

IN THE REVENUE APPEALS TRIBUNAL

HELD AT MASERU

CASE NO. RAT [REDACTED]

In the matter between:-

[REDACTED]

APPELLANT

AND

LESOTHO REVENUE AUTHORITY

RESPONDENT

JUDGEMENT

CORAM: ADV. M. E. TEELE KC
 MS. P. LEBITSA
 MR. R. MAPETLA

DATE OF JUDGEMENT : 23rd – February – 2021

Registration as a vendor under the Value Added Tax 9 of 2001 as amended - Correct interpretation of Section 17(1)(b) of the Value Added Tax Act - Appellant applying for registration as a vendor before rendering taxable supplies - Commissioner General registering the appellant and fixing an effective date of registration which was earlier than the date on which appellant rendered taxable supplies – appellant claiming credit for input tax – the respondent declining appellant's application for credit for input tax - The appellant noting an objection to such refusal - The Commissioner General dismissing the objection and altering the date of registration of the appellant ex post facto – appellant contending that the Commissioner General acted ultra vires his powers in altering the registration date – The appeal dismissed – Each party to bear its own costs.

1. Appellant is a registered vendor in terms of Section 17(1) (b) of the Value Added Tax Act 9 of 2001 as amended (The Act). The

respondent is the Lesotho Revenue Authority (LRA). This appeal has been lodged by the appellant against an objection decision by the Commissioner of the LRA, dated the 8th of February 2020. Since the appeal had been filed out of time it was necessary for the appellant to file an application for condonation for late filing thereof, and the respondent did not oppose the application. We accordingly granted the said application.

2. The parties were agreed that it was necessary for us to hear viva voce evidence. Appellant adduced the evidence of a solitary witness, namely [REDACTED] but the respondent closed its case without calling witnesses. Because of the view that I take of this matter it is not necessary, at this initial stage, to traverse the evidence of appellants' witness which, by and large, was not challenged during cross examination, by [REDACTED] on behalf of the respondent.
3. It proves convenient to reproduce in full the objection decision under challenge in this matter, because it contains a summary of the background events that were known to the Commissioner at the time he made his decision, as well as the reasons upon which he based the impugned decision.
4. I have perused the record of pleadings and trial bundle, and I am satisfied that the summary of background facts contained in the Commissioner's decision is accurate. There was no suggestion, in any event, from either party that this is not the case.
5. The said decision is recorded as follows:-

**Commissioner General
Lesotho Revenue Authority**

8 February 2019

TIN: XXXX

[REDACTED]

MASERU 100

DEAR SIR/MADAM

**RE: OBJECTION DECISION ON THE OBJECTION
SUBMITTED BY ██████████ IN RESPECT OF THE NTOICE
OF ASSESSMENT DATED 3 AUGUST 2018**

1. On the 3rd August 2018, an Assessment was made against ██████████ (hereinafter ██████████). It modified the date of VAT registration of ██████████ from September 2016 (being the month which ██████████ was following its application registered to VAT) to December 2017. The reason advanced behind such a change in the VAT registration dates having been that, ██████████ only started making taxable supplies in October 2017 beyond a period of twelve months from the date it was registered for VAT and only exceeded the VAT threshold in December 2017. As a result, ██████████'s claim for credit for input tax in the total amount of M██████████ in respect of the period February 2017 to September 2017 was disallowed.
2. Having familiarized myself with material correspondence which exchanged hands between us and the ██████████, the following is a fair representation of the background related to this matter:-
 - a) ██████████ was registered as a Company in terms of the Company laws of Lesotho in 2006. Following its incorporation it became a dormant entity that only owned a lease over a vacant Plot No. ██████████ Maseru.
 - b) During 2014, its shareholders approached ██████████ (hereafter ██████████) which is a property development company to discuss the possibility of selling the plot owned by ██████████. Following research conducted by ██████████, it was determined the Plot in question could be put in good use if it were developed and leased out. An agreement was then entered into by ██████████ and ██████████ for the sale of shares of ██████████ to ██████████ which was ██████████ acquiring 100% shareholding of ██████████ in 2016. Subsequent thereto, ██████████ now as the holding company of ██████████ entered into an

agreement with [REDACTED] for the development of the plot in question owned by [REDACTED].

