THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 863/2023

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **APPELLANT**

and

WOOLWORTHS HOLDINGS LIMITED **RESPONDENT**

Neutral citation: *The Commissioner for the South African Revenue Service v Woolworths Holdings Limited* (863/2023) [2025] ZASCA 99 (04 July 2025)

Coram: ZONDI ADP, DAMBUZA and MOTHLE JJA and NAIDOO and DIPPENAAR AJJA

Heard: 26 August 2024

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Summary: Value Added Tax 89 0f 1991 (VAT Act) – An entity conducting an enterprise as an investment company is entitled to input tax deduction in respect of costs incurred in relation to a rights offer made to shareholders to raise capital for further investment which would increase the value of its investments.

ORDER

On appeal from: The Tax Court of South Africa, Western Cape (Grobbelaar AJ, with Pasiwe and Gouws sitting as members of the Tax Court):

1 The late filing of the notice of appeal is condoned.

2 The appeal is reinstated.

3 The appellant shall pay the respondent's costs of the application for condonation and reinstatement, including the costs of two counsel.

4 The appeal is dismissed with costs, including the costs of two counsel, determined in terms of Scale C of the tariff of fees for legal practitioners who appear in the Superior Courts.

JUDGMENT

Dambuza JA (Zondi ADP and Mothle JA and Naidoo and Dippenaar AJJA concurring):

Introduction

[1] During 2014 the respondent, Woolworths Holdings Limited (Woolworths Holdings) acquired all the shares in an Australian entity, David Jones Limited (David Jones). In the course of raising the capital for that acquisition, Woolworths Holdings utilised the underwriting services of resident (South African) and non-resident service providers, and incurred expenses accordingly. It also incurred expenses in respect of underwriting services obtained from non-resident service providers. The main issue in this appeal is whether Woolworths Holdings is entitled to deduct, as input tax, the value-added Tax (VAT) it paid on the fees charged to it by local service providers in relation to the underwriting services.

Aligned to that issue, is the question whether Woolworths Holdings was obliged to declare and pay VAT on the fees it paid to the non-resident services suppliers. A related issue is whether SARS was entitled to impose an understatement penalty (USP) in terms of s 222 of the Tax Administration Act 28 of 2011 (the TAA) in relation to what it considered to be understatements in the declarations made by Woolworths Holdings.

[2] The Tax Court of South Africa, Western Cape (Grobbelaar JA, with Pasiwe and Gouws concurring) (the Tax Court) upheld an appeal against the disallowance by SARS of Woolworths Holding's input tax deduction claim for the costs of the underwriting services and the VAT levied for the imported services. Additionally, the court remitted the understatement penalty to Woolworths Holdings. The appeal by SARS in this Court, in terms of s 135(1) read with s 132(*b*) of the TAA, is against the judgment of the Tax Court, and is with the leave of that court.

Background

[3] Woolworths Holdings is a listed company on the Johannesburg Stock Exchange. It conducts an enterprise whose activities include the supply of management and support services to its subsidiaries. As an active holding investment company, it actively participates and assists in the management of its subsidiaries, including providing financial services and management of the group's capital (referred to as the treasury function). It charges management fees for these services. Its subsidiaries include Woolworths (Pty) Ltd (Woolworths), a retail chain store in which it holds 100% of the issued share capital.

[4] On 1 August 2014 Woolworths Holdings acquired all the shares of David Jones Limited (David Jones), an Australian department store, for a purchase price of R21, 4 billion (A$2.1 billion). At that time, the shares were held through Vela-

Investment Holdings (Pty) Ltd (Vela) and Osiris Holdings (Pty) Ltd (Osiris). Woolworths Holdings still holds the David Jones shares through these 'intermediate' companies.[1] The acquisition was funded by existing cash, new debt facilities, and equity funding raised through a R10 billion fully underwritten renounceable rights offer.[2] Woolworths Holdings concluded an unsecured syndicated facility agreement with Citibank, N.A (London), J P Morgan Limited (Johannesburg), Citi Bank South Africa, and the Standard Bank of South Africa Limited (SBSA), as underwriters and lenders, for provision of a short-term equity bridge facility in the amount of up to R11 billion. At completion of the transaction, the equity bridge facility was repaid with the capital raised from the rights offer.

[5] The rights offer was made to South African residents and non-resident shareholders in the ratio of 54.44% (resident) and 45.56% (non-resident). For this purpose, Woolworths Holdings secured professional (underwriting) services from local suppliers and non-resident suppliers (imported services). The services related to arranging and executing the equity bridge facility and the rights offer.[3] Consequently, Woolworths Holdings incurred professional fees in relation to these services.

