Articles

DEMYSTIFYING THE VALUE-ADDED TAX EFFECTS OF FOREIGN BRANCHES IN SOUTH AFRICA: THE WENCO *CASE*

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Abstract
The application of South African value-added tax (VAT) principles to transactions involving foreign branches is challenging. A recent judgment made in Wenco International Mining Systems Ltd & another v CSARS *(59922/2019) [2021] ZAGPPHC 70 brought the uncertain applications of the VAT Act to the forefront. An awareness of the uncertainties could guide policymakers to improve the legislation and assist tax professionals who advise their clients. This research adopts a qualitative approach and traditional legal doctrinal methodology. It proposes amendments to the legislation. I question the application of s 8(9) of the VAT Act because proviso (ii) of the definition of 'enterprise' separates the activities of foreign branch or foreign main business from those of the vendor. It is unclear if a foreign branch or foreign main business is treated as a separate 'person' in the VAT Act, with all the accompanying powers of another 'person'. The proviso is also unclear about whether it applies only if the foreign branch or foreign main business makes supplies 'for consideration'. It is unclear whether s 11(1)*(i) *and 11(2)*(o) *should apply, as opposed to s 11(1)*(a) *and 11(2)*(l).

Keywords: Wenco case, South African VAT, foreign branch, foreign main business, enterprise

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https://doi.org/10.47348/SAMLJ/v35/i2a1

I INTRODUCTION

Value-added tax (VAT) was introduced in South Africa by the Value-Added Tax Act 89 of 1991 (the VAT Act) on 30 September 1991. The application of South African VAT principles to transactions involving foreign branches is known to be complicated and even obscure. The rationale for proviso (ii) of the definition of 'enterprise'[1] is still unclear, as it appears not to address the intention of the legislature[2] to ensure that 'normal rules' apply to imports, exports, and supplies of services to foreign branches and foreign main businesses.[3]

The recent court judgment made in *Wenco International Mining Systems Ltd & another v CSARS*[4] related to foreign branches and has sparked debate on its correctness. Divaris firmly agreed with the judgment handed down,[5] while Kruger disagreed with it.[6] Besanko and Swanepoel found the judgment 'surprising' and questioned the practicality of the decision.[7] Even Divaris did not agree with all of its underlying reasons. The contention highlights that there are substantial uncertainties in applying the VAT Act to transactions with a foreign branch or foreign main business. Resolutions of the uncertain areas of VAT application could certainly assist tax professionals in advising on these matters.

This article aims to investigate key uncertainties that plague the application of the VAT Act to supplies made by the foreign branch or foreign main business. The analysis primarily focuses on the judgment made in the *Wenco* case to identify these uncertainties.

The structure of this article is as follows: First, the article provides a discussion of the relevant VAT provisions. Secondly, I summarise the principal facts of the *Wenco* case, followed by discussing its legislative appropriateness. I also propose possible solutions. The discussion further analyses the court's approach and how such an application has resulted in unwanted uncertainties in the VAT practice. Finally, I reach a conclusion that identifies areas where guidance from the South African Revenue Services (SARS) would be valuable.

[1] Proviso (ii) to the definition of 'enterprise' in the Value-Added Tax Act 89 of 1991.

[2] De Koker & Badenhorst, *Value-Added Tax in South Africa* (LexisNexis 2022) 3.9.

[3] According to the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2004.

[4] (59922/2019) [2021] ZAGPPHC 70 (*Wenco*).

[5] Divaris, 'VAT law according to a couple of Wencos' (2021) issue 10 week 374 *Tax Administration Weekly* at 9.

[6] Kruger, 'VAT and branches of foreign companies and the Wenco case: Quelle catastrophe!' (2021) 12(3) *Business Tax and Company Law Quarterly* 16 at 30.