- c) In order to develop the plot owned by [REDACTED], [REDACTED] entered into a construction agreement with [REDACTED] Construction Proprietary Limited (hereafter [REDACTED]) on the 17th May 2016.
- d) On or about the 26th October 2016 [REDACTED] concluded an agreement with [REDACTED] to secure financing of the development of the plot in question. [REDACTED] became a surety to the Loan agreement [REDACTED] concluded with [REDACTED] in favour of [REDACTED] and had a Mortgage Bond registered in favour of [REDACTED] over the plot in question. The funds from nedbank became available to [REDACTED] in October 2016.
- e) Whilst [REDACTED] was awaiting for funding from [REDACTED] it incurred the initial costs of development and on the 21st September 2016 entered into a Cession Agreement with [REDACTED] and [REDACTED] in terms which it was agreed that all rights and obligations in and to the Principal Building Agreement [REDACTED] had entered into with [REDACTED] be cede to [REDACTED].
- f) About a month prior to the conclusion of the Cession Agreement referred to above, [REDACTED] entered into a sub-lease agreement with [REDACTED] in terms of which [REDACTED] agreed to sub-let the plot in question to [REDACTED]. The stated reason why [REDACTED] entered into a sub-lease agreement with [REDACTED] was that it required the site in order to manage the contractor and related professional teams. Further that [REDACTED] needed a storage area in order to hold any stock items that [REDACTED] needed on site during the course of the building contract. Another further stated reason was that the sub-lease was intended to generate income for [REDACTED] to take care of the holding costs of [REDACTED] on the land to be developed. These holding costs were identified as rates, electricity, water, administration of the company, audit and financing interests. The sub-lease agreement commenced on the 1st October 2016.

- g) Construction or development of the land commenced on or about April 2016 and was intended to be for a duration of 12 months. However due to unforeseen delays, the Practical Completion Certificate was only issued on the 27th September 2017 and the 1st Rental on the developed property received in October 2017. By December 2017 [REDACTED] had made taxable supplies in excess of the threshold.
- h) The initial payments to the contractor ([REDACTED]) and the professional team were paid by [REDACTED] until [REDACTED] financing was secured. Pursuant to the cession agreement and from the February 2017, [REDACTED] invoiced [REDACTED] directly and all costs which had been incurred by [REDACTED] from the start of construction until January 2017 were transferred to [REDACTED] at cost. These costs were recorded in the books of [REDACTED] as building costs. [REDACTED] did not claim input tax credit on payment made by it to [REDACTED]
3. Section 17(1) of the VAT Act of 2001 provides that *where at the beginning of any period of twelve months there are reasonable grounds to expect that the total taxable value of taxable supplies to be made by a person during that period will exceed the registration threshold set out in subsection (2) such a person may apply to be registered as a vendor*".
4. Once therefore and on information provided by client to the Authority, there appears to be reasonable grounds to expect that client will during any period on the 12 months made total taxable supplies exceeding the registration threshold; the Commissioner is expected to register such a client.
5. [REDACTED] should have therefore had reasonable grounds to have expected that during the period of 12 months from September 2016 to September 2017, it would have made taxable supplies exceeding the registration threshold.
6. In its letter dated 20th February 2018 which appears to be a response to a communication from us, [REDACTED] advises that the reason it applied as it did for rented out its office complex by mid-2017.

7. In between September 2016 and September 2017 (being a 12 months period from the date of its registration) █████ did not undertake any business of letting out its property nor was it in a position to have done so. This because construction of the building was only completed in September 2017. The only sub-letting business it entered into, which I will comment on it later, related to █████
8. As indicated above, on the 3rd August 2018, an Assessment was made against █████ It amounted to a rejection of claims for refund made by █████ for input tax it claimed to have paid to █████ from February 2017 to September 2017.
9. The assessment was raised on the ground of █████ only began making taxable supplies in October 2017 and exceeded the VAT threshold in December 2017. It disregarded █████ claim that it sublet its land to █████ at a fee to enable the latter to develop its land.
10. In terms of Section 11(1)(a) of the VAT (Amendment) Act No. 6 of 2003, a credit is allowed to a vendor for input tax payable or paid in respect of a taxable supply to, or taxable import by the vendor in the course of furtherance of an enterprise carried on by the vendor.
11. Under Regulation 10(2) (a) of the VAT Regulation Legal Notice No. 95 of 2003, input tax credit is not allowed to a vendor in respect of any supply or import by a vendor, which is deemed not to be made with sole purpose of furthering such vendor's enterprise.
12. Enterprise is defined in Section 3 of the VAT Act of 2001 as any undertaking in the ordinary course of which goods or services are supplied.
13. In terms of Section 12(3) of the VAT Act, supply is made in the course of furtherance of an enterprise carried on by a vendor if the supply is made by the vendor as part of, or incidental to, any independent economic activity of the vendor, whatever the purposes or results of that activity.

