

# Considerations do not escape VAT liability

**T**HE most widely publicised and discussed tax judgment last year was undoubtedly that of the Supreme Court of Appeal case of *Commissioner, SARS v Brummeria Renaissance (Pty) Ltd*.

In this case the taxpayer carried on a business in which it developed property and granted the use of the property in return for receiving the benefit of an interest-free loan over the period of the use.

The appeal court ruled that the interest-free loan was the quid pro quo the developer received in return for the granting of the use of the developed property, and that the developer should be taxed on the value of the interest-free loan.

The Brummeria case did not establish new principles, but rather re-confirmed the principles previously established in our tax courts, ie that where a taxpayer receives a benefit measurable in money as quid pro quo for services rendered or goods supplied, then it comprises an "amount" which is "received" for purposes of gross income.

But what are the Value Added Tax (VAT) implications of these transactions, and do the tax principles as confirmed by the Brummeria case also apply to the VAT Act?

For VAT purposes a supply of goods or services is subject to VAT if supplied by a vendor in the course or furtherance of an enterprise carried on by the vendor. VAT is then levied on the consideration that the vendor receives for the supply. The consideration is the consideration in money, or if the consideration is not in money, the open market value of the consideration given for the supply.

For an amount to be subject to

VAT there must be a supply of goods or services by the vendor, and the vendor must receive consideration for the supply in cash or in kind. There must therefore be a link between the consideration received and the supply of the goods or services for VAT to apply. This may sound simple enough, but it is often not clear as to whether there was a supply, and if consideration was received for such supply. The fact that there is no cash consideration for a supply also does not necessarily mean that there is no VAT liability.


In the Brummeria case the court held that the taxpayer supplied the use of the property, and received the benefit of the interest-free loans as consideration for such supply.

For VAT purposes, the taxpayer made a supply of a service and received consideration for the supply in the form of the benefit of an interest free loan. No VAT was payable in this case on the supply because it was an exempt supply of a right of occupation by retired persons in terms of section 12(c)(i) of the VAT Act. However, had the taxpayer granted the right of occupation in relation to commercial property, the transaction would have attracted VAT in the hands of the developer. The occupier of the property would have been entitled to an input tax deduction of the VAT if it was a vendor and occupied the property for purposes of its enterprise.

Similarly, where a developer provides a house at a newly developed golf estate to a celebrity in return for using the celebrity's name and image in its promotion of the golf estate, it would comprise the taxable supply of the house in return for

### VAT LESSONS FROM A HEATED TAX CASE

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which it receives the right to use the celebrity's name and image as consideration. If the celebrity is a VAT vendor, he or she will be required to account for VAT on the granting of the right of use of his or her name in return for the house as consideration. Both parties would be entitled to an equal amount as an input tax deduction and the transaction would be VAT neutral, but only if both parties are VAT vendors.

A reduced price paid for a supply also does not mean that VAT is only

payable on the reduced cash consideration received. This was confirmed by the European Court of Justice case of *Naturally Yours Cosmetics Ltd v Customs and Excise Commissioners*. This case involved a cosmetics company that sold products through beauty consultants who arranged for hostesses to organise parties at their homes at which the products were sold. The beauty consultant purchased a pot of cream for less than the normal selling price, undertaking to give it as a gift to the hostess

organising the party. The court held that there was a direct link between the supply of the pot of cream and the service provided by the beauty consultant to the company for arranging the party. The taxable consideration was held to be the normal selling price of the pot of cream, and not the discounted price.

In a similar UK case, *Rosgill Group Ltd v Customs and Excise Commissioners*, the company rewarded hostesses for holding parties for the promotion of goods by paying commission based on the value of the goods sold at a party. The commission could be taken in cash, or by way of a discount on products. The hostess chose to take the commission as a discount on the purchase of a blouse. The court ruled that the party the hostess held was the rendering of a service of value to the company, and there was a direct link between this service and the supply of the blouse. The consideration for VAT was therefore the money received for the blouse plus the value of the discount granted.

The position will be different if a consultant renders services to a company at a fixed rate per hour, and the company pays for the consultant's flights and hotel accommodation. In this case, the cost of the air travel and accommodation is not additional consideration for the consultant's services, but merely part of the conditions of the contract. These services are merely used by the consultant in supplying the services, as opposed to the supply by the company as part consideration for the supply of the services.

Each transaction should be carefully analysed to determine whether a taxable supply of goods or services was made, and if so whether any consideration for the supply was received, in cash or otherwise. The VAT position of both parties should also be carefully considered.

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# UIF contributions slip between the cracks

**L**AST year the maximum income threshold for unemployment insurance fund (UIF) benefits was increased from R11 662 per month to R12 478 a month effectively from October 1 2007.

The South African Revenue Service (SARS) informed all employers that UIF contributions had to be increased from that date and employers and employees have since been paying the increased contributions over to the receiver.

However, the finance minister published a notice in the Government Gazette on January 31 saying that section 6(1) of the Unemployment Insurance Contributions Act does not apply to the portion of an employee's remuneration that exceeds R12 478 a month effective from February 1.

So what is the purpose of this latest notice and why is the finance minister telling us something that we already know?

Section 6(2) of the Unemployment Insurance Contributions Act, provides that the finance minister may by notice in the Government

Gazette determine the maximum amount of income that will limit the amount of UIF contributions payable. The last notice by the finance minister in accordance with this section was published on June 23 2006 and set the maximum amount of income for the purposes of the Unemployment Insurance Contributions Act at R11 662 a month. No further notices were published by the finance minister amending this amount.

The notice by the labour minister on August 28 last year was published in terms of section 12(3)(a) of the Unemployment Insurance Fund Act and when read with schedule 2 of the act, this section empowers the labour minister to amend the maximum monthly rate of remuneration for the purpose of amending the scale of benefits payable under the legislation. The amendment of the maximum amount of income by the labour minister was therefore limited to the Unemployment Insurance Fund Act and of no force and effect in relation to the Unemployment Insurance Contributions Act and the

determination of UIF contributions.

This problem was raised with labour department officials and it was pointed out that previously there had always been a corresponding notice issued by both the finance minister and labour minister when amending the maximum income threshold but this time, the finance minister seemed to have slipped up.

In the absence of the required notice under the Unemployment Insurance Contributions Act, the result was that employers and employees were not legally required to increase their UIF contributions to accord with the maximum income amount of R12 478 a month set by the labour minister. Any increased payments made on this basis constituted overpayments entitling employers to refunds together with interest. There was also the risk that employees could claim the excess amounts deducted off their remuneration from their employers.

On the other hand, employers who stopped making contributions and deducting the increased amounts off employees' salaries

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faced the risk of SARS (incorrectly) holding them accountable for the increased amounts together with interest, penalties, interest on the penalties and fines and the possibility of imprisonment.

When the problem was pointed out, the labour department undertook to liaise with the finance department to correct the situation. This is why the minister published the notice on January 31 increasing the maximum income threshold under the Unemployment Insurance Contributions Act. Employers and employees are now legally obliged to pay the increased amounts.

However, it is to be noted that the finance minister has only increased the income threshold effective from February 1 2008 and not October 1 2007. As a result, the increased payments made by employers and employees during the period between these dates still constitute overpayments and still hold the consequences as explained above.

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