[7] Besanko & Swanepoel, 'VAT treatment of foreign entities with branches in South Africa' (2021) 39 *Tax Professional* 19 at 20.

https://doi.org/10.47348/SAMLJ/v35/i2a1

II THE LEGAL FRAMEWORK FOR VAT ON FOREIGN BRANCHES

In interpreting statutes, the principles iterated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[8] are important. Words should be interpreted with reference to the particular context of 'the document as a whole and in light of all the relevant circumstances'.[9] Where there is ambiguity in meanings, an interpretation should not lead to 'impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration'.[10]

(a) The status of a branch for VAT purposes

Section 23(1) requirements for VAT registration apply to a 'person' as defined in s 1 of the VAT Act. A person must register for VAT if it carries on any enterprise that has made one million rand in taxable supplies in the last twelve months. A person must also register for VAT at the beginning of the month when it expects that its total taxable supplies will exceed one million rand in the next twelve months in terms of contractual obligations. In terms of s 1 of the VAT Act, a person is defined as:

> '"person" includes any public authority, any municipality, any company, any body of persons (corporate or unincorporated), the estate of any deceased or insolvent person and any trust fund.'

Most notably, a branch is not included in the definition of a 'person' in s 1.

In fact, although the VAT Act refers to the term 'branch' in the text, it is not defined anywhere else in the VAT Act. In case law, a branch needs to meet two requirements: It must purport to be a branch (of a main body) and its objects and activities must substantially conform to those of the main body.[11] The non-inclusion of a definition of 'branch' may not be an important uncertainty, however, as the proviso (ii) to the definition of 'enterprise' (discussed below) does exclude both a foreign branch and a foreign main business.

A 'person' is required to register if that person carries on any enterprise and the taxable supplies thresholds are exceeded. In s 1 of the VAT Act 'enterprise' is defined as follows:

[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] (4) SA 593 (SCA) (*Endumeni*).

[9] *Endumeni* para 18.

[10] *Endumeni* para 26.

[11] *S v Coetzee* 1927 (3) SA 526 (O).

https://doi.org/10.47348/SAMLJ/v35/i2a1

> '[I]n the case of any vendor,[12] any enterprise or activity which is carried on continuously or regularly by any person in the Republic or partly in the Republic and in the course or furtherance of which goods or services are supplied to any other person for a consideration, whether or not for profit, including any enterprise or activity carried on in the form of a commercial, financial, industrial, mining, farming, fishing, municipal or professional concern or any other concern of a continuing nature or in the form of an association or club.'

The definition of 'enterprise' is then followed by certain inclusions and exclusions by way of para *(b)* and the provisos.[13] The definition of 'vendor' also refers to any 'person' required to register.[14] Accordingly, the definition of 'enterprise' seems relevant only to a 'person' as defined, which a branch is not. The ordinal procedure for VAT application to branches would be to identify the 'person' first and only thereafter to discern the VAT implications for any branch.

A non-resident 'person' with a South African branch may have to register for VAT if its South African activities constitute an 'enterprise' and it meets the thresholds for its taxable supplies in s 23 of the VAT Act. A non-resident 'person' with a South African branch is not only obliged to register for VAT but must account for output tax on all supplies it made regardless of where the supplies are made. VAT experts have indicated that, in practice, SARS has not required these non-residents to register for VAT unless the 'actual revenue-producing transaction is substantially carried out in the country'.[15]

(b) The foreign branch or foreign main business requirements

An important question is whether a foreign enterprise must register and eventually account for VAT in SA. As noted, any person who wholly or partly carries on an enterprise in the country must account for the VAT. A relevant legislative provision is proviso (ii) of the definition of 'enterprise'. It states:

> '[A]ny branch or main business of an enterprise permanently situated at premises outside the Republic shall be deemed to be carried on by a person separate from the vendor, if—
> *(aa)* the branch or main business can be separately identified; and

[12] 'Vendor' means any person who is or is required to be registered under the VAT Act (s 1 of the VAT Act).

[13] For example, para (*b*)(vi) includes the supply of electronic services by foreign suppliers as an 'enterprise', while proviso (iii)(*aa*) excludes the rendering of services by an employee to his employer in the course of his employment.

[14] Definition of 'vendor' in s 1 of the VAT Act.

[15] De Koker & Badenhorst, (LexisNexis 2022) 3.9.

https://doi.org/10.47348/SAMLJ/v35/i2a1

(bb) an independent system of accounting is maintained by the concern in respect of the branch or main business.'

