

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1192/2023

In the matter between:

AVENG MINING SHAFTS & UNDERGROUND **APPELLANT**

and

THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Aveng Mining Shafts & Underground v The Commissioner for the South African Revenue Service* (1192/2023) [2025] ZASCA 20 (17 March 2025)

Coram: ZONDI AP and KEIGHTLEY, KOEN and COPPIN JJA and BLOEM AJA

Heard: 27 February 2025

Delivered: 17 March 2025

Summary: Value-Added Tax Act 89 of 1991 (the Act) – vendor conducting enterprise of shaft sinking and mining construction activities – whether input tax on charges for accommodation and food acquired by vendor for specific project employees deductible from output tax – s 17(2)*(a)*(i)*(bb)* of the Act – whether accommodation and food acquired for making taxable supplies of entertainment in the ordinary course of vendor's enterprise – whether supplied to employees for a charge – if so, whether all direct and indirect costs of such entertainment covered.

ORDER

On appeal from: The Tax Court of South Africa, Gauteng (Makume J sitting with two assessors):

The appeal is dismissed with costs.

JUDGMENT

Koen JA (Zondi AP and Keightley and Coppin JJA and Bloem AJA concurring):

Introduction

[1] The issue in this appeal is whether s 17(2)*(a)*(i)*(bb)* of the Value-Added Tax Act[1] (the Act) allowed Aveng Mining Shafts and Underground, a division of Aveng (Africa) (Pty) Ltd (Aveng), to deduct certain input tax[2] in respect of entertainment expenses, from its output tax[3] for the period 06/2012 to 08/2016. The Tax Court of South Africa, Gauteng (the tax court) found that Aveng was not entitled to the deductions.[4] The appeal against that judgment is with the leave of the tax court.

Background

[2] Section 7(1) of the Act provides that, subject to the exemptions, exceptions, deductions and adjustments provided for in the Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as value-added tax, on the supply by a vendor of goods or services supplied in the course or furtherance of any enterprise carried on by it. Section 16(3)*(a)*(i) provides that the amount of the tax payable shall be calculated by deducting from the sum of the amounts of output tax of

[1] The Value-Added Tax Act 89 of 1991. All references to sections in this judgment are to sections of the Value-Added Tax Act unless stated otherwise. Only the parts of sections relevant to this judgment are quoted.
[2] The definition of input tax is set out in footnote 6 below.
[3] The definition of output tax is set out in footnote 5 below.
[4] The tax court directed that a 10% penalty be remitted. It directed each party to pay its own costs of the appeal.

a vendor, the amounts of input tax in respect of supplies of goods and services made to the vendor during that period.

[3] The output tax[5] is levied in terms of s 7(1) on the supply of goods and services by a vendor. The input tax[6] is the tax charged and payable under s 7 by a supplier on the supply of goods or services made by it to the vendor, whether acquired wholly or partly for the purpose of consumption, use or supply, in the course of the vendor making taxable supplies, to the extent determined by the provisions of s 17.

[4] Aveng is a vendor[7] as defined in the Act. Its enterprise[8] entails shaft sinking and mining construction activities for various mining clients. From time to time, it employs employees who are deployed to mines for limited periods to do work required for specific projects. These employees are required to be accommodated close to the mines where they perform the work, and they are provided with food.

[5] Aveng pays the suppliers[9] the amounts charged for the accommodation and food. These charges, it is common cause, constitute entertainment expenses.[10]

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[5] Section 1 of the Act defines 'output' tax to mean, in relation to any vendor, 'the tax charged under section 7(1)*(a)* in respect of the supply of goods and services by that vendor'.

[6] Section 1 of the Act defines 'input tax' to mean a tax charged under section 7 and payable in terms of that section by-
(i) a supplier on the supply of goods or services made by that supplier to the vendor; or
(ii) the vendor on the importation of goods by that vendor; or
(iii) the vendor under the provisions of section 7(3); . . .
where the goods or services concerned are acquired by the vendor wholly for the purpose of consumption, use or supply in the course of making taxable supplies or, where the goods or services are acquired by the vendor partly for such purpose, to the extent (as determined in accordance with the provisions of section 17) that the goods or services concerned are acquired by the vendor for such purpose.'

[7] 'Vendor' is defined in s 1 to include any person who is or is required to be registered under the Act.

[8] 'Enterprise' is defined in s 1 to include in the case of any vendor, any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club.

