THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Commissioner for the South African Revenue Service v De Beers Consolidated Mines Limited
(503/11) [2012] ZASCA 103 (1 June 2012)

Media Statement

Today the Supreme Court of Appeal (SCA) delivered judgment upholding an appeal from the Tax Court, Cape Town (Tax Court) with costs. The appellant was the Commissioner for the South African Revenue Service (Commissioner) and the respondent was De Beers Consolidated Mines Ltd (DBCM), a diamond miner and seller.

The background to the matter is briefly as follows. DBCM was approached by a consortium with a proposal to enter into a complex transaction whereby a company to be formed would become the new owners of the De Beers' diamond operations and all its associated holdings. In considering the proposal, DBCM engaged the services of London-based independent financial advisors, NM Rothschild and Sons Ltd (NMR). It also appointed a range of South African advisors and service providers to assist in finalizing the proposed transaction. All these service providers issued invoices to DBCM for services rendered. The invoice submitted by the local providers included value-added tax (VAT) which DBCM treated as input tax in making its own VAT returns.

The Commissioner however determined that NMR's services were 'imported services' for purposes of section 7(1)(c) of the Value-Added Tax Act 89 of 1991 (Act) and assessed DBCM accordingly. Furthermore, it determined that the VAT charged by the local service providers did not qualify as input tax and raised assessments. DBCM's objections against these assessments were disallowed and it approached the Tax Court.

The Tax Court upheld DBCM's appeal against the assessments. In so far as the NMR assessments were concerned, the court held that the services rendered by NMR did not

constitute ‘imported services’ as they had been utilised in making taxable supplies. Regarding the VAT paid in respect of the local service providers, the court found some of those services, specifically those that had been rendered by the law firm Weber Wentzel Bowens (WWB), were deductible. The Commissioner, with the leave of the Tax Court, appealed to the SCA. DBCM cross-appealed.

DBCM argued that, as the NMR services were consumed outside of South Africa, they could not be found to be imported services and therefore should not attract VAT. At least, so the argument went, the advice that was given at meetings held outside of South Africa could not be categorised as imported services.

Furthermore, they contended that the provision of the services by NMR were necessarily attached to and accordingly a concomitant of their mining and commercial enterprise as a public company. The services were rendered in fulfilling their statutory obligations as a public company, were therefore directly linked to the making of ongoing supplies and, so it was argued, could therefore not fall within the definition of imported services.

It was also argued that NMR’s services had been acquired as a necessary input giving rise to an overhead expense, as they could not continue to operate their enterprise without complying with their legal obligations in acquiring NMR’s services.

The Commissioner argued that the purpose that should be looked to was that of the acquirer of the service. The purpose was to acquire advice in relation to a takeover by parties to which it was related, especially for the benefit of the outgoing shareholders. In this regard the Commissioner urged the court to take into account the peculiar features of how the transaction in question was structured and eventually implemented. If this was done, the Commissioner contended, NMR’s services were unrelated to DBCM’s core activities.

In a case whose facts it termed ‘unique and hardly likely to be duplicated’ and wherein the ‘conclusions reached [were] based on [its] curious facts’, the court found the Commissioner’s submissions to be correct. Finding DBCM’s reliance on certain foreign judgments misplaced, the court found itself enjoined to interpret and apply the legislation in question to the facts before it. Consequently, the court found NMR’s services not to be related to DBCM’s core business activities. Furthermore, the court followed a practical approach in dealing with DBCM’s objections based on the place where the NMR’s services were consumed. Taking numerous facts into consideration, the court found the compelling conclusion to be that NMR’s services were consumed in South Africa.

Regarding whether the local services obtained could be seen a necessary input the court held that three questions arose: were the local services acquired by DBCM for the purpose of consumption, use or supply in the course of making taxable supplies; were they acquired wholly for that purpose; and if so, but not wholly, to what extent were they acquired for such purpose? The court found WWB to have given legal advice from the transaction’s inception and that their services were instrumental to certain aspects of the transaction. The same reasoning applicable to NMR’s services applied to the services rendered by the other local service providers. These services were also found to have been acquired for the purpose of dealing with the proposal in question and did not qualify for input tax deductions.

The appeal was upheld and the cross-appeal dismissed both with costs.

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