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CHARLES VELKES MAIL ORDER 1973 (PTY) LTD. APPELLANT

and

THE COMMISSIONER FOR INLAND REVENUE RESPONDENT

CASE NO. 306/85
/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

CHARLES VELKES MAIL ORDER 1973 (PTY) LTD. APPELLANT

and

THE COMMISSIONER FOR INLAND REVENUE RESPONDENT

CORAM: CORBETT, HOEXTER, NESTADT JJA et NICHOLAS, STEYN AJJA

HEARD: 9 MARCH 1987

DELIVERED: 12 MAY 1987

J U D G M E N T

NESTADT, JA:

The/ .....

The broad issue in this matter concerns appellant's liability for the payment of certain amounts of tax in terms of the Sales Tax Act 103 of 1978 ("the Act").

Appellant is a retailer of a wide variety of goods including clothing, linen, crockery and cutlery, watches, cameras, radios and other electrical equipment. It has no showroom or other premises where its merchandise is on display. Its main method of selling is through the mail order system, ie orders for goods are sent to it (at an address in Cape Town) by post. Appellant then, through the same medium, despatches what has been purchased to the buyer. Payment either has to accompany the order or has to be made on delivery. Potential customers

are informed of what items are on offer only by means of catalogues. These are prepared internally by appellant and then printed for it by an outside agency. They are each marked with a sale price of 10 cents. Their cost of production, however, was, in the case of some of the catalogues, 54 cents each and, for the rest, 22 cents each. They contain colour photographs of each type of article that appellant has for sale, a short description thereof and its price. The catalogues are, at intervals during the year, distributed to three categories of persons, viz: (i) customers who have placed an order with appellant; here a catalogue is sent with the parcel of goods which is despatched to them; (ii) those on appellant's mailing list, ie customers who have bought

from it in the past two years; (iii) those who write in and request one; about half of these were persons who had previously been on the mailing list but whose names had been removed because they had not continued buying from appellant. In each case the catalogues are sent by post; about 40.75% to persons resident within the Republic of South Africa; the balance to places beyond the Republic, namely, Botswana, Swaziland, Transkei, Bophuthatswana and South West Africa. The catalogues contain an order form in duplicate. It is these which (on being cut out and filled in with details of what is being purchased, together with the buyer's name and address) are remitted to appellant.

The dispute relates to the catalogues and

in particular to those distributed during the period 3 July 1978 (being the commencement date of the Act) to 29 February 1980. Appellant paid sales tax calculated at the rate then applicable, viz, 4% of the cover price (ie 10 cents) of each catalogue distributed to persons in the Republic. In respect of those sent to foreign addresses it did not. It took the view that no tax was payable on these. Respondent, however, being of the opinion that appellant was liable for sales tax on all the catalogues distributed (ie whether in or outside the Republic) and that it was calculable on their cost (ie 54 cents and 22 cents per copy) claimed from appellant an additional sum of R14 477,54 (together with a penalty in an equivalent amount). In terms of sec

19(5) of the Act respondent notified appellant of his intention to raise an assessment accordingly. Appellant, being dissatisfied with respondent's contemplated action and relying on sec 20(1), requested that the matter be referred to an advisory committee for an opinion as to whether the intended assessment was correct. The opinion given was adverse to appellant. As it was entitled to do, appellant, in terms of sec 21, then objected to the assessment which had consequently been issued. When this was disallowed, it, under sec 22, appealed to the Cape Income Tax Special Court. The appeal (heard by Tebbutt J and assessors) was dismissed (save that, by consent, the penalty was set aside). The assessment of R14 477,54 was confirmed. This is an appeal against

such decision direct to this court in terms of sec 86(A)(5) of the Income Tax Act 58 of 1962 (read with sec 22(4) of the Act).

The fate of the appeal depends upon an interpretation of certain sections of the Act together with a closer analysis of the evidence. Before embarking on this, however, it is, I think, appropriate to briefly outline, in simplified form, the broad scheme of the Act. It has been amended from time to time. Where, in what follows, sections are quoted, the wording is that of the Act as it stood in 1979 (the latter not being materially different to how it originally read). The Act introduced a new type of tax in South Africa, viz, a so-called sales tax. The expression is, however,

misleading/.....

misleading. Tax is levied not only on what is termed the taxable value of the sale of goods (calculated at a given percentage thereof) but also on that of a wide-ranging number of other specified transactions (sec 5(1)). Even the concept of sale is, as will be seen, more extensively defined than its ordinary, common law meaning (sec 1(xxix) sv "sale"). It is not every sale of goods (for present purposes I confine the discussion to this type of transaction) that attracts tax. As a general rule those which take place prior to the purchase by what may be called the ultimate consumer or end-user of a particular res vendita do not. This would exclude the sequence of earlier sales of an article as where it passes from manufacturer, via a wholesaler, to a retailer.

Similarly/.....

