**REPORTABLE**

**CASE NO: SA 18/2007**

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**COMMISSIONER OF INLAND REVENUE** **APPELLANT**

and

**NAMSOV FISHING ENTERPRISES (PTY) LTD** **RESPONDENT**

Coram: Maritz, JA, Strydom, AJA, *et* Mtambanengwe, AJA.

Heard on: 2007/11/07

Delivered on: 2008/06/25

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**APPEAL JUDGMENT**

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**STRYDOM, AJA**: [1] This is an appeal from the Special Tax Court of Appeal (Tax Court) constituted in terms of sec. 73 of the Income Tax Act, Act 24 of 1981.

[2] By letter dated 22nd January 2004 the respondent claimed a refund in regard to Value Added Tax (VAT) paid by it in regard to meals and beverages provided to its crew members during the periods when its fishing vessels were at sea, harvesting fish. This claim was submitted in terms of sec. 38(3) of the Value Added Tax Act, Act 10 of 2000 (the VAT Act).

[3] By letter dated 21st April 2004 the Acting Deputy Commissioner of Inland Revenue informed the respondent that its claim was unsuccessful. As a result the respondent lodged an objection to the appellant's disallowance of its claim. This was done by letter dated 7th July 2004 in terms of sec. 27 of the VAT Act. In each of the above instances the respondent fully motivated its claim and its objection.

[4] By letter 21st July 2004 the respondent was again informed by the Acting Deputy Commissioner that its objection was dismissed and by letter dated 20th September 2004 the respondent then lodged an appeal to the Tax Court which was heard on the 13th May 2005.

[5] A statement of agreed facts was presented to the Tax Court which formed the basis of that Court's deliberation and decision. On this occasion the respondent was successful and the relevant findings by the Tax Court were as follows:

> "The provision of food and beverages to the crew members of the vessels as set out in paragraph 4 above constitutes 'entertainment' as envisaged in section 19 of Value Added Tax Act, Act 10 of 2000, as amended.
>
> The input tax payable in respect of the food and beverages referred to in paragraph 4 above is deductible as envisaged in section 19 (read with section 18) of the Value Added Tax Act, Act 10 of 2000.
>
> Accordingly the Court finds that the Appellant has successfully discharged the burden of proof cast upon it by section 29."

[6] The appellant was not satisfied with this outcome and thereupon launched an appeal to this Court. Mr. Narib appeared on behalf of the appellant and Mr. Emslie appeared on behalf of the respondent.

[7] The appeal launched by the appellant was against the whole judgment of the Tax Court and on the following grounds:

> "1. The Learned President of the Court erred in law and/or in fact by finding that the respondent is in the business of entertainment, as defined in section 19(1) of the Value-Added Tax Act, Act No. 10 of 2000.
>
> 2. The Learned President of the Court erred in law and/or in fact by finding that the respondent was entitled to deduct input VAT on supplies of food made to it for purposes of victualing its fishing vessels and providing meals to seamen.
>
> 3. The Learned President of the Court erred in law and/or in fact in finding that the provision of food and beverages to the crew members of the vessels as set out in paragraph 4 of the statement of agreed facts constituted 'entertainment' as envisaged in Section 19 of the Value-Added Tax Act, Act 10 0f 2000, as amended.
>
> 4. The Learned President of the Court erred in law by holding that Practice Note 17 dated 22nd November 2000 was admissible in the particular circumstances in which it was presented in this matter."

[8] The dispute between the parties is crystalized in the Statement of Agreed Facts which reads as follows:

> "1. The Appellant, Namsov Fishing Enterprise (Proprietary) Ltd, is a fishing company and its business comprises the harvesting and processing of fish.
>
> 2. The Appellant supplies in raw form and in whole round condition to customers for consideration, be it in Namibia or outside.

3. For the purposes of harvesting the fish, the harvesting vessels often go out to sea for extended periods of time, that is overnight or for longer periods.

4. During this time members of the crew of such vessels receive the food and beverages (referred to as 'rations') for their personal sustenance.

5. The food and beverages attract input Value Added Tax as contemplated in section 6 of the Value Added Tax Act, Act 10 of 2000. The Appellant actually pays such tax when it acquires the food and beverages concerned from the suppliers of such vessels, being 'Spar' and 'Namibia Ship Chandlers'.

6. **The Issue**

This Court is called upon to decide:

Whether the provision of food and beverages to the crew members of the vessels as set out in paragraph 4 above constitutes "entertainment" as envisaged in section 19 of Value Added Tax Act, Act 10 of 2000, as amended

In any event whether the input tax payable in respect of the food and beverages referred to in paragraph 4 above is deductible as envisaged in section 19 (read with section 18) of the Value Added Tax Act, Act 10 of 2000."

[9] The dispute between the parties turns on the interpretation of sec. 19 of the VAT Act read together with sec. 18 thereof. The relevant part of sec. 18, together with its heading, provides as follows:

**"Calculation of tax payable by registered person for a tax period**

**18**(1) The tax payable by a registered person for a tax period shall be the total amount of output tax payable by the registered person in respect of taxable supplies made by the registered person during the tax period less –

(a) subject to this section and section 19, the total amount of input tax –

(i) payable in respect of taxable supplies made to the registered person during the tax period, or during preceding two tax periods

(and has not been claimed under this subparagraph in those periods); and

(ii) …."