An enterprise with a branch or main business permanently situated at premises outside South Africa can be deemed to be carried on by a separate person to the vendor if the above requirements are met.

(i) Historical development of the treatment of a foreign branch or main business in South Africa

Initially, when the VAT Act was introduced in 1991, a foreign branch or main business was excluded from the definition of 'enterprise'. The old definition of 'enterprise' read as follows:

> '(ii) the supply outside the Republic of goods or services by any concern from any branch thereof which is permanently located at premises outside the Republic *shall not* be deemed to be effected in the course or furtherance of any enterprise or activity carried on by such concern, if—
> *(aa)* the branch can be separately identified; and
> *(bb)* an independent system of accounting is maintained by the concern in respect of the branch' (own emphasis added).

Clearly, the old position excluded the foreign branch from the definition of 'enterprise'. This means a foreign branch could not be considered as an enterprise for VAT purposes. In 1993, there was a subparagraph that excluded supplies where a branch or main business is already registered as a vendor in a 'specified country', where a 'specified country' included the now-dissolved TBVC countries (Transkei, Bophuthatswana, Venda and Ciskei).[16]

Proviso (ii) to the definition of 'enterprise' was amended in 1994 to remove all references to specified countries (being the old TBVC countries) that ceased to exist when they were absorbed into South Africa in 1994.

The proviso was amended in 2004 to its current wording by s 92(1)*(e)* of the Revenue Laws Amendment Act 32 of 2004. The explanatory memorandum, 2004 explained this amendment as follows:

> 'Subclause (e): The Act provides that supplies made by a branch or main business of an enterprise situated outside South Africa shall not be regarded as supplies made by the South African enterprise. It is proposed that the non-South African enterprise be regarded as a separate person for VAT purposes to ensure that the normal rules relating to exports and imports as well as of the supply of services will apply to the foreign branches or main businesses.'

[16] The Taxation Laws Amendment Act 97 of 1993.

https://doi.org/10.47348/SAMLJ/v35/i2a1

The rationale for the VAT Act amendment to the definition of 'enterprise'[17] in this regard is still unclear, as it appears not to address the intention of the legislature (according to the Explanatory Memorandum on the Revenue Laws Amendment Bill, 2004) to ensure that 'normal rules' apply to imports, exports, and supplies of services to foreign branches and foreign main businesses.[18] Generally, imports are taxed and exports are zero-rated. De Koker and Badenhorst note that SARS's intention to have 'normal rules' apply may not have been effected.[19] This is because s 11(2)*(o)* and s 11(1)*(i)* now apply to zero-rate the goods or services; but nothing precludes s 11(1)*(a)* and s 11(2)*(l)* from applying either. Section 11(1)*(a)* and s 11(2)*(l)* may apply because the foreign main business or branch outside the Republic is treated as a separate person by virtue of the proviso (ii) to the definition of 'enterprise'.

It is interesting that a foreign 'main business' permanently situated outside South Africa may also be treated as separate person. 'Main business' is not defined. In light of the case law interpretation relating to a branch (discussed in part II(a) of this article), it is submitted that the 'main business' of an entity permanently situated outside South Africa could be treated as a separate person when it no longer has the features of the branch. This would occur where it no longer conforms to the objects of the main business and instead has itself evolved into the lead business.

It is unclear whether the foreign 'main business' refers to an incorporated or unincorporated entity. However, the registration requirements in s 23 of the VAT Act do already apply to a 'person' that is incorporated. As such, there would be no need for the proviso (ii) exclusion to apply to an incorporated entity that is already a 'person'. It is submitted that the interpretation of foreign 'main business' should be restricted to unincorporated entities only, to prevent an absurd result. The exclusion can, consequently, apply to a local company with an unincorporated foreign 'main business' but will not apply when there is both a foreign company and a local company. The exclusion may also apply to a foreign company with an unincorporated local branch.