Similarly unaffected are sales of raw materials or other components from a supplier to a manufacturer for use in the production process of the end-product. This is achieved by a series of exemptions created by sec 6 (and, in relation to the examples given, more particularly sub secs 1(b)(i) and (c)(i) thereof). The result is that, instead of having a piecemeal taxation of sales along the line, only the last sale in the chain of transactions leading to it falls within the tax net created by sec 5(1); in effect a type of delayed action taxation. The manner in which the exemptions are controlled is the following. Every person who carries on the enterprise inter alia of selling goods is required (in terms of secs 12(1) and (2))

to/ .....

to be registered by the Commissioner as a vendor. The utilisation of the registration certificate, which is then issued to him, entitles him to purchase, free of tax, the goods which are intended for resale by him (sec 14(1)). In other words, the registration certificate is the passpost to tax-free purchases. Indeed, the exemptions referred to only apply to registered vendors. The sale to a purchaser who is not one will be taxable. Where tax is thus payable the person primarily liable (on a monthly basis) to the Commissioner is the seller (sec 9(g) read with secs 16 and 17). He may, however, recover it from the purchaser by adding the tax to the price charged or, as it used to be, by including it in such price (sec

10(2) and the original, now deleted, sec 10(3)). It has been stated that the tax is calculated on the taxable value of the sale. This is determined by reference to its gross value (sec 7(1) and (6)). The manner in which this is calculated will be considered shortly.

Certain of the sections referred to, being directly relevant to the issues that arise for determination, require to be more specifically dealt with. There is firstly sec 5(1). It provides (in so far as is material);

> "5.(1) Subject to the provisions of section 6 there shall be levied and paid, for the benefit of the State Revenue Fund, a tax (to be known as the sales tax) calculated at the rate of four per cent of

the taxable value of -

(a) every sale of goods concluded on or after the commencement date;

(h) (i) goods acquired by any person in carrying on any enterprise ...

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which are applied on or after the said date by such person to his private or domestic use or consumption or for the use or consumption thereof in such enterprise or for the use or consumption of any other person or for the purposes of any other enterprise carried on by the person who has so applied such goods or assets."

The importance of deciding whether a particular transaction falls under sub-sec (a) or (h) lies in the different manner in which its gross (and accordingly taxable) value is respectively determined. This arises from the following provisions of sec 7, viz:

"7.(1)/.....

"7.(1) For the purposes of this Act a gross value shall, subject to the provisions of subsections (2), (3), (4) and (5), be placed on any sale of goods, ... as contemplated in section 5(1), and such gross value shall be -

(a) as respects any such sale of goods, the sum of all the amounts of the consideration accruing to the seller in respect of such sale, ...

(h) as respects goods, referred to in section 5(1)(h), the cost of such goods to the person who has applied such goods, as contemplated in the said paragraph,

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(3) Subject to the provisions of subsection (4), where under any agreement or transaction treated as a sale of goods for the purposes of this Act goods are disposed of or the ownership therein passes or is to pass without the payment of any consideration to the seller in relation to such sale or for a consideration which is less than the cost of such goods

> to the seller, a consideration in respect of such sale shall be deemed to have accrued to the seller equal in value to such cost or if the market value thereof at the time of such sale is less than such cost, such market value."

It follows that in the case of a sale (ie where sec 5(1)(a) applies) the tax is calculated on the price (sec 7(1)(a)) or (where sec 7(3) applies) on the cost or market value, whichever is the lesser. Where, however, the transaction is one falling under sec 5(1)(h), the tax is (in terms of sec 7(1)(h)) determined on the basis of cost.

Finally, reference must be made to sec 6(1)(a)(i). It creates an exemption in the following terms:

> "6.(1) The tax shall not be payable in respect of any taxable value which, but for the provisions of this section, would be determinable

in/.....

in respect of the following, namely

(a)(i) the sale of goods exported from the Republic... within a period of twelve months after the date of such sale."

Against this background I turn to a consideration of the specific issues between the parties. This must be done on the basis that appellant, who at all material times was a registered vendor, and whose acquisition of the catalogues can therefore be assumed to have taken place free of tax, is the person to whom respondent is entitled to look for payment - if it is liable. It will be evident that this question involves a two-fold enquiry. The first turns on whether the transaction, in terms whereof the catalogues were distributed by appellant within the Republic of South Africa, constituted sales of goods within the

meaning/ .....

meaning of sec 5(1)(a). Appellant's contention, both in the court a quo and before us, was that the transaction did, that it was for a consideration that rendered sec 7(3) applicable, that the market value of the catalogues was 10 cents each and that, this being less than their cost, their market value governed the determination of the gross and taxable values and, accordingly, the sales tax payable by it. On the other hand, the argument for respondent (which was upheld by the Special Court) was that sec 5(1)(h)(i) applied and that, by virtue of sec 7(1)(h), appellant was liable for the tax calculated on the cost of the catalogues (ie 54 cents and 22 cents each). Here, therefore, only quantum is in issue. The second enquiry relates to the catalogues sent out of the Republic. What was to be decided here is whether sales tax is payable at all.

This depends on whether the exemption created by sec 6(1)(a)(i) applies and, in particular, on whether it was pursuant to sales that the catalogues were exported (within the specified period). Consistent with its finding on the first issue, the Special Court decided that they had not been sold and that the exemption therefore did not apply and that tax was payable as claimed by respondent.

