



NOT REPORTABLE

CASE NO: SA 88/2023

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MENZIES AVIATION (NAMIBIA) (PTY) LIMITED

Applicant

and

NAMIBIA AIRPORTS COMPANY LTD

First Respondent

PARAGON INVESTMENT HOLDINGS (PTY) LTD JV

ETHIOPIAN AIRLINES

Second Respondent

Coram: FRANK AJA

Heard: In Chambers

Delivered: 3 December 2024

Summary: This is a taxation review in which the applicant (Menzies) seeks to review the taxing master's decision in terms of rule 25(5) of the Rules of this Court. The applicant objected against the first respondent's junior instructed counsel's fees and further objected that the invoices presented by the said junior counsel did not amount to tax invoices as stipulated in the Value-Added Tax Act 10 of 2000 (VAT Act), and that, on this basis, junior counsel's claims should have been disallowed in total.

Held that, an invoice must be distinguished from a tax invoice. The basic working of the VAT Act is that all persons involved in taxable activities exceeding the threshold must register for the payment of VAT and such persons, once registered, are entitled to set off input VAT against output VAT in the VAT returns they are obliged to file once registered so as to determine their liability, if any, for VAT from time to time. Persons not registered for VAT thus continue to issue normal invoices and cannot claim any VAT in respect of taxable activities and do not fall within the ambit of the VAT Act.

Held that, it is not the duty of the taxing master, when dealing with a taxation, to decide whether in respect of a claim, where the claimant does not provide a tax invoice but a normal invoice, the claimant should be registered for VAT or not. The taxing master can accept the claim at face value where he is satisfied that the invoice is not fictional or fraudulent.

The objection against the submission of an invoice instead of a tax invoice by instructed junior counsel is rejected.

The objection raised against items 20 and 22 of the bill of costs relating to the first respondent's charges of the travelling arrangements, airfare and accommodation for its senior counsel were conceded to by the taxing master and thus succeeds.

Held that, the application to review the *allocator* is successful and the *allocator* is set aside for the taxing master to issue a new *allocator* in accordance with this judgment.

TAXATION REVIEW

FRANK AJA:

[1] In the above-mentioned matter the applicant was for practical purposes the losing party. Its appeal was dismissed and the counter-appeal by the second

respondent was successful. The costs order followed the aforesaid result and included the costs of one instructing and two instructed counsel. The full judgment of the court can be accessed as follows: *Menzies Aviation (Namibia) (Pty) Ltd v Namibia Airports Company Ltd* (SA 88-2023) [2024] NASC (3 June 2024).

[2] At the taxation, objections were raised against junior instructed counsel of first respondent's fees. The taxing master did address the amounts claimed and thus dealt with the complaints relating to the quantum of the claim. A further objection was raised that the invoices presented by the said junior instructed counsel did not amount to tax invoices as stipulated in the Value-Added Tax Act 10 of 2000 (VAT Act) and that, on this basis, his claims should have been disallowed in total.

[3] The taxing master indicated that he was of the view that it was not for him to ensure if the VAT Act was complied with or not. He points out that where VAT is indicated as being part of an amount claimed for fees such amount would be disregarded for taxation purposes but that VAT would be added at the end of the *allocator* subsequent to the determination of the total amount due in terms of a taxation.

[4] Menzies seeks a review of the taxing master's decision in terms of rule 25(5) of the Rules of this Court and submits that the lack of a tax invoice from the instructed junior counsel should have led to the rejection of the claim based on his fees.

[5] An invoice must be distinguished from a tax invoice. The former is defined in the VAT Act as 'any document notifying an obligation to make payment'. A tax invoice 'means a document provided as required by section 21'. This in turn refers to invoices issued by 'a registered person' and it is clear that the importance of tax invoices relate to 'registered suppliers' and registered recipients. Registered person in turn is any person registered or deemed to be registered in terms of the VAT Act. A person need only apply for registration once his or her taxable activities exceed the threshold amount stipulated in the VAT Act.

[6] The upshot of the basic workings of the VAT Act is that all persons involved in taxable activities exceeding the threshold must register for the payment of VAT and such persons, once registered, are entitled to set off input VAT against output VAT in the VAT returns they are obliged to file once registered so as to determine their liability, if any, for VAT from time to time. Persons not registered for VAT thus continue to issue normal invoices and cannot claim any VAT in respect of taxable activities and do not fall within the ambit of the VAT Act.