14. *In other words, in order to determine whether a vendor is entitled to credit for input tax paid, the matter has to be looked at from the perspective of whether or not it was paid by the vendor in doing something which was in the course of furtherance of the business carried on by the vendor.*
15. *Primarily the question requires that there be clarity regarding the nature of the enterprise because the purpose of supplying the services and whether they were utilized in making taxable supplies could only be determined in relation to a particular enterprise and what the enterprise consisted of, it being a factual question.*
16. *The normal business and economic activity of ██████ was and it to make available its developed property for rental.*
17. *Whilst it may not be disputed that ██████ did not sub-let any of its developed property for rental from September 2016 to September 2017, it did however enter into a sub-lease agreement with ██████ for a fee of M██████ from October 2016 until completion of the construction period and in terms of which it sub-let to ██████ its premises for reasons already articulated above. I am reluctant to conclude that in so sub-letting its premises to ██████ ██████ became engaged in an enterprise for sub-letting developed property, so much so that it could be said that payments made by ██████ to ██████ were made in the course of furtherance of an enterprise carried on by ██████*
18. *In the event that I should be wrong, I in the alternative pronounce myself as follows. The reason ██████ applied to be registered as a Vendor was because and so it alleged it had reasonable grounds to believe that it would have made taxable supplies within a period of 12 months from date of registration exceeding the registration threshold of rental of its developed property. This did not happen. The effect of this is that it now seeks to gain a tax benefit in circumstances where it did not make taxable supplies on grounds which had motivated it to have applied for registration.*
19. *I am of the view that the reason ██████ applied to be registered as a vendor so early during the construction period and not at the end or*

towards the end of the construction period and/or closer to the period the building was to become available for rental or at the beginning of the period the first rental was to be paid; and the reason it entered into the agreements it did, in the first instance with █████ and in the second instance with █████ and █████, was for the sole and dominant purpose of obtaining a tax benefit.

20. In terms of Section 84(2) (a) and (b) of the Value Added Tax No. 9 of 2001, if I am satisfied that a person obtained a tax benefit in connection with a scheme whose sole and dominant purpose was to enable that person to obtain a tax benefit; I am entitled to determine the liability of the person who has obtained the tax benefit as if the scheme had not been entered into or carried out, or in such manner as I consider appropriate for the prevention or reduction of the tax benefit. This is a matter wherein I am so satisfied on the grounds advanced in paragraph 19 above.

21. █████ Objection is accordingly disallowed on the basis of grounds advanced above. Its claim for input tax is disallowed.

Yours faithfully,

████████████████████ (CFA)
Commissioner General

6. The appeal is premised upon two principal contentions by the appellant, namely that :-

6.1 The CG incorrectly interpreted, and applied, the provisions of Section 17(1) (b) of the Act and

6.2 The CG incorrectly held that the appellant entered into a scheme for the sole and dominant purpose of obtaining a tax benefit as provided for under Section 84(2)(a) and (b) of the Act.

7. The appellant contends that had the CG correctly interpreted the provisions of Section 17(1)(b) of the Act, he would not have modified the appellant's date of registration from September 2016 to December 2017, on the basis that the appellant only started making taxable supplies in October 2017, beyond period of 12 months from the date it was registered for VAT and that it exceeded the VAT threshold only in December 2017.
8. In the same vein the appellant contends that it was an error on the part of the CG to have found that appellant applied for registration as a vendor for VAT so early during the construction period, not at the end or towards the end of construction period and/or closer to the period when the building was to become available to tenants for rental, or at the beginning of the period when the first rental was paid, and that the reason it entered into an agreement it did, in the first instance with [REDACTED] and in the second instance with [REDACTED] and [REDACTED] Construction, was for the sole dominant purpose of obtaining a tax benefit.
9. It is the correctness of the preceding contentions of the appellant that I have to decide. I propose, to first deal with the contention relating to the correct interpretation and application of Section 17(1)(b) of the Act.