The fundamental question, therefore, is whether the distribution of the catalogues constituted sales within the meaning of sec 5(1)(a) or whether sec 5(1)(h)(i) applies. The relevant sub-sections of sec 7 respectively and ultimately relied on by the parties (on the first issue)

are wholly dependent for their application on which part of sec 5(1) is to be invoked. The problem is one of classification.

Basic to appellant's reliance on sec 5(1)(a) is the definition of "sale" contained in sec 1. It reads:

> "(xxix) 'sale' in relation to goods, means an agreement whereby a party thereto agrees to sell, grant, donate or cede goods to another or exchange goods with another or otherwise to dispose of goods to another, including, without in any way limiting the scope of this definition -
>
> ----
>
> (d) any other transaction whereby the ownership of goods passes or is to pass from one person to another
>
> wheresoever such agreement or transaction is entered into or concluded ..."

There/ .....

There follow a number of sub-sections which contain exclusions from the definition. It was not suggested that any of them applied. Nor was it in dispute that catalogues are goods (as defined in sec 1 (xvi)). What has to be decided is whether, as was argued by Mr Swersky on behalf of appellant, their distribution in each case (i) resulted in or involved an agreement, or, (ii) constituted a transaction whereby ownership in them passed from appellant to the recipients (so that, in either event, there was, in terms of sec 5(1)(a), a sale). These two submissions were advanced separately. It was said that "transaction" in sub-paragraph (d) of the definition was independent of and not governed by the earlier part

thereof/ .....

thereof reading "sale ... means an agreement whereby a party thereto agrees ..."; in other words, to qualify as a transaction, there only had to be the transfer of ownership; there was no need for an agreement; a sale could accordingly be proved either on a consensual or a proprietary basis. Counsel, besides referring to certain judicial and dictionary definitions of "transaction" (which is not defined in the Act) drew attention, in support of this approach, to the use of "agreement or transaction" in the definition of "sale" (just after sub-paragraph (d)) in apparent contrast to each other. It is, however, unnecessary to express an opinion on the point. I shall, in favour of appellant, assume its correctness.

Now,/.....

Now, plainly, certain sales of catalogues (in either sense) did take place. These, in the words of Mr Felthun, appellant's auditor and financial consultant, who testified on its behalf, related to the "very small proportion" of persons on the mailing list who paid for the catalogues sent to them (part of category (ii) above). They would also include those catalogues requested by persons in category (iii). But these too, so the witness conceded, represented but a minor percentage of the total number of catalogues involved. In the result, the number of catalogues "actually sold" was described by

the Special Court as "minimal" and was, for practical purposes, ignored. Mr Swersky, wisely and fairly, accepted this; he conceded that if they were the only catalogues in respect whereof sales were established, the appeal should fail. It follows that the catalogues in category (iii) can be left out of account.

From appellant's point of view, it can, I think, be accepted that the distribution of catalogues (to whatever category of persons) constituted offers by it either to donate or dispose of them (or to sell them in the conventional sense) and, at the same time, established an intention to transfer ownership in them. However, the reaction, if any, of the addressees of the catalogues must naturally also be looked to.

Both/ .....

Both agreement and the passing of ownership are strictly bilateral concepts; the former involves consensus and the latter mutual intentions (constituting a "saaklike ooreenkoms" - Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander 1980(3) S A 917 (A) at 922 F). In particular, the question is whether the evidence establishes either that the offers were accepted by them or that they took delivery of the catalogues with the intention of acquiring ownership thereof. Only then would there, in each case, be an agreement or a transaction (and, accordingly, a sale). There was no direct evidence of such acceptance or intention. No sample selection of customers was called by appellant to testify in this regard. Appellant's case was, however, that these facta probanda were to be inferred from the

circumstances and the conduct of the parties. The argument was, in summary, the following:

(i) (a) The catalogues were not unsolicited. Those sent to persons in category (i) formed part of the goods ordered, ie, there was a composite sale of both, the catalogues being sent free of charge. As regards those in category (ii), there was a tacit understanding or contemplation, when the original purchase was made, that a follow-up catalogue would subsequently be sent.

(b) Alternatively, there had been an acceptance, by conduct, of appellant's offer. This was to be inferred from the following. The effect of the evidence was that there was

no random distribution of catalogues; it was to an interested and identifiable market which comprised persons with whom appellant had a business connection. Moreover "tight control" (in the words of Mr Felthun) was exercised over the mailing list; it was "clean". Accordingly, those in category (ii), to whom catalogues were sent (also without charge), were persons "who we felt wanted" catalogues. This assertion had not been challenged in cross-examination. The catalogues were useful; far more so than the normal advertising pamphlets placed in post boxes of homes. On the probabilities, then, they were accepted. And the making of a further purchase showed that the

catalogues sent had, indeed, been used by the persons concerned; this was a signification of their assent to the offer (the communication whereof to appellant had been dispensed with).

(ii) It was also to be inferred from the fact of customers "wanting" the catalogues plus their utility and that they were used, that, on delivery, ownership was acquired. In any event, ownership passed, on receipt of the catalogues, even though they might have been immediately discarded.

It will be apparent that the main thrust of the argument was that a tacit agreement (in respect of each catalogue) was concluded.

This/ .....