[6] Woolworths Holdings incurred VAT of R18 609 841.21 in respect of SBSA's underwriting fees. When determining its liability for VAT for the period ending in February 2015 it deducted input tax of R8 478 752. 06, being a portion (54.44%) of the VAT incurred in relation to the services used in respect of the rights offer taken up by resident shareholders. It the declared R15 489 266 in

[1] Woolworths Holdings holds 100% of the shares in Osiris and Osiris holds 100% of the shares in Vela. Vela acquired 100% of the shares in David Jones.
[2] An invitation to existing shareholders to buy additional new shares in the company at a discount to the market price on a stated future date.
[3] Essentially assisting Woolworths Holdings with raising the capital needed to purchase the David Jones shares.

respect of the portion (45.56%) of the VAT incurred for the services supplied by non-resident service providers as 'imported' services and claimed a reduction of a portion (R12 883 990.78) of such costs. The input tax deduction claim resulted from a tax opinion given to Woolworths Holdings by Finvision VAT Specialists (Pty) Ltd (Finvision). It was based on the supply of the shares to residents being an exempt supply and the supply to non-residents being a zero-rated taxable supply.[4] In essence, Woolworths Holdings deducted input tax only in respect of the costs incurred in respect of local suppliers and paid output tax in respect of the costs incurred in respect of foreign suppliers of services.

[7] SARS disallowed the deduction of the VAT input of R8 478 752.06 and levied a further VAT output tax of R28 373.90 on what it regarded as the correct value of the total imported services (in addition to the R15 489 266.12 that had been declared by Woolworths Holdings). SARS then imposed a 10% USP of R2 136 274.28 against Woolworths Holdings, in terms of ss 222 and 223 of the TAA, for the amounts it considered to have been understated.

[8] The basis for disallowing the input tax deduction was that the services relating to the rights offer were not taxable supplies rendered for the purpose of consumption, use or supply in the course or furtherance of an enterprise conducted by Woolworths Holdings, as provided in the Value-Added Tax Act 89 of 1991 (the VAT Act). SARS reasoned that prior to the acquisition of David Jones, Woolworths Holdings had not engaged in the activity of issuing shares in a continuous, unchanged or uninterrupted manner, as an enterprise. It had not traded in the issuing of shares prior to the acquisition and did not do so subsequent to the acquisition. It never conducted an 'enterprise' continuously or regularly as envisaged in s 1 of the VAT Act. Rather, it conducted the rights offer as an

[4] In terms of s 2(1)*(c)* and *(d)* of the Value-Added Act 89of 1991 (the VAT Act) the issue of shares and debt are '*deemed to be financial services*'.

isolated activity. The issuing of the shares was 'not a sufficiently continuous or regular activity so as to constitute an enterprise activity'.

[9] For the same reason, SARS was of the view that the costs incurred in respect of the services rendered by the foreign suppliers related to a non-enterprise activity (the rights offer). A further additional output liability assessment was raised by SARS in respect of services supplied for due diligence, on the basis that the expenditure was incurred prior to the actual acquisition of David Jones.

[10] Woolworths Holdings lodged an appeal in terms of s 104 of the TAA, against the additional assessments. Only a portion of the objection relating to the output tax was upheld. Woolworths Holdings approached the Tax Court on appeal.

[11] The Tax Court found that the VAT charged on the underwriting services supplied to Woolworths Holdings by resident service providers was deductible input tax. It found that Woolworths Holdings conducted an enterprise as an investment company, which consisted of acquiring and managing investments, including raising capital to acquire subsidiaries and capital management services of the subsidiaries. As such, the expenditure was therefore incurred in the conduct of the enterprise conducted by Woolworths Holdings, the Court found. It also found that the services supplied in relation to the issuing of shares under the rights offer to non-resident shareholders were not imported services and that Woolworths Holdings was not liable for understatement penalties.

[12] In this Court, SARS appeals against the reversal of its disallowance of the input tax deduction together with its levying of VAT on what it considered to be imported services, and the imposition of the USP.

Input tax

[13] In determining these issues the starting point is s 7 of the VAT Act which regulates the imposition of VAT on the supply of goods or services, and the supply of imported services within the Republic. The imposition of VAT under s 7 is subject to exemptions, exceptions, deductions and adjustments as specified in the VAT Act.

[14] Section 7(1) and (2) of the VAT Act reads as follows:

'7 Imposition of value-added tax

(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-

(a) on the *supply by any vendor of goods or services* supplied by him on or after the commencement date *in the course or furtherance of any enterprise* carried on by him;

(b) on importation of any goods into the Republic by any person on or after the commencement date;

(c) on the supply of any *imported services* by any person on or after the commencement date, calculated at the rate of 15 per cent on the value of the supply concerned or the importation, as the case may be.

