the resources (or inputs) which are employed to produce that turnover.'

The ratio in BGR16 thus applies to all vendors to whom s 17 finds application and who had not applied for and been granted an alternative ruling by the Commissioner. Mukuru fell within that category, until such time as the Commissioner issued the July 2018 ruling in its favour (and at its request), permitting the use of the TC method.

[16] It is so that BGRI6 does indeed contain a section headed 'Conditions'. Those are however manifestly not conditions in the true sense. They do not relate to the ratio referred to in s 17, but rather to the requirement to apply to SARS for an alternative ruling in the event that the STB method operates unfairly and unreasonably or is inappropriate. The condition, such as it is, cannot qualify s 17(1). BGR16 does no more than fix the ratio, left to the Commissioner for determination by s 17(1).

[17] In any event, it is not open to a vendor to simply ignore a SARS' ruling or to unilaterally apply its own method of apportionment. What is more, in terms of BGR16, if the method prescribed is not fair and reasonable or appropriate, the vendor must apply to SARS for a fair, reasonable and appropriate ruling. It does not provide, as Mukuru appears to suggest, that from the commencement of its operations, no

approved apportionment method applied to it. Nor did it provide for Mukuru to simply unilaterally assume its own apportionment; one not sanctioned by SARS. The remedy for any unfairness and unreasonableness or inappropriateness is for a vendor to apply to the SARS for an alternative method of apportionment, not to regard BGR16 as *pro non scripto*.

[18] The purpose served by the requirement that a vendor must make an application to the Commissioner, is to enable the latter to evaluate whether there is indeed any unfairness, unreasonableness or inappropriateness and if so, to approve an alternative method. Thus, even were it to be assumed in Mukuru's favour that the 'condition' is a condition in the true sense, Mukuru did not, at the level of fact, claim any unfairness, unreasonableness or inappropriateness.

[19] The legislature contemplates that the apportionment method for the purposes of s 17 of the VAT Act must relate to a time in the future or, if it is to be retrospective, for a period not exceeding the income tax year during which the application is made for a change in the apportionment method. Properly understood therefore, Mukuru's application for the July 2018 ruling was an application to change from the STB method to the TC method. Accordingly, when SARS approved the change of method in response to Mukuru's application, it had no power to do so, retrospectively, to a date earlier than 1 March 2016. It follows that the Tax Court was correct in its conclusion that:

'. . . The STB method set out in BGR16 was the only ratio applicable to the appellant until its private binding ruling had been issued in 2017 and proviso (iii) to section 17(1) expressly precluded SARS from issuing a ruling that had effect from a date earlier than 1 March 2016.'[3]

[3] Paragraph 17 of the judgment.

[20] In the result, the appeal must fail and it is accordingly dismissed with costs, including those consequent upon the employment of two counsel.

V M Ponnan
Judge of Appeal

APPEARANCES

For appellant:	M W Janisch SC
Instructed by:	Dingley Marshall Lewin Inc, Cape Town
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