This, on one of the recognised tests, is established where, by a process of inference, it is found that the most plausible conclusion from all the relevant proved facts and circumstances is that a contract came into existence (Plum v Mazista Ltd 1981(3) S A 152(A) at 163 - 4; Spes Bona Bank Ltd v Portals Water Treatment S A (Pty) Ltd 1983(1) S A 978(A) at 981 A - D; Mühlmann v Mühlmann 1984(3) S A 102(A) at 124 C; but cf Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984(3) S A 155(A) at 164 G - 165 G). Where the acceptance of an offer by conduct is relied on it must be shown that the offeree acted with the intention (actual or apparent) of accepting the offer (Chitty on Contracts: General Principles, 25th ed para 55 at p 34). In the case

of contracts of sale such conduct may be the retention by the "purchaser" of goods sent to him (Christie: The Law of Contract in South Africa, 62). Instances of this are where a purchaser, to whom there is delivered a quantity of goods on approval or in excess of his order or not answering the description contracted for, keeps them (MacKeurtan: Sale of Goods in South Africa 5th ed, 8). The factor underlying these cases is a prior or existing business relationship or course of dealings between the parties. Where, however, this is absent the position will ordinarily be otherwise. In this situation, ie where unsolicited goods are sent to a person, the failure per se to return them would not normally found a sufficient inference that they had

be accepted. As Corbin on Contracts, vol 1, sec 72, p 306 puts it:

> "(I)t may indicate that he preferred to give no thought to the offer and to waste no time and effort in making a reply, whether orally or by a writing. In such cases, the offeror is not reasonable in giving to the offeree's mere silence an interpretation that he accepts. So, if a party sends a book or paper or other goods to another, with a letter saying he is offering it for sale at a specified price, the party to whom it is sent is not bound by a contract to pay for it if he does nothing and says nothing."

To/ .....

To similar effect is Wessels: The Law of Contract in South Africa, 2nd ed, vol 1, para 269, where it is stated:

> "The want of a reply to an offer which one is not bound to answer may not be a refusal, but it certainly is not equivalent to an acceptance. Consent is a positive act not a negative act.
> Thus, if tickets, newspapers or goods are sent to my address with a notice that if I do not return them within a certain time I shall be taken to have accepted them, my silence and my not returning things cannot be construed into an acceptance on my part. There is no legal duty laid upon me to incur the trouble and expense of returning the articles so sent to me, and therefore my passive attitude cannot be interpreted into an implied consent to take them."

On/.....

On the other hand, were the offeree to make beneficial use of the goods or otherwise exercise ownership over them, an acceptance may and probably would be inferred (see Williston on Contracts, 3rd ed, vol 1 sec 91(D) pp 333-4). Ultimately, of course, whether the offeree's conduct was such that an acceptance (or intention to acquire ownership) can be inferred, is a question of fact to be decided on the circumstantial evidence of each case. The party bearing the onus would have to convince the court that such inference is the most readily apparent and acceptable one (A A Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982(2) S A 603(A) at 614 H); in other words that the circumstances justify the inference sought

to/ .....

to be drawn (Smit v Arthur 1976(3) S A 378(A) at 384 H).

I proceed to apply these principles to the facts in casu. It can, I think, be accepted that most of the catalogues were properly addressed and posted and, in the ordinary course, reached their destination and were received by the addressees. I am, nevertheless, unable to agree with appellant's argument. I deal, firstly, with that part of it relating to the alleged consensual sales. There is, in my opinion, no merit in the proposition that the catalogues were part of the goods ordered or that it was an implied term of each sale that a catalogue would subsequently be sent to the erstwhile purchaser. Neither directly nor indirectly is there any evidence in support of this. The matter must therefore be approached on the basis that the catalogues were unsolicited.

Can it be said that they were nevertheless accepted by conduct? In considering this, it must be stressed that, what appellant had to prove was a multiplicity of sales and, in particular, if respondent's assessment (which was obviously based on the total quantity of catalogues printed and distributed) was to be successfully challenged, a reasonably precise estimate of the number thereof. Otherwise one would not know what (lesser) amount of tax was payable. But in order to quantify the number of alleged sales, it did not suffice for appellant to rely on the proposition that, in the nature of things, the catalogues must have been responded

to because, unless that happened, its business would have collapsed. This generalisation is no doubt true, but it would not result in the quantum of sales of catalogues being established. For this to be achieved, it was incumbent on appellant to lay a sufficient basis for inferring the probability of particular sales (involving individual recipients of catalogues) having taken place - and the approximate number thereof. In my opinion, it did not do this.

Whilst there was no evidence on the point, it can be assumed that no catalogues were returned by any of the recipients. But this is neither surprising nor of any consequence. The relationship between the parties was not such as to require this to be done (on

pain of an inference of acceptance arising). There is no warrant for a finding that anything more than one isolated purchase had been made by any particular customer prior to the despatch of a catalogue to him. Though the catalogues are perhaps advertising material of a superior kind, they remain such. I do not think that a customer who, on receiving one, and seeing what it is (even though, in order to do so, he may page through it), discards it, can be said to have the intent either of accepting it or of acquiring ownership thereof. Rather the opposite seems true. Thus Williston (op cit) at 334 - 5 says:

> "It should be noted that to come within the operation of this general principle the taking or exercise of

dominion/ .....

dominion must be something more than mere temporary taking or handling for purpose of inspection or to determine whether to accept."