(2) Except as otherwise provided in this Act, the tax payable in terms of paragraph (a) of subsection (1) shall be paid by the vendor referred to in that paragraph, the tax payable in terms of paragraph (*b*) of that subsection shall be paid by the person referred to in that paragraph and the tax payable in terms of paragraph (*c*) of that subsection shall be paid by the recipient of the imported services'. (Emphasis added.)

[15] Section 7(1) creates a liability for the payment of VAT in relation to three kinds of persons: a vendor, an importer of goods and a recipient of imported services. A vendor is defined in s 1 of the VAT Act as a person who is required to be registered under that Act. In terms of s 23 of the Act any person who conducts an enterprise in this country, exceeding the prescribed registration

threshold value (of R1 million) in respect of taxable supplies, over the prescribed period must register with SARS as a vendor.

[16] Once a vendor is registered as such, under s 23, it must furnish returns to SARS in which it calculates and pays to SARS the VAT payable by it for each prescribed period. Vendors must then levy VAT on all their taxable supplies and are required to account for output tax on taxable supplies made.[5] In terms of s 16(3), vendors are entitled to deduct from their output tax liability, the associated input tax incurred.[6]

[17] Ordinarily, VAT is intended to levy tax on final consumption of goods and services that take place within the Republic, irrespective of where the goods are produced. Therefore, Woolworths Holdings would become liable for VAT on the value of the services it utilised from its suppliers in relation to the rights offer. However, as stated, Woolworths Holdings contends that the services were acquired in the course of furthering its enterprise and the attendant expenses were incurred for the purpose of making taxable supplies as contemplated in the definition of 'Input tax'. In addition, it asserts that the rights offer taken up by local shareholders was a supply of financial services which is exempt from VAT in terms of s 12(*a*) of the VAT Act. In respect of the rights offer taken up by non-residents, it asserts that the supplies are zero-rated under s 11(2)(l) of the VAT Act.

[18] Input tax, in relation to a vendor, is defined in s 1 of the VAT Act as:

'(*a*) tax charged under section 7 and payable in terms of that section by—

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[5] Section 7(1)*(a)* of the VAT Act.

[6] Section 16(3) of the VAT Act regulates the calculation of tax payable as follows:
'(3) Subject to the provisions of subsection (2) of this section and the provisions of sections 14, 15 and 17, the amount of tax payable in respect of a tax period shall be calculated by deducting from the sum of the amounts of output tax of the vendor which are attributable to that period, as determined under subsection (4) and the amounts (if any) received by the vendor during that period by way of refunds of tax charged under section 7(1)*(b)* and *(c)* and 7(3)*(a)* . . . '

(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) [not relevant in this instance]

where the goods or services concerned are required by the vendor wholly for the purposes of consumption, use or supply in the course of making taxable supplies or, where the… 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.'

[19] What this means is that input tax is incurred on taxable supplies used by the vendor and on imported goods used in making the taxable supplies in the course or furtherance of any enterprise conducted by the vendor. Under s 1 of the VAT Act, 'any supply of goods or services which is chargeable with tax under the provisions of s 7(1)*(a)* including tax chargeable at a rate of zero percent under s 11', is regarded as 'taxable supply'.

[20] Deviations from liability for VAT are provided for in ss 11 to 17 of the VAT Act. Section 11 provides for VAT on the supply of certain goods to be charged at the rate of zero per cent in specified circumstances. The supply of financial services, other than the zero rated per cent under s 11, is exempt from VAT charges in terms of s 12*(a)*. That section provides as follows:

'**12 Exempt supplies**. - The supply of any of the following goods or services shall be exempt from the tax imposed under section 7(1)*(a)*:

(a) The supply of financial services, but excluding the supply of financial services which, but for this paragraph, would be charged with tax at the rate of zero percent under section 11.'

In terms of s 11(2)*(l),* financial services supplied to non-residents are zero rated. In addition, under s 2(1)*(c)* and *(d)* of the VAT Act, the issue of shares and debt are 'deemed to be financial services'.[7]

[21] In *Commissioner for South African Revenue Service v De Beers Consolidated Mines Ltd*[8] (*De Beers*), this Court held that the first step in determining if goods or services are taxable supply is to identify the activity or business of the enterprise and to make factual findings as to what the enterprise is constituted of.[9] The activities that form the enterprise must first be determined and thereafter an enquiry shall be conducted into whether the goods or services in question were used in the course or furtherance of the enterprise. If they were, then they were a taxable supply in relation to the enterprise and proportionate input tax may be deducted.

Determining the enterprise

[22] The relevant parts of s 1 of the VAT Act define 'enterprise' as follows:

> '''**[E]nterprise''** means-
>
> (a) 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

[7] Section 2 of the Act provides:
'**Financial services. -(**1) For the purposes of this Act, the following activities shall be deemed to be financial services:
(a) . . .
(c) the issue, allotment, drawing, acceptance, endorsement or transfer of ownership of a debt security;
(d) the issue, allotment, or transfer of ownership of an equity security or participatory security.'