SECTION 17 OF THE ACT

10. Since Section 17 is central to the first ground of appeal it is necessary to reproduce its provisions in some detail in so far as they might be implicated in the determination of this appeal.

The Section 17 in so far as it is relevant reads as follows:-

- 1) *A person who is not already registered is required to apply to be registered as a vendor –*

(a) within fourteen days of the end of any period of twelve months if during the period the person made taxable supplies the taxable value of which exceeded the registration threshold set out in subsection (2); or

(b) at the beginning of any period of twelve months where there are reasonable grounds to expect that the total taxable value of taxable supplies to be made by the person during the period will exceed the registration threshold set out in subsection (2).

2)

3)

4) For purposes of subsection (1) and paragraphs (b) and (c) of this subsection:-

(a) the term "taxable supplies" means supplies that would be taxable supplies if the person making the supply were a vendor;

(b) the taxable value of the person's supplies is determined under Section 14; and

(c) in determining whether the registration threshold is exceeded, regard shall be had to the value of taxable supplies made by the person and associates of the person.

5)

6)

7) An application for registration shall be in the form approved by the Commissioner and the applicant shall provide such further information as the Commissioner may require.

8) The Commissioner shall register a person who applies for registration in accordance with subsection (1), (3) or (6) and issue to the person a value added tax registration certificate unless the

Commissioner is satisfied that the person is not eligible to apply for registration for the purposes of the Act.

9) *A value added tax registration certificate issued under this section shall state the name and other relevant details of the vendor, the nature of the vendor's trading activities, the date on which the registration takes effect, the taxpayer identification number of the vendor, and any other matters as the Commissioner may prescribe.*

10)

11) *Registration under this section takes effect from the date of registration as specified in the value added tax registration certificate or such later date as the Commissioner may determine.*

12)

13) *The Commissioner may:-*

(a) impose conditions or limitations on a registration; or

(b) suspend, or modify the conditions or limitations on, a registration

14)

15)

16)

11. The parties are in agreement that Section 17(1) (b) requires an ex ante facta assessment of the total taxable value of taxable supplies to be made by a party required to apply for registration. The appellant contends that despite the concession, the CG has in fact applied an ex post facto test to the application of the provision. This is so, contends the appellant, because the CG has taken into account facts that were not known to the appellant when it applied for registration

which the CG, like an arm chair critic, had in his possession to modify the date of registration.

12. It has been contended for the respondent that the CG did no such thing. The fault, so contends the respondent, lies with the appellant in that it failed to reckon the 12 months period from the date when it started to make taxable supplies. The start of the 12 months period referred to in Section 17(1)(b) had to coincide with the time when taxable supplies would first be made by the applicant, the argument goes.
13. Section 17(1) (b) is drafted in a manner that may lead to controversies such as presented in this case. Whereas in Section 17(1)(a) the requirement for registration is indicated within 14 days of the end of any period of twelve months, such clear formulation is not retained in respect of Section 17(1)(b). This notwithstanding, there can be no doubt that there are no two periods of twelve months but only one contemplated in S17(1)(b). The beginning of twelve months refers to the same twelve months during which the threshold is projected to be exceeded.
14. Nevertheless the uncertainty as to the starting point at which registration becomes compulsory persists, and begs the question whether the section has any inbuilt criteria on the basis of which the beginning of the twelve months period may be reckoned. This is the issue to which I now turn. I was referred to the case of *Natal Joint Municipal Pension V Endumeni Municipality*¹ to the effect that

“interpretation is the process of attributing meaning to the words used in the document... having regard to the context provided by reading the particular provisions in the light of the document as a whole and the circumstances attendant upon its coming to existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the

¹ 2012 (4) SA 593 (SCA)

material known to those responsible for its production The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible of unbusinesslike results or undermines the apparent purpose of the document".²

This is how I propose to deal with the matter.