[9] 'Supplier' is defined in s 1 to mean, in relation to any supply of goods or services, the person supplying the goods or services. 'Supply' includes performance in terms of inter alia a sale and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly.

[10] *AB (Pty) Ltd v CSARS* [2014] ZATC 7.

Aveng's enterprise does not involve the making of taxable supplies of entertainment in the course of its enterprise. Aveng does not separately charge its mining clients for these costs. According to its civil and costs engineer, Mr Martin Kruger, an estimate of the costs is included in the overall price at which it tenders to do the shaft sinking and mining for its clients. By the time the entertainment expenses are actually incurred, they may differ from the costs which prevailed when the tender price was determined.

[6] In submitting its VAT returns for the period 06/2012 to 08/2016, Aveng claimed input tax in the sum of R17 495 071.81 in respect of entertainment expenses incurred in respect of these employees. The input tax was claimed in terms of the provisions of s 17(2)*(a)*. The respondent, the Commissioner for the South African Revenue Service (the CSARS), disallowed the input tax deduction because: the entertainment expenses were for employees who were not away from their usual place of work; and Aveng did not recoup the expenses from the employees.[11] Aveng's subsequent appeal to the tax court against the disallowance of the input tax was unsuccessful.

Section 17

[7] Section 17(2)*(a)* deals with the deductibility of input tax from output tax. Material to this appeal are the following parts thereof:

'(1) . . .

(2) Notwithstanding anything in this Act to the contrary, a vendor, shall not be entitled to deduct from the sum of the amounts of output tax and refunds contemplated in section 16 (3), any amount of input tax –

(a) in respect of goods or services acquired by such vendor to the extent that such goods or services are acquired for the purposes of entertainment: Provided that this paragraph shall not apply where –

[11] Apart from the CSARS rejecting the input tax it imposed understatement penalties, late payment penalties and interest. Aveng's subsequent objection was allowed only in respect of the late payment penalties.

(i) such goods or services are acquired by the vendor for making taxable supplies of entertainment in the ordinary course of an enterprise which –

(aa) continuously or regularly supplies entertainment to clients or customers (other than in the circumstances contemplated in item *(bb)*) for a consideration to the extent that such taxable supplies of entertainment are made for a charge which –

(A) covers all direct and indirect costs of such entertainment; or

(B) is equal to the open market value of such supply of entertainment,

unless –

(i) such costs or open market value is for *bone fide* promotion purposes not charged by the vendor in respect of the supply to recipients who are clients or customers in the ordinary course of the enterprise, of entertainment which is in all respects similar to the entertainment continuously or regularly supplied to clients or customers for consideration; or

(ii) the goods or services were acquired by the vendor for purposes of making taxable supplies to such clients or customers of entertainment which consists of the provision of any food and a supply of any portion of such food is subsequently made to any employee of the vendor or to any welfare organisation as all such food was not consumed in the course of making such taxable supplies;

(bb) supplies entertainment to any employee or officeholder of the vendor or any connected person in relation to the vendor, to the extent that such taxable supplies of entertainment are made for a charge which covers all direct and indirect costs of such entertainment;'

(ii) such goods or services are acquired by the vendor for the consumption or enjoyment by that vendor (including, where the vendor is a partnership, a member of such partnership), an employee, officeholder of such vendor, or a self-employed natural person in respect of a meal, refreshment or accommodation, in respect of any night that such vendor or member is by reason of the vendor's enterprise or, in the case of such employee, officeholder self-employed natural person, he or she is by reason of their duties of his or her employment, office or contractual relationship, obliged to spend away from his or her usual place of residence and from his or her usual working place. . .

(iii) Such goods or services consist of entertainment supplied by the vendor as operator of any conveyance to a passenger or crew member, in such conveyance during the journey, where such entertainment is supplied as part of or in connection with the transport service supplied by the vendor, with a supply of such transport service is a taxable supply;

(iv) such goods or services consist of a meal or refreshment supplied by the vendor as organiser of the seminar or similar event to a participant in such seminar or similar event, the supply of such meal or refreshment is made during the course of or immediately before or after such seminar or similar

event and a charge which covers the cost of such meal or refreshment is made by the vendor to the recipient;

(v) such goods or services are acquired by a municipality for the purpose of providing sporting or recreational facilities or public amenities to the public;

