

THE CONSEQUENCES OF LAND EXPROPRIATIONS IN TERMS OF THE SOUTH AFRICAN VAT ACT

Mini-dissertation by

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Submitted in partial fulfilment of the requirements for the degree

MAGISTER COMMERCII (TAXATION)

in the

FACULTY OF ECONOMIC AND MANAGEMENT SCIENCES

at the

UNIVERSITY OF PRETORIA

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Date of submission:
2012-10-08

ABSTRACT

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The VAT consequences of land expropriations appear to be a grey area with no definitive answer as to which expropriations are zero rated or vatable at 14%. While it is generally understood that the government performs expropriations, there are many departments within the government that have authority to perform these expropriations independently. Based on section 11(1)(s) and (t) of the VAT Act, depending on which department performs the expropriation and under which Act the expropriations are made it will be determined whether the expropriation will attract VAT at 14% or 0%. However, the detail contained in section 11(1)(s) and (t) does not lend itself to a clear cut explanation as to the motive behind why some expropriations are zero rated and others that are fundamentally similar are vatable at 14%.

This study performs a comparison of expropriations under the Housing Act, Restitution of Land Rights Act and the Provision of Land and Assistance Act and their VAT consequences. The purpose of this study is to try and find the driving factor that determines the VAT consequences of the different expropriations and to determine whether there is a commonality.

The study performs an analysis of the expropriating authorities of the different Acts mentioned above and determines whether their VAT vendor status has an influence as to whether VAT is levied at 0% or 14% or whether the entire transaction is an exempt supply. The conclusion reached is that the most appropriate course of action would be to apply a

blanket rule of zero rating the supply. This would reduce confusion and uncertainty relating to the VAT consequences and would also assist all parties concerned to have the same expectation. It is important that the South African Revenue Service provides some guidelines to assist in understanding the VAT consequences of expropriations in South Africa, as they will be required to enforce the legislation.

Keywords:

Expropriation

Zero rating

Supply

Involuntary supply

Housing Act

Restitution of Land Rights Act

Provision of Land and Assistance Act

Municipality

Value Added Tax

OPSOMMING

DIE GEVOLGE VAN GRONDONTEIENINGS IN TERME VAN DIE SUID- AFRIKAANSE BTW-WET

deur

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Die BTW-gevolge van grondonteienings blyk 'n grys gebied te wees met geen duidelike antwoorde wanneer dit kom by watter van hierdie onteienings onderhewig is aan nulkoers en watter onteienings belasbaar is teen 14% nie. Alhoewel die algemene gevoel is dat die regering onteienings uitvoer, is daar wel departemente binne die regering wat die volmag het om hierdie onteienings onafhanklik toe te pas. Op grond van artikel 11(1)(e) en (t) van die BTW-wet, sal vasgestel word watter onteienings aan 14% of nulkoers BTW onderhewig is deur te kyk na watter departement die onteienings uitvoer en onder watter wet die onteienings gemaak is. Die detail wat in artikel 11(1)(e) en (t) vervat word is nie heeltemal duidelik oor hoekom sekere onteienings aan nulkoers onderhewig is en ander, wat fundamenteel dieselfde is, belasbaar is teen 14% nie.

'n Vergelyking van onteienings wat onder die Wet op Behuising, Wet op Herstel van Grondregte en die Wet op die Beskikbaarstelling van Grond en Bystand plaasvind, asook die BTW-gevolge van elke wet, word deur middel van hierdie studie gemaak. Die doel van hierdie studie is om te bepaal watter faktore die BTW-gevolge van die verskillende onteienings bepaal, en of die faktore iets in gemeen het.

Die studie analyseer die onteieningsgesag wat by die verskillende wette soos hierbo genoem ter sprake is en bepaal of die BTW-ondernemer-status 'n invloed het op of 1)

BTW teen nulkoers of 14% toegedien word en of 2) die hele transaksie 'n nie-belasbare lewering is. Die gevolgtrekking wat bereik word is dat die mees geskikte plan van aksie sal wees om alle lewerings onderhewig te maak aan 'n nulkoers. Dit sal verwarring en onsekerheid met betrekking tot die BTW-gevolge verminder en verseker dat alle betrokke partye dieselfde verwagting sal hê. Dit is belangrik dat die Suid-Afrikaanse Inkomstediens riglyne sal verskaf wat kan help om die BTW-gevolge van onteienings in Suid-Afrika verstaanbaar te maak, aangesien daar in elk geval van die regering vereis word om wetgewing af te dwing.