This exclusion also introduces a need to differentiate between an 'independent' foreign branch (or foreign main business) that can be separately identified and maintains its own system of accounting versus a 'dependent' foreign branch (or foreign main business) without a separate system. An 'independent' foreign branch contemplated by the

[17] Proviso (ii) to the definition of 'enterprise' in the VAT Act.
[18] De Koker & Badenhorst, (LexisNexis 2022) 3.9.
[19] De Koker & Badenhorst, (LexisNexis 2022) 3.9.

https://doi.org/10.47348/SAMLJ/v35/i2a1

exclusion would have to make its own assessment of its 'enterprise' status once it is treated as a separate person to the vendor.

(c) Supplies made by or to foreign branches or foreign main businesses

The exclusion from the definition of 'enterprise' above also has implications for supplies made between the enterprise and the branch. Where there is a 'dependent' foreign branch or foreign main business, that cannot be separated from the enterprise using the exclusion, supplies made by the branch to the main business (and vice versa) cannot be said to exist. A person cannot make supplies to oneself. No VAT is levied on these supplies.

It is interesting that s 8(9) exists to deem supplies made by a vendor to its 'independent' foreign branch or foreign main business as a separate supply.[20] De Koker and Badenhorst argue that the provision is unnecessary in light of the exclusion to the definition of 'enterprise' in proviso (ii), as the foreign branch or foreign main business (by virtue of that exclusion) is already treated as a separate person[21] and could then constitute a supply made 'to any other person'.[22]

The zero-rating provisions of s 11(1)*(i)* and s 11(2)*(o)* may apply to the supply of goods and services (respectively) when s 8(9) applies. De Koker and Badenhorst correctly question the inclusion of these two sections, as the enterprise exclusion would have allowed the vendor to treat supplies made to an 'independent' foreign branch or foreign main business as a separate supply, regardless.[23] The exclusion would allow the vendor to zero-rate these supplies using the 'normal' zero-rating provisions of the VAT Act, such as s 11(1)*(a)* and s 11(2)*(l)*.[17] Perhaps, one should apply s 11(1)*(i)* and s 11(2)*(o)* rather than s 11(1)*(a)* and s 11(2)*(l)* under the premise of *generalia specialibus non derogate* that general words or things do not derogate from special ones. The correct application, however, is uncertain.

III SUMMARY OF THE *WENCO* CASE

The first and second applicants applied to the High Court to review and set aside a private VAT ruling issued to them by SARS in 2019. The first applicant was identified as Wenco International Mining Systems Ltd,

[20] Per proviso (ii) of the definition of 'enterprise'.
[21] De Koker & Badenhorst, (LexisNexis 2022) 3.9.
[22] As per the definition of 'enterprise' in s 1(1) of the VAT Act.
[23] De Koker & Badenhorst, (LexisNexis 2022) at 3.9.

https://doi.org/10.47348/SAMLJ/v35/i2a1

a company incorporated and with its principal place of business in Canada (hereafter referred to as 'Wenco'). The second applicant was a branch of the first applicant with its principal place of business in South Africa, a separate registration number to the first applicant ('the branch'[24]) and a different accounting system. Wenco is involved in the business of providing software to mining clients, and the branch provides support services to clients related to Wenco's software (e.g., site visits, system support, and training). Wenco serves as the party to customer contracts in all instances (not the branch). The branch is remunerated for its services by way of a management fee paid by Wenco to the branch.

Wenco and its branch wanted a new and private VAT ruling that required the branch to be registered for VAT. Relying on proviso (ii) of the definition of 'enterprise' in the VAT Act, it may then consider the Canadian main business (Wenco) as a separate person to the enterprise and zero-rate the supplies of services made to Wenco per s 8(9) of the VAT Act.

Wenco previously had an old (private) VAT ruling issued to it indicating that Wenco, the Canadian company, should register for VAT in respect of its 'enterprise'[25] in South Africa. This was under the premise that s 8(9) of the VAT Act can apply only when there is a pre-existing 'enterprise' and that this provision cannot 'create' an enterprise.