[7] In the circumstance I cannot see why the taxing master, when dealing with a taxation should be called upon to decide whether in respect of a claim, where the claimant does not provide a tax invoice but a normal invoice, such claimant should be registered for VAT or not. The taxing master can accept the claim at face value where he is satisfied that the invoice is not fictional or fraudulent. He is the taxing master

and not an inspector of NAMRA. There is no suggestion that the expense was, in fact, not incurred by first respondent.¹

[8] I am thus of the view that the objection based on the fact that as the invoice of instructed junior counsel was not a tax invoice but a normal invoice meant that the claim had to be rejected in total cannot be upheld.

[9] What I realised when considering the response of the taxing master to the aforementioned objection was that the format of the standard *allocator* assumes the the relevant persons are registered for VAT. Hence the *allocator* provides for the items to be taxed and this amount (without VAT) is then listed per item. Once all items are taxed, provision is made for a 'subtotal' which is the taxed amounts added up whereafter provision is made for 'VAT at 15%' to be added to this 'subtotal' and thereafter disbursements are added to get to the total of the *allocator*. This means that it is assumed that all services adding up to the mentioned 'subtotal' are by VAT registered suppliers.

[10] The consequence of the foregoing format was that VAT was added to the fees of first respondent's junior counsel so as to calculate the total value of the *allocator*. This obviously could not be done as the invoice was not a tax invoice but a normal invoice which did not include VAT. This was clearly wrong. First respondent did not have to pay VAT when it paid its instructed junior counsel and nor can

¹ *Texas Co. (S.A.) Ltd v Cape Town Municipality* 1926 AD 467 at 488.

Menzies be compelled to pay VAT where it is not payable. This was not the complaint by Menzies but as it was clearly an error I am of the view that it should be corrected.

[11] The relevant invoices in support of the claim in respect of first respondent's junior counsel after being taxed amounted to N\$140 300 and to this VAT at 15 per cent was added, ie an amount of N\$21 045. This latter amount, calculated on the assumption that VAT was payable, was wrong as indicated above and the *allocator* must accordingly be reduced by this amount.

[12] Objections were also raised at the taxation against items 20 and 22 of the bill of costs. Item 20 relates to charges to first respondent in respect of the traveling arrangements for its foreign senior counsel. Similar objections were raised against item 22 which relates to disbursements made by first respondent in respect of the said senior counsel's airfare and accommodation. Whereas the taxing master did tax off a significant part of these claims, Menzies objected to payment of these charges on principle and submitted that these costs are attorney and client costs as first respondent elected to employ foreign senior counsel and cannot expect its opponent to stand in for mentioned costs on a party and party scale.

[13] Where local counsel is not available and foreign counsel are engaged the normal rule should be that the opposing party should not be liable for such counsel's traveling expenses or accommodation.² I do not state this as an absolute rule

² *Windhoek Crushers (Pty) Ltd v Voights & another* 1969 (1) SA 574 (SWA) and *Friedrich Kling v Continental Jewellery Manufacturer* 1993 (3) SA 76 (O) para 11.2.

because foreign counsel can only appear in Namibian courts subsequent to permission being granted for this purpose by the Chief Justice pursuant to the provisions of s 85(2) of the Legal Practitioners Act 15 of 1995. Where, eg, the application for such foreign counsel is granted out of necessity rather than because of considerations of convenience, reasonable travelling and accommodation costs may be considered. It is however not necessary to delve into more details in the present matter as no special reasons have been advanced as to why the said disbursements should be allowed and the taxing master conceded that in terms of the normal approach these disbursements should not have been allowed.

[14] In the premises, the application to review the *allocator* is successful and the *allocator* will be set aside for the taxing master to issue a new *allocator* in line with this judgment. As the review was not opposed no costs order will be issued.

[15] The following order is thus made:

- (a) The *allocator* of N\$287 916,73 dated 6 September 2024 is hereby set aside.
- (b) The Taxing Master is to recalculate the amount due in respect of the expenses other than disbursements without adding VAT to the fees taxed in respect of first respondent's junior counsel.

- (c) The taxing master is directed to deduct from the amount due in respect of disbursements the total of the payments allowed and reflected under items 20 and 22.
- (d) The taxing master is directed to issue a new *allocator* in the amount determined subsequent to executing the calculations made in paras (b) and (c) above.

FRANK AJA

REPRESENTATION:**APPLICANT:**

S Oosthuizen (with him E Viljoen)

Instructed by Viljoen, Viljoen &
Vennote (Partners) Windhoek

FIRST RESPONDENT:

C Kavendjii

Of Kanguuehi & Kavendjii Inc.,
Windhoek