Sleutelwoorde:

Onteiening

Nulkoers

Lewering

Onwillekeurige lewering

Wet op Behuising

Wet op Herstel van Grondregte

Wet op Besikbaarstelling van Grond en Bystand

Munisipaliteit

Belasting op toegevoegde Waarde

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION	1
1.1 BACKGROUND.....	1
1.2 PROBLEM STATEMENT	3
1.3 PURPOSE STATEMENT	3
1.4 RESEARCH OBJECTIVES	4
1.5 DELIMITATIONS AND ASSUMPTIONS	4
1.5.1 Delimitations	4
1.5.2 Assumptions	5
1.6 DEFINITION OF KEY TERMS	5
1.7 OVERVIEW OF CHAPTERS.....	6
CHAPTER 2 LITERATURE REVIEW	7
2.1 INTRODUCTION.....	7
2.2 VATABLE SUPPLIES IN TERMS OF THE LEGISLATION.....	8
2.2.1 The imposition of VAT	8
2.2.2 Definition of a ‘supply’	8
2.2.3 Other jurisdictions	10
2.3 THE TERM EXPROPRIATION.....	11
2.3.1 Definition of the term ‘expropriation’	11
2.3.2 Expropriation in terms of the VAT Act.....	12
2.4 THE ANALYSIS OF EXPROPRIATIONS UNDER THE FOLLOWING 3 AREAS:	15
2.4.1 The expropriating authority	15
2.4.2 The source of the funds used to expropriate the land	16
2.4.3 The intended use or purpose of the land once expropriated	17
2.5 EXPROPRIATIONS IN TERMS OF THE HOUSING ACT	18
2.5.1 What the Housing Act says.....	18

2.5.2	Can an expropriation under the Housing Act be zero rated?.....	19
2.6	PRACTICAL ILLUSTRATIVE EXAMPLE	21
2.7	CONCLUSION.....	22
CHAPTER 3	RESEARCH DESIGN AND METHODS	23
3.1	DESCRIPTION OF INQUIRY STRATEGY AND BROAD RESEARCH DESIGN.....	23
3.1.1	A description of the proposed study’s strategy of inquiry	23
3.1.2	Exploratory and descriptive research	24
3.1.3	Research strategy: Single case study	24
3.2	SAMPLING.....	25
3.2.1	Sample size	26
3.2.2	Sampling technique to be utilised	27
	Conclusion.....	28
3.3	DATA COLLECTION	28
3.3.1	Data collection method	28
3.3.2	Conducting the informal interviews.....	30
3.4	DATA ANALYSIS	30
3.4.1	Preparation of data for analysis	31
3.4.2	Qualitative data analysis technique	31
3.4.3	Interview summaries.....	32
3.5	ASSESSING AND DEMONSTRATING THE QUALITY AND RIGOUR OF THE RESEARCH DESIGN	32
3.5.1	Reliability	32
3.5.2	Validity	33
3.5.3	Conclusion	33
3.6	RESEARCH ETHICS	33
CHAPTER 4	FINDINGS.....	35
4.1	INTRODUCTION.....	35

4.2	HAVE YOU OR YOUR ORGANISATION WITH WHICH YOU ARE CURRENTLY EMPLOYED HAD ANY EXPERIENCE RELATING TO THE EXPROPRIATION OF LAND AND ITS VAT IMPLICATIONS?.....	36
4.3	HOW WOULD YOU DEFINE AN EXPROPRIATION?.....	37
4.4	HOW WOULD YOU DEFINE A SUPPLY UNDER THE VAT ACT?.....	38
4.5	WOULD YOU CONSIDER AN EXPROPRIATION A VOLUNTARY OR INVOLUNTARY SUPPLY?.....	39
4.6	DO YOU THINK IT IS APPROPRIATE THAT THE DEFINITION OF A SUPPLY UNDER THE VAT ACT INCLUDES INVOLUNTARY SUPPLIES?.....	40
4.7	DO YOU THINK THAT AN EXPROPRIATION SHOULD BE DEEMED A SUPPLY AS DEFINED BY THE VAT ACT?	41
4.8	DO YOU KNOW THE PURPOSE OF THE FOLLOWING ACTS:.....	43
4.8.1	The Housing Act?	43
4.8.2	The Restitution of Land Rights Act?	44
4.8.3	The Expropriation Act?	45
4.8.4	The Provision of Land and Assistance Act?	47
4.9	PLEASE COMPLETE A COMPARISON OF THE HOUSING ACT AND THE RESTITUTION OF LAND RIGHTS ACT UNDER THE FOLLOWING 3 HEADINGS:.....	48
4.10	IN TERMS OF THE VAT ACT, HOW DO YOU THINK EXPROPRIATIONS SHOULD BE TREATED: EXEMPT, ZERO RATED OR VATABLE AT 14%	51
4.11	DO YOU THINK THAT THE EXPROPRIATIONS OF LAND UNDER THE DIFFERENT ACTS SHOULD BE TREATED THE SAME OR INDEPENDENTLY UNDER THE VAT ACT? IN OTHER WORDS SHOULD THERE BE A BLANKET RULE FOR ALL EXPROPRIATIONS IRRESPECTIVE OF WHO THE EXPROPRIATING AUTHORITY IS AND UNDER WHICH ACT THE EXPROPRIATION IS DONE?.....	55
4.12	DO YOU THINK THAT VAT SHOULD BE PAID ON LAND THAT IS EXPROPRIATED BY THE GOVERNMENT?	57
4.13	EX05.....	58