Upon careful examination of the service level agreement between Wenco and the branch, the court found that the branch should provide its services 'solely and exclusively' to Wenco. The court referred to the general principle of VAT interpretation that 'the VAT consequences of a supply must be assessed by reference, first and foremost, to the contractual arrangements under which the supply is made'.[26] The geographical arrangements seem to indicate that the branch provides services to South African clients directly, however, the terms in the service level agreement infer that the branch is merely acting as an agent on behalf of Wenco (the principal). This is supported by the fact that all customer contracts are agreed between Wenco (not the branch) and the customer.

The court contended that the applicants' reliance on proviso (ii) of the definition of 'enterprise' in the VAT Act was ill-founded. The branch, as an agent from a legal perspective, could not be said to be

[24] For this purpose, it seems that the branch was registered as 'an external company' per s 23 of the Companies Act 71 of 2008 and not for Value-Added Tax purposes (but the transcript is silent on this matter).

[25] As defined in the VAT Act.

[26] *CSARS v Respublica (Pty) Ltd* (1025/2017) [2018] ZASCA 109 (12 September 2018).

https://doi.org/10.47348/SAMLJ/v35/i2a1

carrying out an 'enterprise' in South Africa. The supplies made to end-clients are supplies of Wenco and do not pertain to the branch. The branch makes supplies solely to Wenco, where a separation is not tenable. It does not make supplies to 'any other person'.[27] The court asserted that proviso (ii) of the definition of 'enterprise' must certainly not contemplate a situation where a branch is registered for South African VAT solely in respect of its supplies made to a business permanently situated outside South Africa. Furthermore, s 8(9) cannot be applied when there is no pre-existing enterprise. The review application was dismissed.

IV DISCUSSION OF THE *WENCO* CASE

In *Wenco*, the court aptly referred to the definition of 'person' in s 1 of the VAT Act and the s 23 registration requirements because they apply to a 'person'. The legal person in the *Wenco* case is the company incorporated in Canada, which should have arguably been the starting point in determining a VAT registration liability. The *Wenco* court should have determined if it was conducting an 'enterprise' as defined. This assessment would be made by considering the business of the Canadian company including the South African branch, since a branch is not a 'person' as defined. An 'enterprise' requires an activity to be conducted 'in or partly in' South Africa, where the branch's activity in South Africa would be considered as an 'enterprise'. It is apparent that the definition of 'person' and 'enterprise' are not synonymous: The obligation to register for VAT rests on the 'person' in respect of their 'enterprise' 'in or partly in' South Africa when all business activity may not geographically be taking place in South Africa.

The court identified that the primary question is whether the branch conducts a separate enterprise to Wenco as per proviso (ii) to the definition of 'enterprise'. It then discussed that the branch cannot be conducting an 'enterprise' as it provides services 'solely and exclusively' to Wenco. The court concluded that the branch cannot be separated from Wenco and, consequently, does not provide services 'to any other person'.

The consideration of this issue raises another aspect that is not clear: whether it is necessary for a foreign branch or foreign main business to be conducting its own 'enterprise' for it to be separated from an overall enterprise. Referring to the definition of 'enterprise' and proviso (ii), it is clear there must be at least one 'enterprise' that exists (and meets

[27] As per the definition of 'enterprise' in s 1(1) of the VAT Act.

https://doi.org/10.47348/SAMLJ/v35/i2a1

the definition). Consequently, a 'branch' or 'main business' outside South Africa may qualify to be treated as 'carried on by a person separate to the vendor' if the proviso (ii) requirements are met. A 'branch' or 'main business' may not have the same meaning as 'enterprise'. Based on the literal or ordinary meaning of the exclusion, 'branch' or 'main business' does not have the same meaning as the '*enterprise*' (as defined) of the 'branch' or 'main business'. The ordinary meaning of 'business' in the dictionary would also not necessarily need a supply to be provided to another 'person', since the Oxford Dictionary defines 'business' as 'trade, commercial transactions and engagements'.[28] 'Enterprise' (as defined in the VAT Act) requires certain criteria and extends on the ordinary and case law interpretations of a 'branch' or 'main business'. One could argue that Wenco has a 'main business' outside SA that may indeed be considered separately because 'main business' is not synonymous with 'enterprise'; where only the latter term requires, inter alia, supplies provided 'to any other person'.