15. Section 17(1) (b) has two basic features that hold a clue to its interpretation. First, it refers to a period of twelve months. In this regard there is reference to the beginning of such period, as well as duration of such period when the registration threshold is likely to be exceeded. The second major feature is the concept of taxable value of taxable supplies.
16. Taxable supplies are defined as supplies that would be taxable supplies if the person making the supply were a vendor ³. It is immediately clear that taxable supplies are determined with reference to the activities of a vendor. A vendor is defined as a person who is registered or treated as registered under the Act ⁴.
17. Taxable value is determined in terms of Section 14 of the Act. Taxable value of a taxable supply is defined as consideration for the supply ⁵. Whereas there are different goods and services set out in the Act, a common denominator is that taxable value is reckoned on the basis of a fair market value of supply at the time of supply ⁶. Section 4(2) of the Act provides that a fair market value of a taxable supply or taxable import at any date is consideration in money, which a similar supply or import would generally fetch if supplied or imported in similar circumstances at that date.
18. Section 9(4) of the Act specifically deals with a time of supply where goods are supplied under a rental agreement on a continuous basis, under an agreement or law that provides for periodic

² paragraph 18

³ {See Section 17(4)}

⁴ {Sect 3}

⁵ {Sect 14(1)}

⁶ {See Section 14(2) and (3)}

payments in which case goods are treated as successively supplied, with each successive supply occurring on the earlier date on which payment is due.

19. It would appear to me then, that the issue of the dates on which supplies are made play a huge and in some cases determinative role in deciding the taxable value of the taxable supplies, which as we have seen translates into the fair market value of the taxable supplies reckoned at the date of such supplies.
20. Section 17(1)(b) requires that the taxable value of taxable supplies shall be projected at the beginning of any twelve months period, during which period the reasonable expectation is that the threshold would be exceeded. I am unable to see how a person would reasonably expect to exceed the taxable value of taxable supplies within the twelve months period during which he has not started to make taxable supplies, as a matter of fact.
21. In my humble opinion the legislature intended that a person should apply during the twelve months when he has commenced to make taxable supplies. In other words the beginning of the twelve months indicated for registration has to coincide with the making of taxable supplies. This finds support from the definition of taxable supply in the Act. Section 12 defines taxable supply as a supply of goods or services (other than exempt supply) made in Lesotho by vendor consideration in the course of furtherance of an enterprise carried on by vendor⁷
22. There are further indications in the Act that registration has to be made at the time a person has commenced making taxable supplies. In terms of Section 18(1) and (2) a vendor is required to apply for cancellation of registration within 14 days after ceasing to make taxable supplies. Similarly a vendor whose taxable supplies drop below the threshold may apply, within two years, for de-registration⁷.

⁷ (See Section 18(3) and 4 of the Act

23. Finally being registered as a vendor carries with it an obligation to keep proper books of accounts, and to file value added tax returns for each tax period within 21 days after the end of the tax period⁸. A tax period is defined as the period of one month ending on the last day of each twelve months period of the calendar year⁹. It is relevant to registration that the Commissioner has been given the power to cancel a registration of a vendor for failure to file value added tax returns ¹⁰or cancel registration of a vendor who has not kept proper accounting records relating to any enterprise carried on by such vendor ¹¹.

24. In any humble opinion, therefore, a person is entitled and required to apply for registration under Section 17(1)(b) only when he has commenced making taxable supplies and not before. The period of twelve months would then be reckoned in the course of making such supplies, and would make it possible to determine the tax period for the particular vendor, which is 12 months reckoned from the date of registration.

MODIFICATION OF THE DATE OF REGISTRATION

25. The conclusion to which I have arrived does not mean that this is the end of the enquiry. The appellant contends that the CG is in any event not entitled to modify the date of registration he allocated to it. It was submitted that none of the provisions of the Vat Act authorizes the CG to amend the date of registration simply because facts on which the vendor relied upon did not materialize. It was contended that the CG cannot thus apply an ex post facto test as he did.

26. Though the submission is qualified by reference to the failure of the facts on which the appellant relied to make a projection under Section 17(1)(b), I comprehend the submission to be a broad one invoking the principle of legality that the CG may not exercise any

⁸ (See Section 27(1))

⁹ (See Section 3 of the Act)

¹⁰ (Section 18(6)(d))

¹¹ (Section 18(1)(c)).

power to the prejudice of a party that has not been conferred upon him by legislation expressly or by necessary implication.