4.13.1	Have you had any experience relating to an expropriation and its VAT treatment?	58
4.13.2	Please can you provide a brief overview of the case that you are currently involved in with regards to an expropriation under the Housing Act?	59
4.13.3	On what reasoning can you base your theory that this expropriation is zero rated?	61
4.13.4	Do you know the purpose of the following Acts, namely:	62
4.13.5	What are the main differences between an expropriation under the following Acts: the Housing Act, the Provision of Land and Assistance Act and the Restitution of Land Rights Act? And does the expropriating authority make a difference as to the VAT consequences of an expropriation?	63
4.13.6	Do you think that expropriations performed under the Housing Act are zero rated?	64
CHAPTER 5 DISCUSSIONS, CONCLUSIONS AND RECOMMENDATIONS		66
5.1	CONCLUSIONS REACHED ON RESEARCH OBJECTIVES	66
5.1.1	To evaluate the definition of ‘supply’ according to the VAT Act and whether an expropriation, which is involuntary, falls within the definition	66
5.1.2	To analyse whether there are significant differences between an expropriation under the Housing Act, the Restitution of Land Rights Act and the Provision of Land and Assistance Act.....	67
5.1.3	To evaluate whether expropriations performed by the national, provincial government or local municipalities should be subject to VAT at 0% or 14% or should be an exempt supply	67
5.1.4	To establish whether there should be a blanket rule applied to all expropriations with respect to their VAT consequences	68
5.2	FINAL CONCLUSION AND RECOMMENDATIONS	68
5.3	FURTHER RESEARCH	69
LIST OF REFERENCES		70

APPENDICES

APPENDIX A: Interview Schedule	74
APPENDIX B: Informed consent form	79

LIST OF TABLES

Table 1: Abbreviations used in this document	5
Table 2: Response from EX01	48
Table 3: Response from EX02	49
Table 4: Response from EX03	50
Table 5: Response from EX04	50
Table 6: Conclusion	51

THE CONSEQUENCES OF LAND EXPROPRIATIONS IN TERMS OF THE SOUTH AFRICAN VAT ACT

CHAPTER 1 INTRODUCTION

1.1 BACKGROUND

“Next to the right of liberty, the right of property is the most important individual right guaranteed by the Constitution and the one which, united with that of personal liberty, has contributed more to the growth of civilization than any other institution established by the human race.”(Taft, W.H.1909).

The expropriation of land is not a new age idea. According to Viitanen and Kakula (2009: 1), governments all over the world are usually faced with land use demands for development and infrastructure provision, and most of these challenges are met through expropriation or compulsory acquisition. South Africa is therefore not in a unique situation regarding the expropriation of land. The act of expropriation results in land being taken by the government from one party in exchange for compensation and being given to another party. The issues usually arise where the first mentioned party does not feel they have been adequately compensated or they are unwilling sellers.

The government of South Africa has a constitutional obligation to ensure that all citizens of South Africa have access to land on an equitable basis. Furthermore, the government can take the necessary legal or other steps to achieve land, water and related reform in order to redress the results of past racial discrimination (Government Gazette, 2008: No. 30963).

In order to ensure consistent implementation of expropriations, the government drafted the Expropriation Amendment Bill of 2008 (Expropriation Bill) as an amendment to the Expropriation Act No. 63 of 1975 (hereafter referred to as the Expropriation Act). One of the most important changes that the Expropriation Bill brought about was the fact that it gave the Minister of Public Works the power to expropriate property in the public interest or for public purpose (Government Gazette, 2008: No. 30963). The original Expropriation

Act, which was drafted in the Apartheid era, did not allow the government to expropriate land in order to bring about equitable access to the country's land.

