



UNICUS TAX UPDATE

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VAT consequences of unlawful transactions

Ndyamara NO v CSARS, Respublica, MP Finance and credit-note mechanics

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HELLO & WELCOME!

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FACTS: THE UNDERLYING TRANSACTION

- PRASA procured 70 dual electric/diesel locomotives from Swifambo.
- Purchase price was approximately R3.5 billion, inclusive of VAT.
- Swifambo delivered 13 locomotives and issued invoices / received payments.
- Swifambo accounted to SARS for net output VAT of about R235 million.
- The procurement decision and purchase agreement were later reviewed and set aside because of material irregularities, including corrupt conduct.

FACTS: THE LATER VAT LITIGATION

- Swifambo was in liquidation.
- The liquidators sued SARS to recover the VAT payments.
- The claim was framed under section 26 of the Insolvency Act.
- The liquidators argued that the VAT payments were dispositions not made for value.
- The separated issue was whether the VAT payments discharged a real VAT liability and therefore constituted value.

TAXPAYER'S ARGUMENT

- The purchase agreement was set aside retrospectively and treated as void ab initio.
- If the contract never legally existed, there was no taxable supply in law.
- If there was no taxable supply, there was no output VAT liability.
- The VAT paid to SARS therefore discharged no lawful obligation.
- On that basis, the payments were sine causa and recoverable as dispositions not made for value.
- Alternatively, VAT could only have been payable on the 13 locomotives actually delivered, not on all progress / milestone payments.

SARS' ARGUMENT

- VAT liability arose under the VAT Act, not under the private contract alone.
- Swifambo made taxable supplies, issued invoices and received consideration.
- Section 9 triggered VAT when invoices were issued or payments were received.
- The later setting-aside of the contract did not retrospectively extinguish VAT already due.
- Payment of VAT reduced Swifambo's liabilities and therefore constituted value.
- Illegality does not mean a transaction has no fiscal consequences.

COURT'S DECISION: SUPPLY AND ENTERPRISE

- The definition of “supply” is broad.
- The enquiry is directed at factual conduct: were goods or services provided or made available?
- A valid and enforceable contract is not always required for a “supply”.
- Swifambo issued invoices and delivered locomotives to PRASA.
- The court found that Swifambo carried on an enterprise through the procurement and supply of locomotives over an extended period.
- Use of subcontractors did not prevent Swifambo from making the supply.

COURT'S DECISION: SECTION 26 AND VAT LIABILITY

- VAT arose when invoices were issued or consideration was received.
- Progress / milestone payments were not ignored for VAT purposes.
- The later invalidation of the purchase agreement did not retrospectively erase the VAT consequences.
- Because the VAT was due when paid, payment discharged a statutory liability.
- That discharge of liability was “value” for purposes of section 26 of the Insolvency Act.
- The liquidators' claim was dismissed.

INSIGHT A: RESPUBLICA AND THE ROLE OF THE CONTRACT

- Respublica emphasises that VAT treatment is usually determined by the legal rights and obligations created by the contract.
- The court must characterise the actual supply: who supplies what, to whom, and on what legal basis?
- That principle should not be ignored after Ndyamara / Swifambo.
- The reconciliation is: Respublica is mainly about characterising the supply; Ndyamara / Swifambo is about whether later invalidity erases an already-triggered VAT event.
- The contract remains crucial evidence, but illegality or later invalidity does not automatically sterilise the VAT consequences.

INSIGHT B: A VAT EQUIVALENT OF MP FINANCE?

- The judgment can be read as a VAT-side cousin of MP Finance.
- MP Finance: illegal receipts can still have income-tax consequences.
- Ndyamara / Swifambo: an unlawful or later-invalid contract can still have VAT consequences.
- The shared principle is that illegality does not, by itself, make the tax statute blind to what factually happened.

INSIGHT C: CREDIT NOTE INSTEAD OF SECTION 26

- The better VAT Act route would not be: “the VAT was never due”.
- The better route would be: “the VAT was originally due, but a later adjustment event occurred”.
- Section 21 can apply where the supply is cancelled, the nature of the supply is fundamentally varied, the consideration is altered, or goods / services are returned.
- If the locomotives were returned and the consideration repaid, Swifambo could potentially issue credit notes and adjust output tax.
- The recipient would ordinarily need to make the corresponding input-tax adjustment.

CREDIT-NOTE ROUTE: KEY LIMITATION

- The credit-note argument only works if there is an actual section 21 adjustment event.
- A bare declaration that the contract is void ab initio may explain why restitution is due, but it does not necessarily prove that restitution occurred.
- The stronger facts would be actual return of funds, repayment of the money, settlement, or a restitution order.
- Without that factual unwinding, the taxpayer is left with invoices, consideration and supply events that were never reversed.
- That is why the section 26 argument was vulnerable: it attacked the original VAT payment rather than using the VAT Act's adjustment machinery.

TAKEAWAYS

- Do not assume that an unlawful or void contract has no tax consequences.
- For VAT, always separate the original tax event from later adjustment events.
- Use the contract to characterise the supply, but do not treat later invalidity as automatically erasing the supply.
- If the transaction is later unwound, check section 21 before looking for insolvency-law or enrichment-law shortcuts.
- For a credit-note strategy, prove the actual restitution: returned goods, repaid consideration, cancelled supply or altered consideration.

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