(The "general principle" is that the taking or retention by an offeree of possession of property offered to him may constitute an acceptance "in the absence of other controlling circumstances" - see sec 91 D at 332). It would, moreover, not occur to a customer that an article of this kind (being a catalogue with a price of only 10 cents marked on it) should be returned to appellant if he did not wish to accept it.

What remains, then, is the contention that (former) customers of appellant, on the probabilities, in fact used the catalogues and must thus be taken to have accepted appellant's offer. The

fallacy/ .....

fallacy inherent in the argument, and rendering it still-born, is that its basic premise, viz, that the addressees "wanted" the catalogues, is flawed. It was founded on Mr Felthun's bald, unsubstantiated allegation (amounting to an opinion) to that effect. There was no evidence that he had any direct dealings with any of the persons whose subjective state of mind he was testifying to. What he said really begs the question and was simply conjecture. A taxpayer's ipse dixit does not necessarily have to be accepted (Malan v Kommissaris vir Binnelandse Inkomste 1983(3) S A 1(A) at 18 E); uncontradicted evidence is not necessarily cogent, (Patel v Grobbelaar 1974(1) S A 532(A) at 534 C - D)

There/ .....

There was no information as to the volume of orders or how many customers who ordered goods at any given time had previously purchased from appellant. The number of repeat orders would have been indicative of the use to which catalogues (whether in category (i) or (ii)) were put. Indeed, the Special Court was left in the dark as to the actual number of catalogues involved, the dates when they were sent out, what proportion those in the two categories bore to each other and how many were on the mailing list. In the absence of evidence along these lines, it was not possible to infer whether any specific (and, if so, how many) addressees of the catalogues responded to their distribution by using and thus accepting them.

Finally,/.....

Finally, if there was agreement, what were the terms thereof? It is difficult, in this regard, to reconcile the price marked on the catalogues with the contention that the offer was to supply them free of charge. If it was not the latter, the fact that no payment was made by any of the recipients (save to the extent already mentioned) is a strong indication, not merely of non-performance of the contract, but of non-acceptance of the offer. It, accordingly, does not avail appellant to argue that communication of the acceptance of the offer was dispensed with.

To sum up so far, the evidence was, in my opinion, insufficient to enable the inference to be drawn that appellant's offer (whether to sell, donate

or dispose of the catalogues) was accepted by conduct. Equally so, and for substantially the same reasons, it cannot be said to have been proved that its customers intended to acquire ownership of the catalogues received by them. They were there for the taking, but gifts are not always accepted. Accordingly, appellant failed to establish (and the onus was on it, in terms of sec 23) that any particular catalogues (and, a fortiori, the number thereof) were sold and its attempt to have sec 5(1)(a) apply was rightly rejected by the Special Court. Mr Seligson, on behalf of respondent, submitted that appellant had not proved that the market value of the catalogues was 10 cents each, so that, in any event, even if sec 7(3) applied, their cost should be the yardstick of the taxable value.

In the light of the conclusion come to, it is unnecessary to decide this point.

I am not sure whether a decision that sec 5(1)(a) is not applicable, does not dispose of the first issue. This is because I understood it to be common cause that either this section or sec 5(1)(h)(i) governed; it was one or the other. However, in case this approach be unfair to appellant and, in any event, in order to determine whether the facts of the present matter, on their own merits, fall within the ambit of sec 5(1)(h)(i), I propose to consider the question. But in so doing it is unnecessary to deal with the argument, advanced on behalf of appellant, that sec 5(1)(h) only applies where a particular transaction does not fall

within any of the earlier sub-sections of sec 5(1); it was to be invoked as a last resort so to speak; thus if there was a sale of goods, tax would be calculable on the basis that sec 5(1)(a) applied, even though the transaction was, at the same time, one within the meaning of sec 5(1)(h). That this could happen was submitted to us. Particular reference was, in this regard, made to that part of the latter section (towards the end) reading: "which are applied ... for the use or consumption of any other person..." Unless some restrictive meaning was given to this expression, it could, as counsel put it, cover every sale (under sec 5(1)(a)) by an enterprise of its goods. One can conceive of other examples falling under sec 5(1)(h) and other sub-sections of

sec 5(1). The problem, in these circumstances, is which of the differing parts of sec 7 will apply to determine the taxable value of the transaction. However, in view of the finding that appellant's evidence fell short of proving the requisites for the operation of sec 5(1)(a), the problem of the two sub-sections possibly overlapping and the proper approach to be adopted where this occurs, can be and is left unresolved.