The post Apartheid government therefore embarked on a crusade whereby land would be expropriated in order to allow previously disadvantaged groups of the South African population access to land that they would not have been able to obtain under normal circumstances. In accordance with the Expropriation Act, companies that own land that has been earmarked by the government to be expropriated are notified in the form of a Notice to Expropriation. This notice contains details of the expropriation but more importantly it identifies the property and provides an amount that the government feels is a fair consideration for the property. If the company from whom the government is expropriating the property is registered for Value Added Tax (VAT) under the Value Added Tax Act No. 89 of 1991 (hereafter referred to as the VAT Act), then this would result in the expropriation of the property potentially being deemed a 'supply' as defined by section 1 of the VAT Act and resulting in VAT being levied at 14% on the consideration received by the company. However, in 1999 in the court case *Snell's Annandale Farm (Pty) Ltd v C: SARS (62 SATC 97)* in the Cape of Good Hope Provincial Division, the court deemed that the expropriation of property was not a 'supply' as defined by section 1 of the VAT Act and as a result the expropriation fell outside the scope of the VAT Act.

Shortly after the *Snell's Annandale Farm* case, the definition of 'supply' in the VAT Act was amended to include expropriations. Subsequently, section 11(1)(s) & (t) was included in the VAT Act that allowed for certain expropriations to be zero rated. Taxpayers assumed then that all expropriations would be zero rated under these changes in the VAT Act. But when the South African Revenue Service (SARS) continued to issue VAT assessments on land expropriations, taxpayers were not aware of the fact that expropriations would be treated differently based on the relevant facts pertaining to each case. The Government departments maintain that all expropriations are zero rated while SARS are assessing them differently.

1.2 PROBLEM STATEMENT

Therefore, despite the insertion of section 11(1)(s) & (t) in the VAT Act detailing the zero rating of land expropriations, SARS is still issuing assessments for certain land expropriations on the grounds that the expropriations do not fall within the boundaries of section 11(1)(s) & (t) in the VAT Act.

After extensive research into land expropriations and the potential VAT effect of the consideration paid for these expropriations, there was no formal study or guidance available on what constituted an expropriation in terms of section 11(1)(s) & (t) of the VAT Act. The limited guidance provided leads to confusion as to which expropriations is zero rated and it also results in inconsistencies in applying the limited legislation. Furthermore, there is no formal definition for an expropriation in terms of the VAT Act.

1.3 PURPOSE STATEMENT

The main purpose of this research is the study of the implications of the VAT Act on the expropriations of land by a district municipality or government within South Africa and more specifically to determine which expropriations qualify for zero rating in terms of section 11(1)(s) & (t) of the VAT Act.

This research study aims to clarify the understanding of the VAT implications of an expropriation. In most instances companies assume that their expropriation is zero rated under section 11(1)(s) & (t) of the VAT Act when in actual fact, on the contrary, the proceeds attract VAT at 14%. In cases where the expropriation proceeds is a substantial amount it could result in an assessment being issued by SARS in the years following the expropriation. The company could then be facing a cash flow issue in the sense that it had not made provision for the payment of the VAT on the proceeds as they were under the impression that the expropriation was zero rated under the VAT Act.

Furthermore, having an understanding of whether an expropriation results in VAT being levied at 14% or 0% could affect the negotiations with the South African ('SA') government or municipality in terms of what is deemed a fair consideration for the expropriated land.

1.4 RESEARCH OBJECTIVES

This research will be focused on the following research objectives:

- To evaluate the definition of 'supply' according to the VAT Act and whether an expropriation which is involuntary falls within the definition.
- To analyse whether there are significant differences between expropriations under the Housing Act, the Restitution of Land Rights Act and the Provision of Land and Assistance Act.
- To evaluate whether expropriations performed by the national, provincial government or local municipalities should be subject to VAT at 0% or 14% or whether it should be an exempt supply.
- To establish whether there should be a blanket rule applied to all expropriations with respect to their VAT consequences.

1.5 DELIMITATIONS AND ASSUMPTIONS

1.5.1 Delimitations

The study has several delimitations related to the context, constructs and theoretical perspectives of the study. Firstly, it will be limited to the context of the South African environment and expropriations performed by the government and municipalities within South Africa.

Secondly, the study is focused on expropriations performed in terms of the Provision of Land and Assistance Act No. 126 of 1993 (hereafter referred to as the Provision of Land and Assistance Act) and the Restitution of Land Rights Act No. 22 of 1994 (hereafter referred to as the Restitution of Land Rights Act). The study will also look at expropriations performed in terms of the Housing Act No. 107 of 1997.

This study will only be focusing on the VAT implications of these expropriations and will be ignoring all other taxes relating to the transfer of property.

Attention must be drawn to the fact that while references are made to the Expropriation Act No. 63 of 1975, this Act will not be dealt with in detail.

1.5.2 Assumptions

An assumption is defined as “a thing that is accepted as true or as certain to happen, without proof” (Oxford dictionaries online) Leedy and Ormrod (2010:5) explain that it is essential for a researcher to let others know what they assume to be true with respect to their study. No assumptions have been made in this study.

