



## Respublica case: Characterisation of the supply of property

The proper characterisation of a supply of property in terms of a lease agreement for VAT purposes may be quite challenging. The SCA was called upon to consider the characterisation of an arrangement in terms of which the taxpayer, Respublica, made a property available to the TUT, which in turn used to property as a student residence. The SCA ruled that based on the contractual arrangements the taxpayer did not make a supply of commercial accommodation.

When it comes to property rental transactions a number of permutations exist from a VAT perspective. In brief, the agreement can give rise to a supply of residential accommodation (which is exempt), a supply of commercial accommodation (which is not fully subject to VAT in the case of long-stay accommodation) or commercial rental (which is fully subject to VAT). The distinction between these supplies can be challenging in certain circumstances, as illustrated in *CSARS v Respublica (Pty) Ltd* that was decided in the SCA in September 2018. This article provides an overview of the issue at hand and discussion of the judgment.

### Facts and dispute

Respublica (Pty) Ltd ('Respublica') owns a building that it leased to the Tshwane University of Technology ('TUT'). The building was divided into smaller units that were fully furnished with a kitchenette, bathroom and bedroom/living area. Respublica provided certain maintenance and communal property services to TUT in respect of the property. TUT used the property as a residence and made the rooms in the property available to students. TUT selected students, allocated rooms to the students and was responsible for the discipline in the residence.

Respublica, the taxpayer, contended that the nature of the supply made by it to TUT was that of commercial accommodation extending beyond 28 days, which would mean that only 60% of the rental amount attracts VAT. SARS, on the basis of a lack of nexus between Respublica and the students who occupied the property, disagreed with the taxpayer. The taxpayer sought a declaratory order from the High Court to confirm its position.

### High Court judgment

In the High Court, Semenya AJ, at para 14, agreed with the taxpayer that a nexus between the lessor and the end user (occupant) was not a requirement for the supply of commercial

accommodation. From para 18 of that judgment it appeared as if an approach to look through the agreement between Respublica and TUT at the ultimate use of the property by TUT was to some extent motivated by the outcome that the VAT charged in respect of the supply of accommodation by the TUT in property not owned by TUT became a cost borne by TUT and ultimately the students.

### SCA judgment

The SCA considered the proper characterisation of the supply by Respublica in light of the definition of commercial accommodation, which as far as relevant reads:

"lodging or board and lodging, together with domestic goods and services, in any house, flat, apartment, room ... which is regularly and systematically supplied..."

In the judgment Ponnar JA considered the distinction between a lodger and a tenant in terms of a conventional lease in some detail. He concluded that the relationship between Respublica and TUT bore little resemblance to an arrangement for the provision of board and lodging. He further held that an argument that Respublica supplied commercial accommodation because the property was ultimately occupied by students was analytically unsound as it failed to take account of the contractual arrangements. It conflated two distinct supplies arising from different legal relationships, being a supply by Respublica to TUT and another by TUT to the students. Respublica had no contractual arrangement with the students for any supply to them.

Para 12 of the judgment re-iterates the fact that the VAT consequences of a supply should first and foremost be determined by reference to the contractual arrangement under which the supply is made. The label given to the arrangement or economic consequences are not decisive. It is submitted that this approach can be contrasted to that followed by the High Court.