27. I turn to the question of whether the CG has power to modify the registration in terms of the Act. Section 17(8) appears to require the Commissioner, in peremptory terms, to register a person who applies for registration in terms of, inter alia, Section 17(1) unless such a person is not eligible to apply for registration. Put differently the CG has no power to refuse to register a person who satisfies all the legibility criteria set out in Section 17(1).
28. It is important, especially in this case, that in terms of the Act registration takes effect "from the date of registration as specified in the tax registration certificate or such later date as the Commissioner may determine"¹². In terms of Section 17(13) the Commissioner is empowered to impose conditions or limitations on a registration, or suspend or modify the conditions or limitations on a registration.
29. It is common cause that the appellant applied for registration on the 1st of August 2016 and the CG approved the application setting an effective date as the 1st September 2016. I am satisfied that Section 17(13) is broad enough to qualify the decision of the CG to fix an effective date of registration as a condition attaching to registration, which may be modified as circumstances may arise.
30. Even if I am wrong in the view I take of Section 17(13), it would seem to me that Section 18(5)(b) of the Act confers the power on the Commissioner to cancel a registration of a vendor who has not applied for a cancellation of registration, but in relation to whom the Commissioner is satisfied that the vendor is neither required nor entitled under Section 17 to apply for registration". It is clear therefore that the fact of registration, under Section 17, is always reviewable by the Commissioner.

¹² Section 17(11)

31. I have already found that the applicant ought to have applied for registration only at the time when it had started making taxable supplies. Therefore as a natural concomitant it was not entitled to apply earlier. This brings its case squarely within the provisions of Section 18(5) (b) of the Act.
32. Having found that the Commissioner had authority to review the registration, I reject the contention that he acted ultra vires his powers under the Act. Whereas the applicant for registration is required to make a projection, the Commissioner is entitled to regard the matters that existed ex post facto. Apart from Section 18(5)(b), Section 17(12) authorizes the Commissioner so to act. Both the modification and cancellation of registration are treated as an assessment, confirming the right of the Commissioner to review the registration¹³.
33. It had been contended for the respondent that since the Commissioner had registered the appellant contrary to the Act, in that the appellant did not qualify for registration under Section 17(1) (b), therefore his act is a nullity. In the view I take of this matter I find it unnecessary to make a finding on that issue. I can only comment without deciding that it is doubtful that the actions of the Commissioner could be said to be so patently unlawful as to constitute a nullity, or that the respondent is entitled, without nothing more to ignore such action on that basis.
34. The above findings, however, do not resolve the matter because it is common cause that the appellant, had as a fact, entered into lease agreements, which the Commissioner has characterized as a scheme. The question to be answered is whether the lease agreement to which I will advert constituted taxable supplies in terms of the Act. If it did, then in that event, effect has to be given to the effective date of registration which is the 1st September 2016.

DID LEASE BETWEEN APPELLANT AND ██████████ CONSTITUTE TAXABLE SUPPLIES?

¹³ (See Section 17(15) and Section 18(9) respectively)

35. Facts pertaining to the above sublease appear in the summary of the challenged decision, and I need not repeat here. It is sufficient to point out that a decision on this matter will also affect the appeal on whether the Commissioner was correct in finding that this sub-lease was a scheme under Section 84.
36. The undisputed evidence of the appellants witness, Mr. Walker, is that [REDACTED] ([REDACTED]) is a company engaged in property development. It was approached by the appellant which proposed a sale to it of the appellant's vacant site which is plot [REDACTED] Constitution Road, Maseru.
37. The [REDACTED] however, after doing market research saw a good opportunity for a profitable building development being made for rentals on the site. Following this the [REDACTED] purchased shares in the appellant with the result that in 2016 [REDACTED] owned 100% of the shares of the appellant. The two companies however kept their separate legal identities.
38. As appellant could not obtain financing to develop the site, and prospective tenants had already been secured prior to the developments, which was necessary to give confidence that the development would not constitute a loss, there was a need for the developments to commence no later than the 1st of April 2016. As [REDACTED] was able to finance the project in the short term, while funds were being sought from the banking institutions, appellant and RPP concluded a short term development agreement on the 1st April 2016. RPP would finance the development in the short term, and expenses incurred would be invoiced to the appellant.
39. Following the short term development agreement, the Principal Building Agreement was entered into between [REDACTED] and [REDACTED] Construction (PTY) LTD on the 17th of May 2016. The [REDACTED] was employer and [REDACTED] the contractor. [REDACTED] would later, on the 21st of September 2016, cede and assign all its obligations to the appellant under the Principal Building Agreement ([REDACTED]).

