

Groundbreaking ConCourt ruling in Capitec, Sars VAT deduction dispute

In a landmark judgment, the Constitutional Court has ruled in favour of Capitec Bank, in a case that has raised questions regarding the interpretation and application of the Value-Added Tax Act 89 of 1991 (VAT Act).



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The ConCourt's verdict in *Capitec Bank Limited v CSARS [2024]* has granted Capitec the right to claim a VAT deduction of almost R72m from the SA Revenue Service (Sars) - setting a significant precedent for how VAT deductions on loan cover payments are treated.

History

As part of its business model, Capitec Bank provides free loan cover to clients with unsecured loans. In November 2017, Capitec submitted a VAT return with a R71.5m deduction, relying on section 16(3)(c) of the VAT Act, which allows for a vendor to deduct, from its output tax, the tax fraction of any amount made to indemnify another person in terms of a contract of insurance, provided that the supply of the insurance contract constitutes a taxable supply.

Sars disallowed the claim on the basis that supply of the loan cover did not constitute a 'taxable supply'. Capitec in turn objected and appealed the decision to the Tax Court, which found in favour of the bank.

However, the Supreme Court Appeal (SCA) overturned the Tax Court's judgment, ruling that the loan cover provided by Capitec was supplied in the course of making an exempt supply, and therefore, no VAT deduction was allowed.



Developments in the VAT and residential property realm - part 2

Ursula Diale-Ali and Jana Krause 11 Oct 2023



ConCourt ruling

In the unanimous judgment penned by Rogers J (Zondo CJ, Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring), the Constitutional Court found that the provision of loan cover by Capitec was free of charge and thus made for consideration having a nil value. Although the loan cover was supplied free of charge, this did not disqualify it from being a taxable supply.

In order to determine whether the loan cover was an exempt, taxable or mixed supply, the purpose of supplying the loan cover is an important consideration.

On the undisputed evidence, the Court found that by providing free loan cover, Capitec was making its credit offering more attractive - the credit offering being one in which Capitec earned exempt interest and taxable fees. Accordingly, the Court found that the loan cover was a mixed supply, made in the course or furtherance of Capitec's exempt activity of lending money for interest and its taxable activity of lending money for fees.

Therefore, Sars should not have disallowed the deduction in full and should have permitted a partial deduction. Although Capitec did not plead partial deduction as an alternative, the Court found that the bank should not be penalised for its failure to do so, as Sars should not seek to exact tax which is not due and payable.

For these reasons, the Constitutional Court upheld the appeal and set aside the orders of the Tax Court and SCA. The Court remitted the matter to Sars for further assessment and ordered each party to pay its own costs.

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