[8] *De Beers Consolidated Mines v CSARS* [2012] ZASCA 103 para 44.

[9] Ibid para 44.

concern *or any other concern of a continuing nature* or in the form of an association or club;

Provided that-

(i) anything done in connection with the commencement or termination of any such enterprise or activity shall be deemed to be done in the course or furtherance of that enterprise or activity.

(v) any activity shall to the extent to which it involves the making of exempt supplies not be deemed to be the carrying on of an enterprise;' (Emphasis Added.)

[23] In *De Beers*, this Court summed up the requirements for entitlement to deduct input tax in computation of VAT liability as follows:

'[A] vendor must (1) be registered in terms of the Act, (2) be carrying on an enterprise and (3) must have paid VAT on goods or services which the vendor acquired wholly for the purpose of consumption, use or supply in the course of supplying goods or services which are chargeable with tax under the provisions of s 7(1)*(a)* of the VAT Act, that is, goods or services must have been supplied in the course or furtherance of the enterprise'.[10]

Woolworths Holdings' Enterprise

[24] In the Tax Court, it was common ground that Woolworths Holdings is a vendor as envisaged in the VAT Act. It was also not in dispute that it is an active investment company that provides management and support services to its subsidiaries. Its main business as described in its memorandum of incorporation, is: 'to carry on the business of an investment holding company, focusing on direct or indirect investment in retail operations and matters ancillary thereto'.

[25] The Tax Court found accordingly that Woolworths Holdings conducts the enterprise of an active investment holding company, which entails acquiring and managing investments, including capital investments and assisting in the management of such investments.

[10] Para 48. The court also referred to s 17 of the VAT Act which, regulates computation of input tax where goods or services are acquired *partly* for consumption or use in the course of making taxable supplies.

[26] In this Court, SARS accepts that Woolworths Holdings receives dividends from the investments it holds and nurtures, but it insists that the dividends are received as a result of shareholding and not because of an enterprise conducted by it. SARS also contends that the description of the services supplied by Woolworths Holdings to its subsidiaries, as capital management, is an obfuscation.

[27] I have difficulty understanding this argument. SARS ignores a significant portion of the activities conducted by Woolworths Holdings. No explanation is offered as to why activities relating to the investments and financial management of those investments must be ignored in the factual determination of the enterprise of Woolworths Holdings.

[28] It is true that the definition of 'enterprise' requires, as a basic premise, that the activity of the enterprise be conducted continuously or regularly. But that definition makes express provision, by way of the proviso, for activity conducted in connection with the commencement or termination of the continuous activity, to be deemed to have been performed in the course or furtherance of the enterprise or the continuous activity. The inclusion of the proviso in the definition of 'enterprise', demands a holistic consideration of the activities of the entity under consideration. It includes, as part of business operations, transactions that are performed at the start and the end of such business operations.

[29] The contention by SARS that a once-off transaction at the start of a business enterprise does not form part of the enterprise is incorrect. Apart from ignoring the facts relating to the activities of Woolworths Holding, that argument is inconsistent with the textual definition of 'enterprise' in the VAT Act, including the proviso. In addition, the distinction sought to be drawn between an

'enterprise' and its 'business' is strained. The reference to the 'activity' of the vendor in the definition of enterprise puts paid to the distinction advanced by SARS.

[30] The courts have held that the words 'any enterprise or activity' in the definition of 'enterprise' in the VAT Act must be given a broad interpretation. In *Commissioner for South African Revenue Services v Tiger Oats (Tiger Oats),*[11] this Court rejected an argument similar to the contention advanced by SARS in this case. The Court held that even a business conducted intermittently, with long intervals, met the requirements of an enterprise as defined in the VAT Act. It further held that:

'….[Tiger Oats] is a public company listed on the stock exchange and it proclaims its object to be "to carry on the business of an investment holding company". That immediately negates any suggestion that the making of investments by it is, if it occurs at all, will be purely collateral and unrelated to the other business activities. It is to be its very *raison d'etre*. (Indeed, if that is not the business which it is carrying on, what, one may ask, is that business? No other is described in the memorandum and articles of association as being its main business and main object.) That, in turn, also negates the suggestion that making investments by it was not intended to be an ''activity of a continuing nature''. Any member of the public subscribing for shares in such a company would be entitled to expect, and it would be the duty of the company's board of directors to ensure, constant monitoring of the investments which the company chose to make, and appropriate action by way of new investment, further investment, or disinvestment as the need arose. Moreover, as was said in *Smith v Anderson* (1880)15Ch 247 (CA) at 260-261 and *Platt v CIR* 1922 AD 42 at 51, where the question is whether a company is in fact carrying on a business, the fact that it was formed for the purpose of doing so indicates *prima facie* the presence of the element of continuity of activity which is said to be a characteristic feature of carrying on a business.