1.6 DEFINITION OF KEY TERMS

This study involves some key concepts, namely expropriation and supply.

Expropriation: expropriation is defined as ownership of the land that vests in public interest in the expropriator; where the previous owner’s ownership is terminated without his consent, against payment of compensation (Van Der Walt and Pienaar, 2008: 83).

Supply: is described as the performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly, as defined by Section 1 of the VAT Act.

The following abbreviations have been used in this study.

Table 1: Abbreviations used in this document

Abbreviation	Meaning
ATO	Australian Tax Authority
Expropriation Act	Expropriation Act No. 63 of 1975
Expropriation Bill	Expropriation Amendment Bill 2008
GST	Goods and services tax
GST Act	A New Tax System (Goods and Services Tax) Act 1999
Housing Act	Housing Act No. 107 of 1997

MEC	Member of Executive Council in South Africa
Minister	Minister of Land Affairs
NSWSC	New South Wales Supreme Court
Provision of Land and Assistance Act	Provision of Land and Assistance Act No. 126 of 1993
Restitution of Land Rights Act	Restitution of Land Rights Act No. 22 of 1994
SA	South African
SARS	South African Revenue Service
VAT	Value Added Tax
VAT Act	Value Added Tax Act No. 89 of 1991

1.7 OVERVIEW OF CHAPTERS

This research proposal is made up of five chapters.

Chapter one explains the assumptions on which the study is based, the purpose of the research and also discusses the delimitations that apply to the study. This first chapter also defines key terms used in the study, including listing definitions and their meanings that have been used in this study.

In Chapter two, the extant literature relevant to the VAT consequences of the expropriation of land is reviewed and analysed.

Chapter three describes the research design, approach and methods used to determine the sample size and how to select the sample. This chapter also explains how the data will be analysed and the quality of the data obtained.

Chapter four details the interviews held with the sample selected. Each of the questions presented to each of the interviewees is detailed, followed by their response and is summarised by a conclusion to each question.

Finally, chapter five details conclusions for each research objective based on the responses provided by the different participants and the literature review conducted in chapter two. An overall conclusion is also contained within this final chapter.

CHAPTER 2 LITERATURE REVIEW

2.1 INTRODUCTION

The VAT Act deals specifically with certain types of expropriations and remains silent on the others. The main question that has arisen in this study is what differentiates the different types of expropriations. If the different types of expropriations have the same goal and are authorised under the same government umbrella, why does the VAT Act deal with the different types of expropriations differently? It is difficult to ascertain as to whether it was SARS' intention to only allow certain expropriations to be dealt with in the VAT Act. However, it could possibly have been an oversight, in the sense that when the relevant sections of the VAT Act were amended to specifically deal with expropriations, the amended section was not all encompassing. Section 11(1)(s) and (t) of the VAT Act only refers to expropriations done under the Restitution of Land Rights Act and the Provision of Land and Assistance Act. Unbeknown to the authors of the amended section it would not be a section that could be applied to all expropriations. The amendment has led to the expropriations being treated differently based on the expropriating authority and under which legislation the expropriation was done.

There has been no guidance provided by SARS or any interpretation notes issued that attempt to guide taxpayers in trying to ascertain as to how their expropriation will be dealt with under the VAT Act. It is therefore left to a trial by error procedure.

Before an attempt can be made to answer any of the questions that have been raised above, an understanding of the different legislations and literature that is available needs to be obtained.

Firstly an understanding of the VAT Act and the relevant sections relating to expropriations needs to be obtained.

2.2 VATABLE SUPPLIES IN TERMS OF THE LEGISLATION

2.2.1 The imposition of VAT

In terms of section 7(1) of the VAT Act: "...there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax-

(a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;..”

Specific attention needs to be given to the term supply and whether an expropriation can be termed a supply in terms of the VAT Act.

2.2.2 Definition of a ‘supply’

Before 2000, section 1 of the VAT Act defined a supply as meaning all forms of supply, irrespective of where the supplies are effected (*VAT Act before the Revenue Laws Amendment Act 53 of 1999*) (Government Gazette, 1999: No. 20656).

In terms of the *Snell’s Annandale Farm (Pty) Ltd v C: SARS (62 SATC 97)*, the applicant contended that the expropriation of land fell outside the definition of a supply. Seligson (applicant’s lawyer) stated: “What is required before a supply of goods or services can be said to have been made by a registered vendor is some act on the part of the vendor. As nothing had been done by the applicant which contributed to the transfer of the land which was expropriated or in relation to the divesting of ownership in itself, there had been no supply sufficient to bring the proceeds of the expropriation within the scope of the Act.” Seligson’s main form of defence for the Shell’s Annandale case was that in order for a taxpayer to make a taxable supply, the taxpayer needs to perform some form of positive act. When property is removed from a person’s ownership it was not seen as the taxpayer performing a positive act in the course of his trade and therefore the taxpayer was not seen to be making a taxable supply.