(vi) such goods or services are acquired by a welfare organisation, for the purpose of making supplies in the furtherance of its aims and objects; or

(vii) such goods or services are required by vendor for an employee or officeholder of such vendor, that are incidental to the admission into a medical care facility;

(viii) such goods or services consist of a meal or refreshment supplied by the vendor as operator of any ship or vessel (otherwise than in the circumstances contemplated in subparagraph (iii) in such ship or vessel to a crew member of such ship or vessel, where such meal or refreshment is supplied in the course of making a taxable supply by that vendor; or

(ix) that entertainment has acquired by the vendor for the purpose of awarding that entertainment as a prize contemplated in section 16 (3)*(d)* in consequence of the supply contemplated in section 8 (13) . . .'

The 'taxable supply' referred to is defined to mean 'any supply of goods or services which is chargeable with tax under the provisions of section 7(1)*(a)*, including tax chargeable at the rate of zero per cent under section 11'.

In the tax court

[8] The tax court concluded that the input tax charged by the suppliers of the entertainment expenses to Aveng were not deductible for the following reasons. First, they were not deductible in terms of s 17(2)*(a)*(i)*(aa)* because that provision applies to goods and services acquired by a vendor for the purpose of making taxable supplies of entertainment continuously or regularly, as in the case of, for example, a hospitality company. This is not the situation with Aveng. Second, s 17(2)*(a)*(i)*(bb)* only allows the deduction of input tax if the charges relating to the supply of meals and accommodation to employees are recouped from the employees. As Aveng did not recoup the entertainment expenses from the employees, it was precluded from deducting the input tax. Third, s 17(2)*(a)*(ii) did not apply because the employees were

all based near construction sites to which they were specifically appointed and thus did not, as employees of Aveng, have a usual place of residence or working-place, from which they were away. Aveng contends that the tax court erred in its interpretation of s 17(2)*(a)*(i)*(bb)*. The appeal is confined to that ground.

Discussion

[9] A proper interpretation of s 17(2)*(a)*(i)*(bb)* requires that the text, the context and the purpose of its provisions be examined. They must be considered simultaneously and holistically.[12]

[10] As regards context and purpose, Aveng invokes the neutrality principle.[13] The thesis of the neutrality principle is that VAT is not a cumulative tax but a tax on value gained during the interval since a previous supply and paid only on the value that is added in each step of a production process. Thus, where a vendor makes taxable supplies, it should be completely relieved of the burden of paying VAT on its inputs.[14]

[11] This entails that in an invoice-based credit method, also known as the 'subtraction method' of VAT, which applies in our law, credit should be granted for the input tax in a vendor's enterprise by it being subtracted from the output tax collected on taxable supplies made.[15] Accordingly, Aveng maintains that the input tax on the entertainment expenses should be allowed as a deductible input tax.

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[12] *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65; *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[13] *Metcash Ltd Trading Ltd v CSARS* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) para 11.

[14] Aveng relied on *Cibo Participations SA v Directeur regional des impots du Nord-Pasde-Calais* C-16/00 at para 27 where it was held that:
'The common system of VAT consequently ensures complete neutrality of taxation of all economic activities, whatever their purpose or results, provided they are themselves subject in principle to VAT . . .'

[15] Section 16(3)*(a)*(i). Interpretation Note 70 of 14 March 2013 para 3.1.

[12] The context applicable to a statutory instrument is important, but it is not everything. Specifically, it is not a licence to contend for meanings unmoored from the text and its structure. The text and structure have a gravitational pull that is very important and often conclusive. Context and purpose may be used to elucidate the text,[16] but it cannot displace the ordinary meaning of the express wording of a statute.

[13] Turning to the text of the relevant provisions of the Act, it is significant that the definition of 'input tax' does not include the input tax on all goods and services supplied to and acquired by a vendor. In terms of its definition, input tax is allowed only 'to the extent' determined in accordance with the specific provisions of s 17, and the goods or services are acquired by the vendor for making taxable supplies in the course of its enterprise.

[14] Furthermore, a vendor is not entitled in terms of s 17(2)*(a)* to deduct from its output tax an amount of input tax in respect of goods or services acquired 'for the purposes of entertainment'. The neutrality principle accordingly cannot find application in the light of this express prohibition against the deduction of input tax in respect of entertainment expenses.