The respondent is not a mere passive investor. It is an investor which is the holding company of the subsidiaries in which it holds shares. It is in a position to control the appointment of the directors of those subsidiaries. Its own executive directors are drawn from the boards of the

[11] *Commissioner for South African Revenue Services v Tiger Oats* [2003] ZASCA 43; [2003] 2 All SA 604 (SCA); 65 SATC 281.

subsidiaries. So intimately it is involved in the affairs of the subsidiaries that it is their banker. The very appellation given to the group of companies (The Tiger Group) is reflective of its dominance. Its fortunes and those of its shareholders are dependent upon the performance of the companies in which it has invested. Their performance is enhanced by the active participation of the respondent in their affairs by acting as their banker and providing loans which are either interest-free or bear rates of interest more favourable than could be bargained for in the market...'[12]

[31] The similarities in business activities and relationship with subsidiaries between the Tiger Group in *Tiger Oats* and Woolworths Holdings in this case, are immediately apparent. Apart from the description of the business conducted by Woolworths Holdings in its certificate of incorporation, the evidence demonstrates that, other than the investments in Woolworths, South Africa and David Jones, Woolworths Holdings also holds other subsidiaries as investments, including Woolworths Financial Services, Country Road in Australia, Witchery, Mimco, Politix, and Woolworths in various other parts of Africa. Woolworths Holdings invests in these subsidiaries and earns dividends and interest from loans advanced to them. Woolworth Holdings' Board of Directors determines capital management policy and makes capital management decisions for its own capital and for its subsidiaries. The business of Woolworths Holdings bears the hallmarks of an active investment holding company.

[32] When giving evidence in the Tax Court, Mr Moegamat Reeza Isaacs (Mr Isaacs), Woolworths Holdings' group finance director, and Mr Ian David Thompson (Mr Thopson), its Head of Taxes and Treasury Division, described the business conducted by Woolworths Holdings as an active investment holding

[12]. Ibid paras 34 and 35. This Court had to determine the liability of Tiger Oats for regional establishment levy under the Regional Services Council Act 109 of 1985. Section 1 of that Act defines an 'enterprise' as: '. . . any trade, business, profession or other activity of a continuing nature, whether or not carries on for the purposes of deriving a profit, but excluding any religious, charitable or educational activity carried on by any religious, charitable or educational institution of a public character'.

company. Mr Thompson described the services provided by Woolworths Holdings to its subsidiaries as treasury and tax services, governance, internal audit, and information technology services. Mr Isaacs described the services rendered as financial, treasury and management services, together with internal audit services. The evidence was that Woolworths Holdings 'would look at capital and other requirements of the business . . . including sourcing of the most cost-effective forms of debt and capital'. The creation or acquisition of subsidiaries and the services rendered to them by Woolworths Holdings all form part of its investment business.

[33] Contrary to SARS' contention, the fact that the rights offer preceded the actual acquisition of David Jones and the relevant management agreement, is immaterial. The sequence of events is a function of the method of nature of raising capital. Equally, the fact that Woolworths Holdings started to earn management fees from David Jones, more than a year after the acquisition, is of no moment.

[34] The factual context in this case is different from that in *De Beers*, on which SARS places much reliance. In *De Beers* this Court held that the holding of shares and receipt of dividends did not fall within De Beers' main trading activities, which were the mining and selling of diamonds from South Africa. De Beers, together with its subsidiaries owned diamond mining interests throughout the world, including South Africa. Its Board, together with an Independent Committee of Directors (ICD) resolved to seek professional advice from N M Rothschild (NMR), a foreign entity, in relation to an offer to take over the interests of the independent unit holders in De Beers and a related Swiss company, De Beers Centenary AG (DBAG). Professional advice was also sought from South African entities, including finance houses and lawyers. SARS determined that the NMR services were imported services under s 7(1)(*c*) of the VAT Act and assessed an amount of R22 549 055.76, as payable in that respect.

It also disallowed input tax claims by De Beers in the amount of R7 021 855.48, relating to VAT charged by the local services suppliers to it, in respect of the same transaction.