However, in the VAT Act, proviso (i) to the definition of an enterprise states that “**anything done** in respect of the commencement or termination of the enterprise will be regarded as

being done in the course or furtherance of the enterprise or activity”. While the sale of property is not deemed to be in the course of an enterprise, supplies made with respect to the termination of an enterprise could still be defined as a supply in terms of proviso (i). Proviso (i) still requires that something needs to be done, in other words some form of positive act is still required to trigger a supply. In the Shell’s Annandale case, the applicant argued that in terms of the expropriation, no act is performed by the owner of the land being expropriated. The expropriating authority is the party that is performing all acts in order to divest the existing owner of the property and transferring the property to the new owner.

When a property is expropriated, ownership is transferred to the expropriating authority from the date of the notice of expropriation and therefore the original owner does not actively transfer the ownership of the property as described in the definition of expropriation. The Court ruled in favour of the applicant stating that “...the act of the authority to expropriate thus involved no act on the part of the person whose land has been expropriated and the Expropriation Act makes it clear that ownership of property expropriated vests ipso jure in the expropriator as from the date of expropriation.” The court held that the expropriation of land fell outside the definition of a supply and as a result no VAT was payable on the expropriation in terms of section 7 of the VAT Act.

Shortly after the ruling in the Shell Annandale case, the Revenue Laws Amendment Act No. 53 of 1999 amended the definition of supply to specifically include expropriations.

Currently, under section 1 of the VAT Act, the definition of supply includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly.

The most significant effect of the amendment to the definition of supply was that the positive act that was required to be made by the taxpayer to trigger a supply had been removed. This change then resulted in a taxpayer being liable for VAT on an involuntary supply. Therefore, under the current definition, there is no doubt that land expropriations are a supply as defined by the VAT Act.

2.2.3 Other jurisdictions

While this research primarily focuses on expropriations under the SA tax legislation, it is important to compare the way in which SA tax legislation is interpreted in comparison to other countries' legislation in order to identify any similarities or problems that are held in common. And more importantly, how other countries interpret their own legislation could help in understanding South Africa's tax legislation.

In A New Tax System (Goods and Services Tax) Act of 1999 (GST Act), which in Australia is similar to South Africa's VAT Act, section 9-5 of the GST Act states: you make a taxable supply if:

- (a) you make the supply for consideration;
- (b) the supply is made in the course or furtherance of an enterprise that you carry on;
- (c) the supply is connected with Australia; and
- (d) you are registered, or required to be registered.

According to Krever (2005), in Australia supplies of immovable property are taxable supplies within the ambit of section 9-5. The Australian Tax Authority (ATO) is, however, not viewing the expropriation of immovable property in the same light as ordinary supplies of immovable property. In fact, Krever (2005) further explains that the ATO has placed emphasis on the term **you make** in section 9-5 of the GST Act, thereby indicating that in order for a taxable supply to tax place some sort of positive action is required to be made by the supplier.

The ATO therefore treats the expropriations of immovable property as passive supplies. As detailed by Krever (2005) the ATO took a stand that resulted in passive supplies being excluded from GST.

The ATO's decision to exclude the expropriation of property from being a taxable supply was further enforced by the New South Wales Supreme Court's decision regarding the CSR Ltd v Hornsby Shire Council [2004] NSWSC 946. In this case the Hornsby Shire Council expropriated immovable property that was owned by CSR Ltd. CSR Ltd refused to issue a tax invoice to the Hornsby Shire Council for the GST on the proceeds of the

expropriated property stating that they had not made a taxable supply as they had no act in the expropriation process. This resulted in the Hornsby Shire Council refusing to pay CSR Ltd the full amount inclusive of GST. The Council held the GST amount back. CSR Ltd then took the Council to court in order to get the full GST inclusive amount paid. The Court ruled in favour of the plaintiff stating that there was no taxable supply if a registered person was paid for property taken through expropriation, because the person did not **make** the supply – the property was simply taken by the expropriating Council (CSR Ltd v Hornsby Shire Council [2004] NSWSC 946).

It is evident from the above two cases that the ATO is clearly regarding expropriations as passive supplies that fall outside the ambit of a taxable supply. Expropriations in Australia are therefore treated in a similar way compared to the way South Africa treated expropriations before the amendment to the definition of supply by the Revenue Laws Amendment Act No. 53 of 1999. It therefore appears that in terms of the Revenue Laws Amendment Act No. 53 of 1999 it was SARS' intention to ensure that all expropriations were included in the definition of a supply and to form a taxable supply in terms of the VAT Act.

