

Media Summary – Stellenbosch Farmers' Winery v Commissioner for SA Revenue Service 511/2011 and 504/2011

The Supreme Court of Appeal (the SCA upheld an appeal from the Tax Court, Cape Town setting aside the additional assessment of the taxpayer, Stellenbosch Farmers' Winery, in respect of the 1999 tax year. The cross-appeal of the respondent, the Commissioner of the Revenue Service, relating to interest on the assessed tax, was dismissed and the appeal in the second case, heard simultaneously, which related to value-added tax (VAT), was also dismissed.

The taxpayer was a wholesaler that imported and distributed Bells whiskey in South Africa. It concluded a 10 year agreement relating to this distribution which was prematurely cancelled more than three years before the earliest date on which the distribution agreement could be terminated. As a result, the tax payer received the sum of R67 million from United Distillers, a United Kingdom (UK) based company with which the tax payer had concluded the distribution agreement. The Commissioner of the Revenue Service included the receipt of this payment as part of the taxpayer's gross income in the assessment for tax. This was upheld by the tax court.

On appeal, the issue before the SCA was the taxpayer's contention that the payment was of a capital nature which attracted no tax liability. The Commissioner's cross-appeal related to the tax court's decision not to allow interest on the unpaid provisional tax while the appeal in the second case related to whether VAT was payable on the payment received because the payment allegedly related to services supplied by the taxpayer to a non-resident of South Africa but directly

connected to movable property situate in South Africa.

The SCA held that the tax court misinterpreted the evidence where it reasoned that the payment received arose out of a calculation by the taxpayer of its future loss of profits, and therefore the payment was part of gross income. Evaluating the evidence in the case, the SCA found that the taxpayer did not carry on the business of the purchase and sale of rights to purchase and sell liquor products, did not embark on a scheme of profit making, and discharged the onus of establishing the payment was of a capital nature.

The cross-appeal was dismissed since the issue became moot once the SCA found that the provisional tax was not payable. The appeal with regard to VAT was dismissed on the bases that the services in question, compositely the surrender of rights, were not connected to any movable property, and on the basis that in any event the exclusive distribution right held by the taxpayer was an incorporeal right not situated in South Africa since United Distillers was registered in the UK, which meant VAT was to be charged at zero per cent in terms of s 11 (2) (I) (ii) of the Valued Added Tax Act