[35] In dismissing the appeal by De Beers against the disallowance of its input tax claim, this Court considered that the expenses incurred related to the then impending take over, and not to De Beers' enterprise of mining, marketing and selling diamonds. The Court held that: 'unless one conducts business as an investment company, the investments one holds cannot conceivably be regarded on their own as constituting an enterprise within the meaning of that term in the VAT Act'[13]...
where [De Beers] is not a dealer in shares, the holding of shares and receipt of dividends by [it] does not fall within the definition of ''enterprise'' and this must therefore be disregarded. It must be found that [De Beers'] ''enterprise'' for the purpose of the [VAT] Act, consisted of mining, marketing and selling diamonds.'[14]

[36] The submission on behalf of SARS in this case, that, based on these findings in *De Beers*, the holding of shares by Woolworths Holdings does not fall within the definition of enterprise, can only be based on a misreading of the judgment of this Court in *De Beers*. This Court in *De Beers* acknowledged that investments held by an investment company can conceivably be regarded, on their own, as an enterprise as envisaged in the VAT Act.

[37] The evidence that Woolworths Holdings acquires, holds and manages its investments is beyond dispute. Similarly, the evidence pertaining to the raising of capital or debt for its subsidiaries and itself was supported by minutes and

[13] *De Beers* para 34.
[14] Para 52.

resolutions taken at its Board meetings. All these activities are part of the enterprise of Woolworths Holdings as a listed active investment holding company.

Did the underwriting services constitute taxable supplies?

[38] 'Taxable supply' is defined in s 1 of the VAT Act as 'any supply of goods or services which is chargeable with tax under the provisions of section 7(1)*(a)*, including VAT chargeable at zero percent under section 11'[15]. This means that a supply is 'liable to [VAT] only if it is made in the course or furtherance of an enterprise'.[16] Consequently, in this case, to constitute a taxable supply, the rights offer, and the related underwriting services must have been used *in the course or furtherance of the* enterprise of Woolworths Holdings. The enquiry in this regard turns on the purpose for which the goods or services were supplied.

[39] In *Commissioner for South African Revenue Service v Capitec Bank Ltd(Capitec Bank)*[17] the Constitutional Court considered that the purpose for which a free loan insurance cover was provided by Capitec to its clients was to make Capitec's loan offering to unsecured borrowers more attractive, thus placing Capitec in a good competitive position relative to other credit providers in the same business.[18] The Constitutional Court held that:

'…The question that has to be answered, in terms of section 16(3)*(c)* is whether the supply of the loan cover to the borrowers was a taxable supply. That depends on whether it was made in the course or furtherance of an enterprise. And that depends, in turn, on whether the activity, in the course or furtherance of which the supply was allegedly made, qualified as an ''enterprise' and, if so, whether as a fact the supply was made in the course or furtherance of that 'enterprise''.

[15] Value-Added Tax Act 89 of 1991.
[16] 35(2) 3 ed *Lawsa* at 156.
[17] *Capitec Bank Limited v Commissioner for the South African Revenue Service* (CCT 209/22) [2024] ZACC 1; 2024 (7) BCLR 841 (CC); 2024 (4) SA 361 (CC); 84 SATC 369.
[18] *Capitec Bank* para 67. Capitec lent money to these borrowers in order to earn exempt interest and taxable fees.

. . . The question is not what benefit the borrower obtained from the free cover, but why *Capitec conferred the benefit* of free cover on the borrower.'[19] (Emphasis added.)

[40] In *Consol Glass* (Pty) Ltd v *The Commissioner for the South African Revenue Service* (*Consol Glass*)[20], this Court, having identified the enterprise carried on by Consol as the manufacture and sale of glass, made the following observations:

'Two observations assist the interpretative exercise. First, the diversity of goods and services that may constitute taxable supply in a modern economy and the complexity of the lines of supply that may be used in the making of such goods and services should not be underestimated. An interpretation that is too restrictive of what is required to make taxable supplies runs the risk of underestimating this diversity and complexity.

Second, since the purpose of acquisition is for consumption, use or supply, it is helpful to consider how these attributes of the goods or services acquired have utility in the making of taxable supplies. It is this functional relationship that signifies'.[21]

[41] The stated purpose of a Eurobond debt that had been taken by Consol was to effect the reorganisation of the Consol group of companies. And the refinancing arrangement, which was sourced in order to substitute the Eurobond debt, was used for the same purpose - the reorganisation of the various entities related to Consol.[22] Thus, both the Eurobond debt and the reorganisation finance did not have any functional effect on the glass container manufacturing operations. They were not a taxable supply.

[42] Similarly, De Beers engaged the services under consideration because it was the target of a take-over. It also had an obligation to report to the independent

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[19] Ibid para 73 and 74.

[20] *Consol Glass* (Pty) Ltd v *The Commissioner for the South African Revenue Service* [2020] ZASCA 175; 83 SATC 186.

[21] Para 29 to 30.