2.3 THE TERM EXPROPRIATION

Now that the definition of a supply in terms of the VAT Act has been examined, it is important that the word expropriation is understood, especially looking at the different kinds of expropriations. In other words, an analysis needs to be made of under which legislations expropriations can be made and who can authorise the expropriation of land.

Firstly the term expropriation is defined.

2.3.1 Definition of the term 'expropriation'

In terms of the Oxford Dictionary, expropriate is defined as: "(of the state or an authority) take (property) from its owner for public use or benefit; dispose (someone) of property".

Van Der Walt and Pienaar (2008:83) define an expropriation in 3 steps, namely:

- (a) ownership of the land vests in public interest in the expropriator;
- (b) the previous owner's ownership is terminated without his consent; and
- (c) against payment of compensation.

While it can be clearly understood from the above two definitions that an expropriation is the removal of ownership of property from an owner by a state authority and is transferred to someone who the state believes is deserving of the ownership, it should be noted that in order for an expropriation to be affected, the consent of the original owner is not a requirement. In most instances the expropriating authority pays compensation to the original owner of the property.

2.3.2 Expropriation in terms of the VAT Act

The term expropriation has not been defined in the VAT Act. Therefore in trying to interpret the relevant sections of the VAT Act relating to expropriations other sources are used in trying to understand what the VAT Act perceives to be an expropriation.

There are two sections of the VAT Act that specifically deal with expropriations. They are section 11(1)(s) and (t) of the VAT Act and form part of section 11 which deals with zero rated supplies.

Section 11(1)(s) & (t) of the VAT Act

On 30 October 2009, Government Gazette No. 32664 was issued which amended the VAT Act and inserted section 11(1)(s) & (t) with effect from 31 October 2009. These two new sections of section 11(1) specifically deal with the expropriation of property and read as follows:

“11) ..such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero percent where-...

- s) the goods (being fixed property) are supplied to the Minister of Land Affairs who acquired those goods in terms of the Provision of Land and Assistance Act, 1993

(Act No. 126 of 1993), or section 42E of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994); or

- t) the goods (being fixed property) are supplied to a person to the extent that the consideration for those goods is an advance or subsidy granted in terms of the Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993).....”

Therefore, the amendment to the VAT Act seemingly indicated that expropriations of land were zero rated under section 11(1)(s) & (t) of the VAT Act.

However, in February 2009, VAT News 33 issued a notice stating that if the property was acquired in terms of the Provision of Land Assistance Act or the Restitution of Land Rights Act, only the portion of the purchase price paid directly to the vendor supplying the property by the Minister of Land Affairs would qualify for the zero rating under the VAT Act. Any additional consideration paid by the beneficiary of the property to the vendor supplying the property would be subject to VAT at 14%.

Furthermore, in 2010 VAT News 35 issued another notice stating that the zero rating only applies to the extent that the transactions are financed from grants or subsidies to which beneficiaries are entitled to from the Department of Rural Development and Land Reform and does not apply to any additional consideration which may be payable by the beneficiary to the vendor supplying the fixed property. The zero rate will also not apply where any movable property such as farming implements and other equipment is supplied together with the fixed property, unless the transaction qualifies as the supply of a going concern [section 11(1)(e) of the VAT Act]. If the transaction is not the supply of a going concern, the movables are treated as a separate supply from the fixed property, and the consideration attributable to the movables must be charged with VAT at the standard rate [section 8(15) of the VAT Act].

What was clearly evident from VAT News 33 and 35 was that there were certain requirements to be met before the expropriation could be classified as a zero rated supply. Before the issue of these two notices it was assumed that all expropriations were just zero rated supplies. In order to determine whether the supply of an expropriated property is

zero rated it is important to examine the details of the expropriation. This is explained in more detail in the following sections.

Expropriations as a zero rated supply

On a first glance, it is quite easy to assume that any property that is expropriated by the government and where the government has paid the consideration is deemed to be a zero rated supply under section 11(1)(s) or (t). The term government is loosely used in this sentence. There are many different departments within the government. The different departments can range from local municipalities all the way through to national government. Initially it did not appear to be important who the expropriating department was, but as a result of the VAT News 33 and 35 statements that were issued, the different departments making the expropriations, can influence as to whether an expropriation is zero rated or not.