The broad purpose of sec 5(1)(h) is to tax goods which have inter alia been acquired by a registered vendor free of tax and which, instead of being disposed of or utilised in such a way as to eventually generate tax, are appropriated or devoted

by him (i) to his private or domestic use or consumption, or, (ii) for use or consumption in his enterprise, or, (iii) for the use or consumption by a third person, or, (iv) for the purposes of another enterprise of his. In most of these cases, the person or enterprise concerned will, as a result of what may be called the internal employment of the goods in any of these ways, become the end-user thereof (and thus, in principle, liable for tax). Examples illustrative of the categories referred to are the following:

(i) groceries taken by a grocer from his stock for consumption by himself or his family; (ii) the use by a retailer of motor vehicles of a car for demonstration purposes; (iii) the giving of free samples or gifts

to/ .....

to customers as part of a sales promotion exercise;

(iv) any of the aforementioned where the use is by an associate enterprise. Normally, the goods in question will be those traded in by the enterprise, but this is not essential for the operation of the section.

The question to be decided is whether that part of sec 5(1)(h)(i) reading "for the use or consumption thereof in such enterprise" applies in the present matter. Clearly, the catalogues were either acquired under a sale or produced by appellant. There

was/ .....

was no suggestion that any of the exclusions contained in the section applied. It was not disputed that if they had been used (or consumed) as stated, this was consequent upon them having been "applied". The real question, then, is whether the catalogues were used in appellant's business within the meaning of the section. The word "thereof" presents some difficulty. It could relate to (the use or consumption of) the goods or to (the use of or consumption by) the registered vendor (ie "such person"). The use in the Afrikaans text of "daarvan" indicates that it is the former. But on the facts of the present matter this possible ambiguity is not important. What has to be decided is whether the distribution of the catalogues by appellant to its customers constituted a use of them by appellant in its business. I think it did. The

evidence was that appellant was "not in the business of selling catalogues"; they were rather "the vehicle" that it used in order to "demonstrate" what goods it has for sale - its "selling medium" (containing, of course, order forms). Indeed, appellant itself, as the docket shows, in a letter that it wrote to respondent, admitted that "catalogues not sold but sent to customers are treated as being consumed in terms of sec 5(1)(h)". In my view, such admission was correctly made. "Use" is a word of wide meaning (R v Tru Products (Pty) Ltd & Others, 1954(4) S A 356(C) at 365 E; R v Appel 1959(3) S A 944(C) at 947 E; S v Naicker 1963(4) S A 610(N) at 613 G; Shell-Mex and B P Ltd v Clayton (Valuation Officer) and Another (1955) 3 All E R 102 (C A) at 117 B - D;

(1956) 3 All E.R.185 (H L) at 195 I - 196 C). Moreover, save that the use must be "in such enterprise" there is no reference and therefore no restriction in the section concerning the manner in or purpose for which the goods must be used. A person in the position of appellant would be using the catalogues where he exercises his rights of ownership by disposing of them. And, in so doing, appellant was using them "in" its enterprise. "In" is an elastic preposition synonymous with "in regard to", "respecting" and "with respect to" (Black's Law Dictionary 5th ed sv "In"). It is therefore not a requirement that the use or consumption of the goods, ie, the disposal of the catalogues, be confined to persons within the enterprise, ie members of appellant's

staff/ .....

staff (as was argued). There is no warrant for giving it this narrow meaning. Secs 7(5)(f) and (h), which were relied on in this regard, were only inserted by amendments subsequent to 1980. In any event, they merely deal with how the cost or value of goods is to be calculated in particular applications of sec 5(1)(h). In so far as may be necessary, appellant itself can be regarded as an end-user of the catalogues, or, as Tebbutt J, found "the real user".

Perhaps the present case is a somewhat unusual illustration of the application of sec 5(1)(h)(i), but, for the reasons stated, I think it falls within the sub-section. In the result, respondent rightly applied sec 7(1)(h) in order to arrive at the taxable value of the catalogues.

There/.....

There was no dispute that, so calculated, the assessment was correct and (in terms of sec 9(e)) payable by appellant. The first issue must be resolved in respondent's favour.

So, too, must the second issue. Appellant, having failed to prove that the catalogues were sold, could not rely on the exemption created by sec 6(1)(a)(i). It follows that tax was payable, as claimed by respondent, on those catalogues distributed outside the Republic.

The appeal fails and is dismissed with costs including those incurred by the employment of two counsel.

H H NESTADT, JA

CORBETT, JA)
)
HOEXTER, JA) CONCUR
)
NICHOLAS, AJA)

4da/87

LL Case No 306/1985

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

CHARLES VELKES MAIL ORDER 1973 (PTY) LTD Appellant

and

THE COMMISSIONER FOR INLAND REVENUE Respondent

CORAM: CORBETT, HOEXTER, NESTADT JJA, NICHOLAS et STEYN AJJA

HEARD: 9 MARCH 1987

DELIVERED: 12 MAY 1987

JUDGMENT

/STEYN AJA ...

STEYN AJA:

I agree that the appeal must be dismissed. But I reach that conclusion by a somewhat different route to that of the majority. For a considerable part of the way we travel together and in the end we meet up again. But along the way my route is deflected from theirs by certain prominent features in the landscape of the case. At the outset I will briefly deal with the route we share before our ways part. I will then describe the main deflecting feature and trace my separate way to the point where our roads rejoin. Then I will shortly deal with our final joint stretch. In that manner I hope to set my route in its proper panoramic context.