Only when considering the principles of tax law interpretation does the above argument fall short. One must consider the intention of the provision, its specific context and avoid an interpretation that would result in an unsensible business result.[29] It may well be the intention of the exclusion to exclude a foreign branch or foreign main business only when the foreign branch or foreign main business makes supplies of goods or services to another person for consideration. It could be unsensible for there to be a business that does not make a supply to another person. Given the judgment needed in interpreting the enterprise exclusion, however, one could argue that its application remains uncertain. The court's conclusion that proviso (ii) cannot apply remains open to interpretation.

The legislators should decide if they desire the separation of a foreign branch or foreign main business per proviso (ii) of the definition of 'enterprise' only if supplies are made for consideration. In this case, I suggest that the legislators should add a further requirement to this effect. Not only should the foreign branch or foreign main business be separately identified and have an independent accounting system, but the proviso should also require that 'the branch or main business supplies goods or services to any other person for a consideration'. This would prevent the separation of an overall enterprise with a foreign branch or foreign main business that provides no goods or services to

[28] *Oxford English Dictionary* (Oxford University Press 1933) 1206.
[29] *Endumeni*.

https://doi.org/10.47348/SAMLJ/v35/i2a1

persons outside the pre-existing enterprise, i.e., it has no customers of its own and is dependent on the overall enterprise.

(a) Principal and agent relationship

The court (in *Wenco*) asserted that the service level agreement terms are such that the branch is acting as an agent on behalf of Wenco (the principal). This is because the branch provides services 'solely and exclusively' to Wenco. Previous commentary criticised the court's reliance on the agency principle, as it is trite that principal and agent relationships may exist only when there are separate legal persons — one cannot be an agent of oneself.[30] This is because 'agency' means 'the performance of a juristic act on behalf of one person (the principal) by another person (the agent)'.[31] A branch, not a separate legal person, could then not be an agent for another. However, even this conclusion is not clear-cut. Proviso (ii) of the definition of 'enterprise' may result in a branch or main business 'deemed to be carried on by a person separate to the vendor'. There is uncertainty on whether the proviso has the power not only to deem the activities to be carried out separately by another person, but also to deem a branch as a 'person' for all purposes in the VAT Act. Kruger argues that proviso (ii) of the definition of 'enterprise' does not deem a branch as a separate legal person and merely separates the activities of an enterprise,[32] while De Koker and Badenhorst describe the proviso as having been 'amended to deem the offshore main business or branch to be a separate person for South African VAT purposes'.[33] If the proviso can deem the foreign 'branch' or foreign 'main business' to have all of the same characteristics as a 'person', then it may well be that the foreign 'branch' or foreign 'main business' can be an agent of a principal. Certainly, in income tax case law, when an event is 'deemed' it may have equal meaning and powers as the 'actual' event.[34]

One should remember that the explanatory memorandum of 2004 states that proviso (ii) of the definition of 'enterprise' was amended to propose that, 'the non-South African enterprise be regarded as a separate person for VAT purposes' (see part II(a) above). It does seem

[30] Kruger, (2021) 12(3) *Business Tax and Company Law Quarterly* 16 at 30.
[31] Du Bois, *Wille's Principles of South African Law* 9 ed (Juta 2007) 984 et seq.
[32] Kruger, (2021) 12(3) *Business Tax and Company Law Quarterly* 16 at 24.
[33] De Koker & Badenhorst, (LexisNexis 2022) 78.
[34] *Commissioner for the South African Revenue Service v Tradehold Ltd* 2013 (4) SA 184 (SCA).

https://doi.org/10.47348/SAMLJ/v35/i2a1

that the legislator intended for the separated foreign main business or foreign branch to be treated as a separate 'person'.