The relevant provisions of sec. 19, together with its heading, provide as follows:

**"Rules relating to input tax**

**19.**(1) In this section -

"entertainment" means the provision of food, beverages, tobacco, accommodation, amusement, recreation or hospitality of any kind by a registered person, whether directly or indirectly, to any person in connection with a taxable activity carried on by the registered person; …

(2) No amount may be deducted under section 18(1) by a registered person for input tax paid in respect of –

(a) …..

(b) a taxable supply to, or import by, the registered person of goods or services acquired for the purposes of entertainment or providing entertainment, unless -

(i) the registered person is in the business of a tour operator or of providing entertainment and the taxable supply or import relates to the provision of taxable supplies of entertainment in the ordinary course of such business; or

(ii) ….."

[10] Both counsel provided the Court with interesting and innovative arguments. Mr. Narib submitted that the words of the definition should be interpreted *ejusdem generis.* Counsel further submitted that the provision of food and beverages to the

respondent's crew members constitute a fringe benefit and the tax could therefore not be deducted. Lastly he argued that such provision did not form part of the overall business of the respondent.

[11] Mr. Emslie submitted that the catching of fish and the marketing thereof fell squarely within the definition of 'entertainment' as this constituted the provision of food which is part of the definition of the word in sec. 19. The definition is as wide as possible because its intention is to deny to a registered person the deduction of input tax in regard to entertainment. However, so counsel argued, there is an exclusion from the denial and the exclusion would prevail where the registered person provided entertainment and the taxable supply relates to the provision of taxable supplies of entertainment in the ordinary course of such business. By way of illustration counsel stated that if the provision of rations to the respondent's crew members did not constitute entertainment then there was no necessity to have to come to Court as the VAT would then be deductible as it was not hit by the section.

[12] I agree with Mr. Emslie that the definition of entertainment was stated for the very purpose to deny the deduction of input tax in certain circumstances, and the issue is not only whether the activity of the respondent fell within the exception to the denial of input tax as contemplated by sec. 19(2)(b)(i) but also whether the taxable activity of the respondent, namely the catching and marketing of fish, is covered by the definition of "entertainment" in sec. 19(1), and more particularly the words "the provision of food".

[13] In my view, the purpose and meaning of sec. 19 is perhaps best understood if it is considered against the scheme designed by the VAT Act to levy a tax on the value added to the supply of certain goods and services in the course of taxable activities. Even if sec. 19 had not been enacted the definitions of "input tax" and "output tax" would have been wide enough, when read together with the provisions of sec. 6, to catch the taxable activities of entertainment businesses within their sweep. Registered persons who provide entertainment in the ordinary course of their businesses would have been entitled to deduct input tax on taxable supplies to them made for the purposes of entertainment from output tax payable for entertainment provided by them just like any other registered person conducting another type of taxable activity would have been entitled to deduct "any tax charged under section 6(1)(a) on a taxable supply to such registered person" from the tax "charged under section 6 on a taxable supply made by such registered person". This would have been so because sec. 6 is the source for the duty of registered persons to levy and pay VAT and the calculation could have been done under sec. 18 of the VAT Act.

[14] Why then was sec. 19 necessary? Whereas the Legislator wanted to accord to those registered persons in the entertainment business the same rights of deduction of input tax, as registered persons in other businesses would have, it was well aware of the fact that entertaining was not limited to registered persons in the entertainment business. Entertaining is often done by businesses who are not in the entertainment business (e.g. as part of a strategy or campaign to advance or advertise a business). The purpose of sec. 19 seems to me to close the door on these latter instances and to deny those businesses whose taxable activity was

not entertainment, the opportunity to deduct input tax expended on entertainment from their output tax recovered from their taxable activity. As such the purpose of sec. 19 and the definition of entertainment was not to deny the deduction of input tax in general, because that would have created an inequality between registered persons in the entertainment business and registered persons involved in the supply of goods and services in other businesses, but to prevent registered persons, not involved in the business of entertainment, from claiming the deduction of input tax where and when they do entertain. This, so it seems to me is made clear by the fact that the definition only applies in regard to sec. 19. Furthermore this purpose is clear when the definition contained in the section is read in context with sub-sec. 19(2)(b)(i), which allows such deduction in regard to taxable supplies where the taxable activity of the registered person is entertainment.

[15] In my opinion the word “entertainment” colours and indicates the context in which the various instances, mentioned in the definition of sec. 19, must be understood. During argument Mr. Emslie was constrained to concede that the provision of food, beverages etc. (referred to in the definition of "entertainment") were to be interpreted as the provision of food etc. to human beings and not to animals or plants. Furthermore the instances defined as entertainment in sec. 19 are instances which one would normally associate with entertainment.