[22] The re-arrangement achieved was that Consol acquired the business of Consol Limited and its two subsidiaries as part of a leveraged buy-out. A new equity, Consol Holdings held all the equity in Consol Limited and Consol. Consol Holdings was controlled by a private equity consortium. Para 34

unit holders on the fairness and reasonableness of the take-over offer. For that reason, it had to obtain independent financial advice. The Court held that, 'such services were not acquired to enable [De Beers] to enhance its VAT enterprise of mining, marketing and selling diamonds. *The enterprise was not in the least affected* by whether or not [De Beers] acquired [the] services. They could not contribute in any way to the making of [De Beers'] 'taxable supplies'. They were also not acquired in the ordinary course of [De Beers'] 'enterprise as part of its overhead expenditure as argued by [De Beers]. They were supplied simply to enable [De Beers'] board to comply with its legal obligations . . .

. . .

The duty imposed on a public company that is a target of a take-over is too far removed from the advancement of the VAT enterprise to justify characterising services acquired in the discharge of that duty as services acquired for purposes of making taxable supplies, especially in the circumstances of this case'. (Emphasis added.)

[43] Woolworths Holdings on the other hand, used the underwriting services to raise capital to expand its business or enterprise. The acquisition affected the totality of Woolworths Holdings' operations. It is in the nature of Woolworths Holdings' business to invest pooled capital into financial securities and to sell shares to grow itself. Active investment of the nature that Woolworths Holding conducts, entails raising capital in the course of investing in prospective subsidiaries, management of capital for its subsidiaries, and trading in finance. Importantly, in *Capitec Bank* the Constitutional Court held that even where the financial services were supplied for no consideration, they were a taxable supply if they were supplied by the vendor to advance the interests of the enterprise.[23]

[44] A comprehensive consideration of the vendor's activities is required, rather than isolating a single or a segregated set of transactions. The inquiry is not narrow or restricted. In this case, instead of examining the enterprise holistically, SARS impermissibly isolated the share offer, ignoring the true extent and nature

[23] *Capitec Bank* para 61.

of the enterprise, and then reasoned that, to qualify as a taxable supply, or as an activity within an enterprise, the share offer (and related expenses) should be a continuous or regular activity on its own. It concluded that because the share offer did not recur, it was not Woolworths Holdings' enterprise. SARS ignored the impact of raising the capital and the acquisition on Woolworths Holdings' business.

[45] It is important to consider how 'enterprise' and 'taxable supply' in comparable foreign legislation have been interpreted in other jurisdictions. Taxation is primarily governed by domestic laws of this country. However, this case illustrates how the South African economy is linked to economies of the world, and how its tax base is affected by cross border transactions. In *Cibo Participants SA v Directeur régional des impôts du Nord-Pas-de Calai* [24] the European Court of Justice considered the direct involvement of Cibo in the management of its subsidiaries to be an economic activity and held that the expenditure it incurred in relation to acquisition of a shareholding in its subsidiary had a direct and immediate link with its business.[25] More specifically, with regard to the raising of capital by way of a rights offer. In *Kretztechnik AG v Finanzant Linz*,[26] it was held that the costs of raising capital by way of a rights offer formed part of Kretztechnik's overheads and had a direct and immediate link with its entire economic activity.[27] The undue focus by SARS, in the case before us, on the specific mode of raising capital (the rights issue), and isolating that activity from the rest of Woolworths Holdings' activities, makes little sense and would render this aspect of South African Tax Law incoherent both nationally and internationally.

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[24] *Cibo Participants SA v Directeur réegional des impôots du Nord-Pas-de Calais* [2001] EUECJ C-16/00; [2001] ECR I-6663; [2001] ECR I-6663, [2002] STC 460.
[25] Ibid para 35.
[26] *Kretztechnik AG v Finanzamt Linz* EU:C: 2005:320; [2005] 1 W.L.R. 3755; [2005] S.T.C. 1118.
[27] See also *Melford Capital General Partner Ltd v Revenue 7 Customs* [2020] STI 171; [2020] UKFTT 6 (TC) para 77.

[46] The underwriting services were used by Woolworths Holdings, for the purpose of enhancing the value of its investments. Consequently, they constituted consumption, use or supply in the course or furthering of its enterprise. A consequential relationship or functional link between the rights offer (together with the underwriting services) and the enterprise conducted by Woolworths Holdings was established. The services were consumed by Woolworths Holdings in the course of making taxable supplies and Woolworths Holdings was entitled to input tax deduction in respect of the costs incurred.

Imported services

[47] The definition of 'imported services' in s 1 of the VAT Act reads:

'a supply of services that is made by a supplier who is resident or carries on business outside the Republic to a recipient who is a resident of the Republic to the extent that such services are utilised or consumed in the Republic *otherwise than for the purpose of making taxable supplies'*. (Emphasis added.)