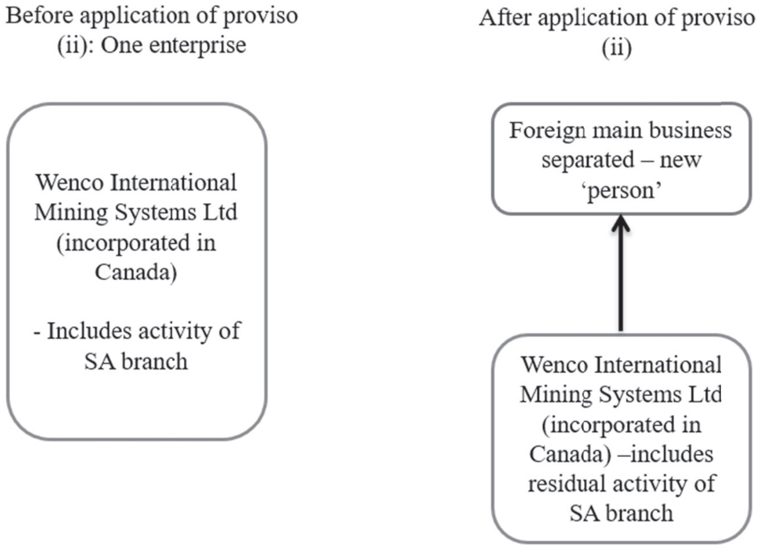
For clarity, I suggest that if the legislator intended that a foreign branch or main business, once separated, is considered as a 'person' for the VAT Act, then the definition of 'person' can be amended to include 'a branch or main business as contemplated in proviso (ii) to the enterprise definition'. For this purpose, the definition of 'person' could be amended by inserting subsections. The existing definition could be contained in a 'subsection *(a)*', while 'subsection *(b)*' can be added to include 'a branch or main business as contemplated in proviso (ii) to the enterprise definition'.

Regardless of whether a branch can legally be an agent for VAT purposes, the two 'persons' to consider in the *Wenco* case may not necessarily be the South African branch and the Canadian company; but rather the foreign 'main business' and the pre-existing Canadian company. Proviso (ii) is a proviso to the definition of 'enterprise', that implies that one overall enterprise is identified and then split into further entities. The foreign main business or foreign branch is excluded from the overall enterprise. Using the exclusion, Wenco could treat its foreign main business as a separate person to the rest of the enterprise. This would bifurcate the foreign main business (the 'Wenco foreign main business') from the pre-existing, legal person and incorporated Canadian company — Wenco. The Wenco foreign main business may now be treated as a new and separate person to the vendor (Wenco). The approach of separate branch registration is similar to the application of s 50 of the VAT Act. Section 50 of the VAT Act allows a vendor to register its South African branches as separate vendors if the requirements are met. The requirements are that the branch has an independent accounting system and can be separately identified by nature of its activities or its location.

In *Wenco*, we assume that the activities of the South African branch are solely what would be left in Wenco after bifurcation. Following bifurcation, the foreign Wenco main business is treated as a separately identifiable person to the vendor. What is left is still represented by the pre-existing, incorporated Wenco and legal 'person'. This incorporated Wenco (a 'person') could act as an agent for another 'person' — the foreign 'Wenco main business' principal (a newly recognised 'person'). This bifurcation of the enterprise can be illustrated by Figure 1.

https://doi.org/10.47348/SAMLJ/v35/i2a1

Figure 1: Suggested application of proviso (ii) to the *Wenco* case



Source: Author's construction

What is possibly a point of confusion is that, after bifurcation, the Canadian company (and remainder of the enterprise) now has residual activity, that is activity conducted by the South African branch. Based on the bifurcation principles as suggested above, one could view the residual South African activities of the enterprise as attributable to a legal person — the incorporated Canadian company — and not the branch. The effect of this bifurcation is that there are two 'persons' from this point onwards: the Wenco foreign main business and the pre-existing and incorporated Wenco. The activities left in Wenco are its South African activities, but these are provided 'solely and exclusively' to the Canadian enterprise — that is the Wenco foreign main business. It may then be plausible that the incorporated Wenco (representing South African activities) is acting as merely an agent for the Wenco foreign main business (if we accept that proviso (ii) can deem the foreign main business as a separate person for VAT).