Except as set out hereunder I am in respectful agreement with my brother Nestadt's exposition and analysis of the facts and the law. For the reasons set out by him I also agree that sales of the catalogues comprising his third category have been

/established ...

established but should nevertheless be left out of account, and that no sales of the catalogues in his first category have been proved. But I do not agree with him that no sales of catalogues in his second category (i e those pertaining to the mailing list) have been established.

I now come to the parting of the ways, but in dealing with the main deflecting feature and in mapping my separate route, I stress (calling in aid the words of Holmes AJA in S v Khoza 1982 (3) S A 1019 A at 1040 F) that what I am about to say is permeated with great respect.

The main deflecting feature in the landscape of this case is the mailing list. Its nature and pur= pose and the strict control exercised over it as testi= fied to by Mr Felthum, are not in dispute. And its significance is such that I cannot agree with Nestadt JA that there is no warrant "for a finding that anything

/more ...

more than one isolated purchase had been made by any particular customer prior to the dispatch of a catalogue to him." To my mind the probabilities arising from the full set of facts relevant to the matter indicate otherwise and point to repeated acceptances, mainly by the same body of customers who, by virtue thereof, came and remain on the tightly controlled mailing list. To determine those probabilities one must, however, cast one's eyes over a wider expanse of the factual landscape than was done by the majority. This is what such a wider view reveals.

When the Sales Tax Act came into force on June 28 1978, the appellant must clearly have already been a well-established mail-order business. Its name indicates that it was probably incorporated during 1973. And the numbers of catalogues sent to customers during the two-year period October 1978 - September 1980, show an undertaking of such magnitude that it most probably must

/have ...

have been expanding for a considerable time in order to reach such a compass by the beginning of that period. The breakdown of those catalogue dispatches by months of mailing during those two years is the following:

October 1978	139 543
January 1979	141 760
March 1979	134 415
April 1979	14 010
June 1979	120 633
July 1979	458
August 1979	146 031
September 1979	2 973
October 1979	147 771
November 1979	6 548
January 1980	135 942
February 1980	16 456
March 1980	145 479
April 1980	1 200
May 1980	2 946
	1 769
June 1980	141 467
July 1980	6 401
August 1980	157 986
September 1980	130
	1 463 018

(It must, however, be noted that these figures do not cover the entire period in question. The significance thereof will appear later.)

During the fiscal year 1980 appellant's turnover and

/gross ...

gross profit were respectively R2 606 552 and R976 056. Such figures could not have been attained overnight and clearly required a considerable period to generate. All this could most probably only have been achieved by ac= quiring a stable body of regular customers.

Even though the catalogues are in essence adver= tising material, as rightly found by my brother Nestadt, they are nevertheless full-colour publications, sometimes running to as many as 100 pages. (The Summer 1979 and Christmas 1979 catalogues, which are part of the record, have 96 pages each.) Despite being advertising material, publications of such quality are clearly not meant for random distribution. And they were not so dealt with.

It is clear that when the Act came into operation appellant had already established a settled procedure for the conduct of its mail-order business, the essence where= of was a tightly controlled mailing list comprising the particulars of the customers with whom appellant was doing

business. It is inevitable, by the very nature of human society, that even a most firmly established busi= ness will experience some fluctuation in the ranks of its customers. Death, illness, migration and financial distress are some of the best-known causes thereof. There are also others. But the fact of such fluctua= tion does not preclude the establishment of a settled relationship between business and customer. And more often than not such relationship is established tacitly by a course of conduct - the one (be it business or customer) contacting the other with a mind to doing business and the other reacting positively, followed by repetition of such interaction. The method of doing business by mail order with the use of a catalogue as the "connecting device" is, indeed, a classic example thereof. The actualities of everyday commercial acti= vity demonstrate thát most clearly, especially in the dealings between mail-order houses and those segments of

/the ...

the public which are generally not privately very mobile or who live in isolated rural areas. These matters are notorious. It must further be borne in mind that it is mainly with those segments that appellant deals. A useful description of the evolution and modus operandi of a mail order system is given at p 429 in vol 15 of the 1963 edition of Collier's Encyclopedia. It is in the following terms s v "General Mail-order Houses":

> "During the first two decades of the twentieth century, general mail-order houses like Sears Roebuck and Montgomery Ward were the major retail sources of a large proportion of U.S. farmers, for three reasons:
>
> 1) they offered a convenient way of buying staple goods to many farm families who received inadequate service from the rural general stores;
>
> 2) they made possible catalogue shopping for farm families isolated from city shopping centres; and
>
> 3) they won and retained the confidence of their customers by maintaining consistent quality standards in merchandise and by adhering scrupulously to money-back guarantees."

/In ...

In Alistair Cooke's well-known work America (first published in 1973) at 317-318, a like il= lustration is given, albeit in somewhat more graphic terms. Having dealt with the social impact of the Model T Ford the author proceeds as follows:

> "There was something else flourishing in the 1920s that was equally revolutionary to people who lived, say, a hundred miles from the nearest town. I recall an advertising tycoon, Bruce Barton, saying in the late 1940s, when we were in a dither about the Rus= sians: 'What we ought to do is to send up a flight of a thousand B-29s and drop a mil= lion Sears, Roebuck catalogues all over Russia.' The mail-order catalogue arrived at the home of the farmer, cowboy, miner and rancher, and they looked it over and realized that they had the world's biggest store in their mailbox. The farmer could simply send off for all his equipment, from wagons and road scrapers down to his jeans. His wife could riffle through sixty pages for clothes to buy and pick a cheap equivalent of what 'smart' women were wearing in New York and Chicago."

