

REPUBLIC OF SOUTH AFRICA



**IN TAX COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

Case No.: VAT 889

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

7 June 2012

DATE

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SIGNATURE

In the matter between:

XYZ CC

APPELLANT

and

**THE COMMISSIONER FOR SOUTH AFRICAN
REVENUE SERVICE**

RESPONDENT

J U D G M E N T

HIEMSTRA AJ

[1] This is an appeal against the decision of the respondent, the South African Revenue service (SARS), to dismiss the appellant's objection to the imposition of value added tax and a punitive levy of 200% on the appellant's tax liability.

[2] The appellant, XYZ CC, registered with the South African Revenue Service (SARS) as a Value Added Tax (VAT) vendor during October 2003. The sole member of the corporation is Mr A.

[3] The appellant issued three tax invoices in January, March and April 2004 respectively to a close corporation, PQR CC (PQR), for the supply of seafood products. PQR duly paid the amounts invoiced. The appellant thereafter submitted a nil VAT return for the relevant VAT periods. PQR submitted an input tax claim to the respondent. Pursuant thereto the respondent conducted an audit to verify whether the suppliers listed in the schedules provided by PQR had accounted for the corresponding output tax, and found that the appellant had submitted a nil VAT return for the relevant VAT periods.

[4] As a result of the appellant's failure to account for output tax in respect of the supplies allegedly made during the January, March and May 2004 VAT periods, the respondent raised additional assessments on 18 March 2005 in terms of s 31 of the Value Added Tax Act 89 of 1991 (the Act) and levied 200% additional tax against the appellant in terms of s 60 of the Act.

[5] The appellant objected to the assessments and the punitive levies, but the respondent dismissed the objection. The appellant now appeals to this Court against the dismissal of his objection.

[6] The appellant admitted that on the documentation received by the respondent, it was entitled to raise the additional assessments and to impose a 200% levy. However, Mr. A claims that the invoices were fictitious and that the appellant had supplied nothing to PQR.

[7] At issue is whether the explanation given by Mr. A is credible, and if it is found to be, whether it exonerates the appellant from liability.

[8] Mr. A is an accountant by profession and he admitted that he is fully acquainted with the provisions of the Act. He gave the following explanation: The members of PQR were Mr B and Mr C. They are related to a woman working in the office of his

family business. Although he is not a close friend of the two men, they did meet socially from time to time. They proposed to him that he establish a close corporation with the business of supplying seafood products. They promised to order supplies from him. He duly incorporated the close corporation and registered as a VAT vendor. Thereafter the men asked him to issue fictitious invoices to PQR for the supply of seafood products. They told him that they wanted to raise a loan from D Bank. In order to acquire the loan they had to convince D Bank that they required the loan for the purpose of purchasing stock for their business. In truth, they did not require stock, but wanted to use the money for some nefarious purpose. Mr. A said that he did not know what the purpose was. According to Mr. A, the men had assured him that they would take care of any tax implications that may arise from the issuing of the fictitious invoices. He said that they had sent him faxes explaining exactly what the invoices should look like, including the fictitious supplies and the amounts of the invoices. The arrangement was that D Bank would deposit the amounts invoiced into the appellant's bank account and that the appellant would return the money immediately to PQR. Mr. A duly compiled three invoices for R474 194.40, R332 766.00 and R217 436.76 respectively. The amounts included VAT.

[9] Mr. A first testified that he had been forced to submit the fake invoices, but later explained that what he had meant was that Mr B and Mr C had badgered him on a daily basis until he relented.

[10] D Bank approved the loan and made three electronic payments into the appellant's bank account on behalf of PQR. The appellant then refunded PQR by means of three cheques.

[11] Mr B and Mr C left the country, leaving Mr A in the lurch.

[12] There are some inexplicable aspects to this version. Mr. A is an accountant who understands the Act. He could easily have avoided his dilemma by taking simple measures. Firstly, he could have withheld the VAT fraction when he refunded PQR and accounted to the respondent for the VAT collected. Secondly, he could have reversed the invoices by issuing credit notes to PQR in terms of s 21 of the Act.

[13] It is moreover difficult to believe that a man of Mr. A's background could have participated in this fraud gratuitously, and in the process expose himself to punitive assessments and criminal liability. The inference looms large that he had participated in the fraud for his own gain. Unfortunately for him, his collaborators bolted and left him with the quandary.

[14] The fact remains that the appellant had issued tax invoices, detailing the nature of supplies allegedly made. In terms of s 15(1) of the Act, a vendor must account for VAT upon the issuing of an invoice unless he or she had been granted permission to account on a payment basis. He failed to account and rendered a nil return. He received payment of the amounts invoiced. In terms of s 31 of the Act, the respondent was entitled in the circumstances to raise additional assessments. In terms of s 60 it was obligatory for the respondent to impose 200% additional tax. The respondent is not concerned with any skulduggery between the parties to the transactions giving rise to the tax liability. It can only act on tax returns and documentation submitted to it.

[15] I therefore find that the appeal must be dismissed on two grounds. The first is that Mr. A did not provide a credible account of the circumstances under which he had submitted the tax invoices, and thereafter a nil VAT return. The second is that whatever his explanation may be, he is patently liable in terms of the provisions of the Act for the VAT collected as well as the punitive levies.

The appeal is therefore dismissed with costs.

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J. HIEMSTRA
ACTING JUDGE OF THE HIGH COURT

Date heard:

6 June 2012

Date of judgment:	7 June 2012
Counsel for the appellant:	Member of appellant in person
Attorney for the appellant:	No attorney
Counsel for the respondent:	Adv. M.N. Xulu
Attorney for the respondent:	Counsel employed by respondent