



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED

Consol Glass (Pty) Ltd v The Commissioner for the South African Revenue Service
(Case no 1010/2019) [2020] ZASCA 175

From: The Registrar, Supreme Court of Appeal

Date: 18 December 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Tax Court, Gauteng (Louw J), which turned upon the appellant's (Consol's) liability under the Value-Added Tax Act 89 of 1991 (the VAT Act) for services rendered to Consol in respect of a refinancing transaction. The appeal was dismissed.

In 2012, Consol restructured its debt. In doing so, it procured services, some from local vendors and others from suppliers resident outside of South Africa. The Commissioner raised additional assessments in respect of Consol's VAT liability. The Commissioner disallowed input tax deductions that Consol had claimed in relation to the services provided by local vendors, and imposed output VAT on the imported services procured by Consol. Consol appealed to the tax court. The tax court dismissed the appeal, save in respect the 10% penalty imposed by the Commissioner. Consol appealed to the SCA.

During 2007, Consol, then a shell company, acquired the businesses of the listed company Consol Limited and its two subsidiaries. The acquisition formed part of a leveraged buy-out. Consol made these acquisitions by securing debt funding in the form of Eurobonds. Consol decided to guard against the risks of its Euro exposure by concluding collateral hedging

agreements. This funding and the hedges proved expensive. In 2012, Consol concluded agreements with a consortium of banks to secure funding in the South African market so as to replace its Eurobond debt and unwind its hedging positions. Consol procured services, local and imported, to effect this refinancing.

The appeal concerned two issues. First, was the tax court correct to find that the Commissioner was entitled to disallow the input tax claimed by Consol on the fees charged to it by local service providers? Second, was the tax court correct to find that Consol was obliged to declare and pay VAT on the fees paid by Consol to non-resident suppliers for their services? These issues turned upon whether the services were acquired by Consol for the purpose of consumption, use or supply in the course of making taxable supplies. If the services were so acquired, Consol was entitled to claim the input tax deductions and was not liable for the output VAT imposed on the imported services.

The Commissioner submitted that the services were not so acquired. Rather, Consol acquired the services to make an exempt supply in the form of a financial service. Consol did so in securing loans from the consortium of banks under the refinancing transactions and thereby issued a debt security, one species of financial service. Consol, so it was contended, made use of the local and foreign services to issue a debt security, and thus did not do so for the purpose of making a taxable supply.

The SCA found that this submission was insupportable. Consol was registered under the VAT Act as a vendor engaged upon the enterprise of manufacturing and selling glass containers. Neither the original issuance of the Eurobonds, nor the loans secured from the local consortium of banks, transformed Consol from a vendor of glass containers to a vendor supplying financial services. Consol was a borrower not a lender and hence not a vendor of financial services. The services were thus not procured to make an exempt supply.

Consol contended that it procured the local and imported services to execute the refinancing transactions, which substituted local debt for foreign debt. The refinancing had the same purpose as the original issuing of the Eurobonds: to permit Consol to acquire the assets in order to make taxable supplies, that is to say, to manufacture and sell glass containers.

The SCA found that since, under the statutory definition, the acquisition of the services is for consumption, use or supply it is helpful to consider how these attributes of the services have utility in the making of taxable supplies. It is this functional relationship which signifies. Consol's appeal rested on the premise that the Eurobonds were utilized in 2007 to acquire the assets from Consol Limited so as make taxable supplies. The acquisition, however, did not make any material change to the operating businesses acquired by Consol. The reorganisation of the Consol group was of no consequence to the enterprise carried on by these businesses. They continued to manufacture and sell glass containers both before and after the reorganisation. There was thus no functional link between the issue of the Eurobonds and the making of taxable supplies. And once that was so, the services procured to effect the refinancing of the Eurobond debt lacked a functional link for the same reason.

Accordingly, the SCA dismissed Consol's appeal with costs, including the costs of two counsel.