Rights and obligations must ensue between the principal and its third parties. One would revert to accounting for supplies from the perspective of one consolidated person — the principal Canadian main business and its rights and obligations with third parties. Using this reasoning then, the issue of principal and agency is relevant to the *Wenco* case. In fact, *whether the agency principle can apply and how it applies* seem to be key issues that were *not* discussed by the court.

https://doi.org/10.47348/SAMLJ/v35/i2a1

Another key observation is that in *Wenco*, the South African branch was not contractually operating independently to its Canadian company since it was contractually bound to provide services 'solely and exclusively' to the latter. One should consider this case with caution, therefore, and not confuse the facts of this case with one where a branch is operating independently of an enterprise with no (or less) contractual restrictions in respect of its customer base.

Wenco, as one 'person', should thereafter consider its 'enterprise' status and VAT registration. This would likely be affirmative, as there is activity conducted 'in or partly in' South Africa.

(b) The application of section 8(9)

Certainly, as discussed above, there is the pre-existing question of why s 8(9) is even necessary due to proviso (ii) of the definition of 'enterprise'. Nevertheless, whether s 8(9) is applicable depends on whether the foreign main business (in Canada) is capable of separation from the overall enterprise. Again, to answer this question one needs to conclude definitively on the powers of proviso (ii) to the definition of 'enterprise' and the principal and agency issue.

If the enterprise cannot be divided (for the reasons above), then there is one registered VAT vendor — Wenco itself. Section 8(9) is accordingly not applicable. The court correctly identified that there needs to be a pre-existing enterprise for s 8(9) to apply because this section does not create nor extend the definition of an enterprise.

V CONCLUSION

The recent court decision made in *Wenco* brought uncertainties in the VAT legislation surrounding foreign branches and foreign main businesses to the forefront. Commentaries on the court decision conflict in their views. This article identifies which applications of the VAT Act (as they relate to foreign branches or foreign main businesses) give rise to uncertainties. It then proposes amendments to VAT legislation to resolve the uncertainties.

De Koker and Badenhorst question the application of s 8(9) when proviso (ii) of the definition of 'enterprise' treats a foreign branch or foreign main business as a separate person.[35] Similarly, it is then unclear whether one should apply s 11(1)*(i)* and s 11(2)*(o)* to zero-rated goods

[35] De Koker & Badenhorst, (LexisNexis 2022) 3.9.

https://doi.org/10.47348/SAMLJ/v35/i2a1

and services provided to a foreign branch or foreign main business, or whether s 11(1)*(a)* and s 11(2)*(l)* may still apply.

A key uncertainty exists in applying the exclusion to the definition of 'enterprise' in proviso (ii). It is unclear whether such foreign branch or foreign main business needs to be conducting its own 'enterprise' — using its strict VAT Act definition — to be separated from an enterprise. A VAT enterprise (only strictly defined) requires inter alia that a supply be made 'to any other person'. It is only in interpreting the proviso by using established principles of interpretation that one can make sense of the proviso. This strengthens the importance of clarifying uncertainties in the VAT Act. To resolve this uncertainty, I suggest that the legislators could amend proviso (ii) of the definition of 'enterprise' to require that 'the branch or main business supplies goods or services to any other person for a consideration'.

Another uncertainty regards the power of proviso (ii) to the definition of 'enterprise'. Read literally, it appears to give a branch or foreign main business the same status as any other 'person' in the VAT Act. As such, a branch or (unincorporated) foreign main business — which outside of the VAT Act is not a separate legal person — could have the power to act as an agent on behalf of a principal. Tax experts are divided in their views on the powers of proviso (ii) of the definition of 'enterprise' and it is difficult to ascertain the intention of the legislation in light of its specific context. This point causes uncertainty in applying any agency and principal rules and is key to the court decision made in *Wenco*. I suggest that if the legislators intend that a foreign branch or foreign main business, once separated, is considered as a 'person' for the VAT Act, then the 'person' definition can be amended to include 'a branch or main business as contemplated in proviso (ii) to the enterprise definition'.

With no clarity on the uncertainties, it is likely that court decisions will be difficult to make and tax consultants, accountants and lawyers may often dissent with them.

https://doi.org/10.47348/SAMLJ/v35/i2a1