[15] The general principle emerging from s 17(2)*(a)* is that a vendor is not entitled to deduct any input tax charged on a taxable supply of goods and services acquired for the purposes of entertainment. The motivation for the general prohibition is not difficult to understand,[17] but need not be considered in this judgment in view of the unambiguous meaning of the wording of s 17(2)*(a)*.

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[16] *Capitec Bank Holdings Ltd v Coral Lagoon Ltd* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

[17] The deduction of input tax on goods and service acquired for entertainment has, as a matter of policy, not been viewed favourably because of the potential for abuse. Abuse has taken the form, for example, of a vendor taking a client to a sporting event which the vendor actually wishes to attend and then claims the input tax on the costs of his entertainment, or where there is some other element of personal enjoyment where entertainment is provided to employees and the full

[16] The only input taxes that may be deducted in respect of entertainment expenses are those falling within the express exceptions listed in subparagraphs (i) to (ix) of the proviso to s 17(2)*(a)*. Being exceptions to the otherwise general prohibition disallowing the deduction of input taxes in respect of goods or services acquired for the purpose of entertainment, they must be interpreted restrictively.

[17] Whether the deduction of an input tax in a particular factual scenario might, or might not, result in abuse, is not the issue. The question is purely whether a vendor can establish that a particular input tax falls squarely within the parameters of one of the exceptions. Aveng has endeavoured to show that the input tax it sought to deduct fell within the exception in subparagraph *(bb)* of s 17(2)*(a)*(i).

[18] The preamble in s 17(2)*(a)*(i) qualifies the exceptions detailed in both subparagraphs *(aa)* and *(bb)* thereof. Subparagraph (i) requires, for the input tax referred to in subparagraphs *(aa)* and *(bb)* to qualify for deduction, that it must be in respect of:

'goods or services . . . acquired by the vendor for making *taxable supplies of entertainment* in the ordinary course of an enterprise . . .' (Emphasis added.)

[19] Entertainment is not the enterprise of Aveng. The input tax incurred was not in respect of goods and services acquired 'for making taxable *supplies of entertainment'* by Aveng. They were acquired, at best for Aveng, in respect of making taxable supplies of sinking mining shafts and related mining work. That is Aveng's enterprise.

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input tax is claimed. The issue can be put no better than explained in the VATCOM report issued in February 1991 before the Act was promulgated. Paragraph 3.13 of the report recorded:

'It is often extremely difficult to distinguish between entertainment expenses incurred for business purposes and those incurred for private purposes. Experience with income tax in South Africa and in other countries is that entertainment expenses claimed often only have a very tenuous link with business activities. Abuse of the deduction also often takes place. In addition, there is often an element of personal enjoyment vault into the activities. For example, taking the client to a sporting event the businessman wishes to attend, club subscription or a golf club or a yacht of a company whose directors enjoy sailing, all contain an element of personal enjoyment.'

The provisions of s 17(2)*(a)*(i) have not been satisfied. The appeal fails at this preliminary level.

[20] But, even assuming that a taxable supply of entertainment is made for a charge in the course of Aveng's enterprise, Aveng failed to recover the charge from its employees directly.[18] In the alternative, if it would be sufficient for the purposes of the exception, to recover the charge from Aveng's clients, it failed to establish that what it built into the price charged to clients covered all the direct and indirect costs of such entertainment. For these reasons too the appeal must fail.

Costs

[21] The costs of the appeal should follow the result. Although the appeal might involve an important issue of principle, it is not one of such complexity as to justify the employment of two counsel. Aveng was represented by one counsel only. Only the costs of one counsel are justified.

The order

[22] The following order is granted:

The appeal is dismissed with costs.

P A KOEN

JUDGE OF APPEAL

[18] The aforesaid conclusions are also consistent, although they are not binding on this Court, with SARS' Guide: Vat 411 – Guide for Entertainment, Accommodation and Catering; The report of the Value-Added Tax Committee issued in February 1991 before the Act was promulgated; and The Explanatory Memorandum on the Taxation Laws Amendment Bill, 1997.

Appearances

For the appellant:	C Louw SC
Instructed by:	Cliffe Dekker Hofmeyr Inc., Sandton
	Lovius Block Attorneys, Bloemfontein
For the respondent:	R Bhana SC with A Kollori
Instructed by:	Majang Inc. Attorneys, Fourways
	Azar and Havenga Attorneys, Bloemfontein.