It has already been observed that appellant's catalogues were and are not distributed at random. And one can pause here to make the further observation that

/it ...

it is highly unlikely that any appreciable proportion of the customers receiving them would throw them away either without looking at them or after merely giving them a cursory glance. It is, to my mind, much more likely that the vast majority of catalogues sent to customers on the mailing list would be retained by them and be "looked over" and "riffled through" as described by Alis= tair Cooke. And such handling of a catalogue would clearly amount to an "acceptance" thereof by the customer concerned because he and members of his family would then certainly have used it in turn for their own purposes to ascertain, by going through it, whether they needed or wanted to buy any of the items therein displayed. If, having found none, such customer then discards the cata= logue, he would be doing so with something he had already appropriated to his own use, and his earlier acceptance would not have been undone by his subsequent discarding of it. One must not forget that by reason of the wide

/variety ...

variety of their contents, these are truly "family cata=
logues". In my respectful estimation it would conse=
quently be a serious error to regard these catalogues
as one would unsolicited direct-mail advertising material
which is more often than not discarded forthwith after
being found in the post-box, and then equate the reaction
of a mailing list customer receiving his catalogue to
that of the recipient of such other, unsolicited, material.

By virtue of the special tacit relationship
which came into being by conduct between appellant and
its mail-order customers it is more probable than not
that most of them would actually want the next catalogue
following upon their last order. This inference is
materially strengthened by the undisputed fact that a number
of them actually wrote requesting catalogues they had
missed for some or other reason, e g a changed address.
The probabilities therefore strongly favour the acceptance
of the catalogues upon receipt of them, and the maintenance

/or ...

or renewal of a pre-existing agreement by such subsequent acceptance.

But the continued "wanting" of the next succeeding catalogue following upon the last order has an added significance. It is this. Such "last order" would in fact constitute the acceptance of an earlier, most probably the immediately preceding, catalogue. In contrast to the aforementioned "subsequent acceptance" such "last order" would constitute an acceptance immediately preceding the receipt of the next catalogue. The significance of such an "immediately preceding acceptance" is that the next catalogue would then be sent to the customer concerned at least partly in response to that acceptance. The specific agreement would then be constituted by the dispatch of the catalogue in response to such acceptance. In other words such preceding acceptance would then be the really important one, being in effect a tacit request for a further catalogue. The relationship would thereby

/also ...

also be established or maintained and projected into the future - i e at least to the next issue of catalogues.

Even if my brother Nestadt be correct in ap= proaching the matter on the basis of no more than "one isolated purchase" having been made by any particular customer prior to the dispatch of a catalogue to him, the matter is consequently not thereby concluded against ap= pellant, because such purchase would most probably con= stitute such a prior acceptance. And the question whether there has been a subsequent acceptance would then cease to have any significance.

But bearing in mind the formation, continued existence and nature of the aforementioned relationship between appellant and its mailing list customers, I am satisfied that the probabilities strongly indicate in the great majority of cases, repeated prior acceptances preceding the dispatch of the catalogues in question, and that they were sent in consequence of such acceptances;

/which ...

which were in effect repeated notifications to appellant by the customers concerned that they desired the con= tinued mailing of catalogues to them.

I am consequently satisfied that the most acceptable conclusion from all the relevant proved facts and circumstances is that the great majority of the cata= logues in question were sent by appellant to its mail- order customers in consequence of tacit agreements be= tween them which came into existence by conduct as set out above. This distribution of catalogues by appellant to such customers within the Republic therefore constitu= ted a "sale of goods" within the meaning of sec 5 (1) (a), and the tax thereon is to be calculated in terms of sec 7 (3) on the market value of the catalogues. I say "market value" because that value has to my mind been established. The "market" for the catalogues in ques= tion is certainly a very special one. But the clear and undisputed evidence is that certain customers did in

fact pay the cover price of 10c for the catalogues. That evidence is under the circumstances sufficient to establish the market value. That value is less than the cost of the catalogues and consequently forms the basis of taxation in terms of sec 7 (3).

Most of the catalogues distributed to customers outside the Republic are therefore exempted from Sales Tax by virtue of sec 6 (1) (a) (i) because their distri= bution constituted "the sale of goods exported from the Republic ...".

Now my route rejoins that of the majority because despite the aforegoing I agree, as already stated, that the appeal must nevertheless fail. This is so because the appellant failed to prove how many customers were on its mailing list during the period in question. It could easily have done so by producing the list for that period. And even if it be accepted in appellant's favour that all the catalogues so distributed were sold to the customers

concerned it would still be impossible to establish the amount of sales tax payable because the total number of such "mailing list sales" cannot be established. The onus to prove that total is upon appellant and he failed to discharge it. But it is unlikely that there was a 100% positive response to such distribution. That complicates matters further for appellant. The appeal consequently fails by virtue of a lack of evidence. I concur in the order made by Nestadt JA.

M.T. STEYN AJA