[48] Ordinarily, Woolworths Holding would have been obliged to declare and pay VAT on all supply of imported services, as prescribed in terms of s 7(1)*(c)* of the VAT Act where such services, were not used for the making of taxable supplies. However, given the conclusions I have reached above, that the services rendered by foreign suppliers were taxable supplies utilised in the course and furtherance of the enterprise of Woolworths Holdings, such services may not be considered to be imported services. No VAT liability was incurred on that portion of supplied services.[28]

Understatement Penalty

[28] See *De Beers* para 45.

[49] In terms of s 222 of the TAA, a taxpayer must pay an understatement penalty, in addition to the tax payable for the relevant period, in the event of an understatement by it.[29] Again, given the conclusions I have reached in the preceding paragraphs, Woolworths Holdings did not understate its VAT liability to SARS. Nevertheless, for completeness, I traverse briefly the further context and the contentions made by the parties in this regard.

[50] SARS levied the USP on the basis that Woolworths Holdings only received the tax opinion from Finvision after the due date of the VAT return, on 31 March 2015. The opinion is dated 25 February 2015 and the evidence on behalf of Woolworths Holdings was that it forwarded the opinion to SARS on the same day that it received it (25 February 2015). Woolworths Holdings asserted that it made a full disclosure of the transactions in accordance with its tax practitioner's opinion obtained prior to the date of the February 2015 return.

[51] SARS contends that Finvision, particularly, Mr Christoffel Johannes Eagar (Mr Eagar), who gave the opinion to Woolworths Holdings, was not an 'independent' practitioner as envisaged by s 223(3)(*b*) of the TAA because he 'peddled a model to Woolworths to move it away from the applicable legal position' as he had a direct and improper interest in the fee that he would earn for giving the opinion. First, this argument was impermissibly raised for the first time in the SARS' heads of argument. At this stage of the proceedings SARS is limited to the grounds raised in its pleadings.[30] In addition, there is no evidence to support the argument that Mr Eagar's opinion was self-serving, contrived and designed to improperly persuade Woolworths Holdings to claim input tax. As

[29] Section 222(1) of the Tax Administration Act 28 of 2011 provides as follows:
'In the event of an ''understatement'' by a taxpayer, the taxpayer must pay, in addition to the 'tax' payable for the relevant tax period, the understatement penalty determined under subsection (2) unless the understatement results from a *bona fide* inadvertent error.'
[30] *Consol Glass* para 44; rule 32(1) of the Rules Promulgated under Section 103 of the Tax Administration Act, 2011 (Act No. 28 of 2011), GN 37819, 11 July 2014.

demonstrated in the findings made in this judgment Mr Eager's opinion was correct, in fact and in law. Furthermore, as stated, SARS never put up any evidence to support the allegation that the opinion was obtained after the due date of the February 2015 tax returns. No basis was established for the imposition of the USP.

The application for condonation of the late filing of the notice of appeal

[52] SARS' notice of appeal was filed out of time by almost four months. The reason for the delay, as explained by SARS, was 'difficulties' experienced with the State Attorney's Bloemfontein office. In opposing the application, Woolworths Holdings points out that there is no admissible substantiation for this allegation. I, however, am of the view that condonation should be granted. Although the delay is not insignificant, the matter is of great importance to both parties. And it was important that the issues arising in this case be determined decisively given the different factual context, compared with *De Beers* and *Consol Glass*.

Costs

[53] Woolworths Holdings seeks a costs order against SARS on an attorney and client scale because of the insistence on the argument that the opinion was obtained after the February 2015 date, and the baseless imputation of impropriety on Mr Eagar. Indeed, in both the Tax Court and this Court SARS persisted with the allegations that Woolworths Holdings was persuaded to claim input tax by Mr Eagar who, in turn, was not independent and was motivated by improper motive to earn fees for opinion. These allegations have been proved to be meritless. However, there is no evidence of bad faith, abuse of court process or other conduct by SARS that requires punishment that is harsher than the usual costs order.

[54] For all these reasons, the following order is granted:

1 The late filing of the notice of appeal is condoned.

2 The appeal is reinstated.

3 The appellant shall pay the respondent's costs of the application for condonation and reinstatement, including the costs of two counsel.

4 The appeal is dismissed with costs, including the costs of two counsel, determined in terms of Scale C of the tariff of fees for legal practitioners who appear in the Superior Courts.

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N DAMBUZA
JUDGE OF APPEAL

Appearances:

For the appellant:	A R Bhana SC, with
	CAA Lewaak
Instructed by:	Phatshoane Henney
	Bloemfontein
For the respondent:	A R Sholto Douglas SC, with
	G Cooper
Instructed by:	Nirenstein Attorneys Inc, Cape Town
	McIntyre Van Der Post Inc, Bloemfontein.