[16] There is therefore no ambiguity which would necessitate the application of the *ejusdem generis* rule of interpretation as argued by Mr. Narib. I do not find anything in the definition of entertainment which indicates that it was the intention

of the Legislator to cast the net wider and to include therein instances which one would not normally associate therewith. If that was the intention the wording of the definition would have been different. Instead of defining entertainment as **meaning** the activities set out therein, it would have used different words, such as entertainment **includes**, and then set out what it wanted to include in the meaning of the word, and those could then include instances which one would not normally associate therewith. (See *R v Hathorn and Others* 1948 (4) SA 162 (NPD) at 166).

[17] I am therefore of the opinion that the definition in sec. 19 must be interpreted in the context of providing those amenities mentioned in the definition as entertainment.

[18] To determine the ordinary meaning of the word "entertainment" it would be permissible to look at what is set out in authoritative dictionaries.

1. **The Concise Oxford English Dictionary,** 10th edition: 1. *Entertain:* to provide with amusement or enjoyment – show hospitality. *Entertainment is the noun of entertain.*

2. **Longman: Dictionary of Contemporary English,** New edition: *Entertain:* **1.** to amuse and interest, esp. by a public performance; keep the attention of (people watching or listening) **2.** To give a party; to provide food and drink for (*We're entertaining our neighbours)* = giving them a meal. *Entertainment:* the act or

> profession of entertaining; something, esp. a public performance, that entertains.

[19] For purposes of this judgment it is also necessary to refer to two other definitions set out in the VAT Act. These are the definitions of “taxable supply” and “taxable activity”. Sec. 1 defines “taxable supply” as meaning “any supply of goods or services in the course or furtherance of a taxable activity, other than an exempt supply.” “Taxable activity” is defined by sec 4(1) as “any activity….that involves or is intended to involve….the supply of goods or services to any other person for consideration.”

[20] The context in which these concepts are used in sec. 19 further explains what is deductible as input tax. It was not any supply which is deductible but only supplies of goods and services which are made in the course of or for the furtherance of the taxable activity. To that extent sec. 19(2)(b)(i) conforms and is in line with the overall intention of the Legislator as expressed in the definitions of "taxable supplies" and "taxable activity".

[21] Considering the words entertain/entertainment it would be far- fetched to describe the taxable activity of the respondent, namely the catching and marketing of fish, as entertainment. The provision of food, in the context of sec 19, does not have the general and wide meaning ascribed to it by Mr. Emslie. In order to comply with the intent of the Legislator the provision of food is the provision of food for entertainment and does not mean more than the food as an act of hospitality. Just as little as the registered person who is the owner of a supermarket or the

farmer, who are both providing food, can claim to be in the entertainment business, just as little can the harvester of fish claim to be in the entertainment business when it catches and markets that fish.

[22] The distinction drawn by Mr. Emslie why the respondent could, and the supermarket owner could not, deduct VAT expended on the rations provided to its employees, is in my opinion not valid. Mr. Emslie submitted that although both are in the business of providing food the exception, set out in sec. 19(2)(b)(i), did not apply to the supermarket owner because he need not, in order to realise his taxable activity, provide his employees with food whereas the respondent is obliged to provide food in order to realise its taxable activity when at sea.

[23] In terms of the VAT Act it seems to me to be clear that the reason why the harvester of fish, the supermarket owner and the farmer cannot deduct input tax for entertainment is simply because the ordinary nature of their businesses is not that of entertaining. To qualify for deduction in terms of sec. 19 two things are necessary, firstly the taxable activity of the registered person must comply with the definition of entertainment and secondly the taxable supply must likewise fall within the definition of entertainment. Only then can it be said that the taxable supply is "taxable supplies of entertainment in the ordinary course of such business." (Sec. 19(2)(b)(i).)

[24] Although there is no doubt that the meals or rations that the respondent provided for its crew members, while out at sea, fall within the ambit of the definition contained in sec. 19, and, but for sec. 19, would have been deductible,

as was also pointed out by Mr. Emslie, the respondent falls foul of the first qualification because its taxable activity cannot be said to be entertainment in terms of the section.

[25] The present instance is a good example of what the Legislator had in mind when it enacted sec. 19. Although the provision of food or rations for its crew members amounts to entertainment the catching and marketing of fish cannot by any stretch of the imagination be described as entertainment. In order for the VAT to be deductible the provision of food must, in terms of sec 19(2)(b)(i) be "taxable supplies of entertainment in the **ordinary course of such business.**" The ordinary course of the business of the respondent is not entertainment and consequently the exception provided for in the sub-section does not apply to the provision of food to the crew members of the respondent. The input vat paid in regard to such food or rations is therefore not deductible by the respondent.

[26] In the result the following order is made:

1. The appeal succeeds with costs.

2. The order of the Special Tax Court, handed down on the 5th December 2005, is set aside.

3. The following order is substituted therefor:

"The objection raised by the respondent in its letter dated 7th July 2004, concerning the rejection of its claim to be refunded input vat in terms of sec. 27 of the Vat Act, is dismissed."

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**STRYDOM, AJA**

I agree

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**MARITZ, JA**

I agree

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**MTAMBANENGWE, AJA**

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