40. The sub-lease agreement between appellant on the other hand was subsequently concluded on the 31st of August 2016, and had the 1st October 2016 as its commencement date. On the 26th of October 2016 appellant and █████ concluded a loan Agreement. A Loan between Nedbank and █████ for the financing of the development on the site was signed on the same day.
41. I have set out a skeletal version of the transactions, but my particular interest is in the sublease between █████ and appellant. The said sublease described the leased property as lease No: █████ in respect of land registered on the 12th of 1989, situate at Maseru Central Urban Area, Maseru. The sub-lessee (█████) was to pay rent to the appellant in the sum of M█████ per month excluding VAT, which VAT would be paid by the sub-lessee¹⁴. The property is stated to have been sublet to the sub-lessee for the sole purpose of site establishment and storage¹⁵.
42. The Commissioner formed an opinion that the sub-lease between RPP and the appellant was a mere scheme calculated to earn the appellant a tax benefit. In my humble opinion the matter is capable of resolution on a different ground. I therefore will not enter into a discussion of whether or not the Commissioner General was correct in his assessment. I also leave open a question of who bears the onus as between the Commissioner and the appellant or whether in any event the matter may be determined purely from the examination of the alleged scheme.
43. It is obvious from the sublease agreement that the appellant sublet unimproved land to the █████ for the rental specified in the agreement. Section 6(2) of the Act provides, inter alia, that a supply of unimproved land is an exempt supply. That being the case it follows that the sublease agreement between █████ and the appellant did not constitute taxable supply under Section 17(1)(b) of the Act.
44. I am satisfied that the Commissioner was correct in finding¹⁴ that the enterprise of the appellant was not supply of unimproved land.

¹⁴ (Clause 2)

¹⁵ (clause3)

The application for registration as a vendor puts the matter beyond doubt. The income projections that accompanied the application for registration did not mention the sublease of vacant land. In the application the appellant mentions that the company is in the process of constructing a commercial property from which income would be generated, hence the need to registrar for income tax and VAT. The cash flow forecast commence from July 2017 to June 2018.

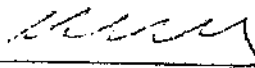
45. In any event it is difficult to see how by giving of possession of the plot to [REDACTED], under a sublease, the appellant would comply with its obligation to give possession to the contractor in terms of the JBCC. In terms of clause 15.2.1 of the JBCC the owner is to give possession of the site to the contractor. Clauses 16.1 to 16.2 deal with areas restricted to the contractor and reasonable access of employer and its agents respectively.
46. In terms of construction contracts handing of possession of the site is no mere matter of formality. It also ensures that in the event of non-payment a contractor may, where he has not waived such right, retains the premises as a lien for payment. It is difficult to see how this could be reconciled with a sublease of the entire premises to the RPP which had itself been an employer of LSP before cession and assignment to the appellant of its rights and obligations under JBCC. The basic structure of the JBCC as between the employer and contractor ensures that neither party causes delays in the construction process without incurring penalties for such delays. The question of handing over of the premises by the owner/employer to the contractor is one such key factor relevant to the issue of delays in construction contract.
47. Because of the conclusion at which I have arrived, I refrain from deciding the competing contentions by the parties regarding the issue of Section 84 of the Act by the Commissioner.
48. I do not think that the appellants appeal was a frivolous one. There are certain features about the conduct of the Commissioner General that have caused the confusion that ensued in this matter. It was imperative that the Commissioner General should have

established whether or not the appellant had commenced making taxable supplies. In any event the projections accompanying the application for registration as a vendor did not conceal the fact that the projections related to future commercial activities to be undertaken by the appellant. That should have been sufficient to alert the Commissioner General that taxable supplies were yet to be made. This would have enabled him to fix the effective date of registration to coincide with the commencement of the rendering of such supplies. I can understand that perhaps the Commissioner General had not received counsel concerning the correct meaning and application of Section 17(1)(b) of the Act, and therefore the issues I have raised in this matter could not have occurred to him. I am therefore inclined to depart from the rule that costs follow the event.

ORDER

In all the circumstances I make the following order :-

- a) The appeal is dismissed.
- b) Each party is to bear its own costs.



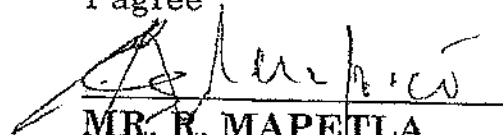
ADV. M. E. TEELE KC
(Member)

I agree

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**MS. P. LEBITSA
(Member)**

I agree



**MR. R. MAPETLA
(Member)**

For the appellant: Adv. [REDACTED] with Mr. [REDACTED]

For the respondent: Mr. M. Lichaba