After further research, it quickly becomes apparent that the zero rating of the expropriations of land is significantly more complex than originally thought. While it is understandable that a municipality could be seen in the same light as the government, there is a distinct difference between property that is expropriated by a municipality and that of the government. In practice, SARS is treating an expropriation by a municipality as a taxable supply under the VAT Act and levying 14% VAT on the proceeds paid with respect to the expropriated property. The expropriation of property by a municipality falls outside the zero rating of section 11(1)(s) and (t) on the grounds that the property is not expropriated by the Minister of Land Affairs and not expropriated in terms of the relevant legislation as defined in section 11(1)(s) and (t).

The different expropriations can only be differentiated based on 3 determining factors. Therefore it would be beneficial to analyse these 3 areas in order to determine what makes them different and which ultimately results in different VAT treatments. The 3 areas of focus are::

- Who is the expropriating authority?
- What is the source of the funds used to expropriate the land?
- What is the intended use or purpose of the land once expropriated?

2.4 THE ANALYSIS OF EXPROPRIATIONS UNDER THE FOLLOWING 3 AREAS:

2.4.1 The expropriating authority

In terms of section 11(1)(s) of the VAT Act an expropriation is zero rated when the Minister of Land Affairs (Minister) has expropriated the land in terms of the Provision of Land and Assistance Act or the Restitution of Land Rights Act.

An in depth look into the legislation stipulated in section 11(1)(s) of the VAT Act will be done in order to obtain an understanding of the type of expropriations that falls within the zero rating of section 11(1)(s) of the VAT Act.

The Restitution of Land Rights Act serves to restore land that has been confiscated from communities and people who had previously owned it. Furthermore, this Act will serve to right the wrongs of past laws that dispossessed and disenfranchised certain groups, depriving these people of the land entitled to them, via racial discrimination (Staib: 2009). In terms of the Restitution of Land Rights Act, the Minister has the authority, in terms of section 4 of the Restitution of Land Rights Act, to appoint a commission to perform the duties required by this Act. But these powers cannot be further delegated, either the Minister or the Commission performs the duties required to enforce the Restitution of Land Rights Act. Therefore, in terms of the Restitution of Land Rights Act, it is left up to the Minister or the Commission to authorise the expropriation of property in order to qualify for the zero rating under section 11(1)(s).

In terms of section 15 of the Provision of Land and Assistance Act the Minister has the authority to delegate his power.

More specifically, section 15(2) of the Provision of Land and Assistance Act states: “The Minister may, either in general or in a particular case or in cases of a particular nature and on such conditions as he or she may determine –

- (a) delegate to the Premier of a province ... any power conferred upon the Minister by this Act, except the power under section 14 to make regulations; and

- (b) authorise that Premier or member of the Executive Council to perform any duty imposed upon the Minister by this Act.”

Furthermore, section 15(4) of the Provision of Land and Assistance Act states that: “The Minister may, with the concurrence of a Municipal Council, either in general or in a particular case or in cases of a particular nature and on such conditions as he or she may determine –

- (a) delegate to any officer of the Municipal Council any power conferred upon the Minister by this Act, except the power under section 14 to make regulations; and
- (b) authorise that officer of the Municipal Council to perform any duty imposed upon the Minister by this Act.”

Therefore, based on section 15 of the Provision of Land and Assistance Act, the Minister may appoint the Premier or a municipal council to perform his duties in terms of the Provision of Land and Assistance Act. If municipalities and/or a premier of a province can be empowered by the Minister under the Provision of Land and Assistance Act to perform expropriations on the Minister’s behalf, then surely a municipality and/or a premier of a province can have the necessary authority required in terms of section 11(1)(s) and (t) of the VAT Act in order for an expropriation to qualify for the zero rating.

2.4.2 The source of the funds used to expropriate the land

The source of the funds utilised to compensate the original owner of a property with regard to an expropriation is very important in determining whether a property is zero rated or subject to VAT at 14%. As previously mentioned, in VAT News number 33 and 35 any proceeds that are directly paid by the beneficiary of the expropriated property to the original owner is subject to VAT at the standard rate of 14%.

In terms of section 10 of the Provision of Land and Assistance Act, the Minister may use money that has been set aside for land reform by Parliament to compensate the original owners of expropriated property. Similarly the Minister may grant an advance or a subsidy to a person to obtain property under the Provision of Land and Assistance Act. Therefore an individual who is the beneficiary of the property may make a payment to the original

owner of the expropriated property as compensation, but these funds must have been obtained from the Minister in order to obtain the property under the Provision of Land and Assistance Act.

Of significant importance to a municipality is section 10(c) of the Provision of Land and Assistance Act that states: “(c) on such conditions as he or she may determine, grant an advance or a subsidy to a Municipal Council to acquire land –

- (i) to be used as a commonage; or
- (ii) to extend an existing commonage;”

Therefore it appears that if funds are made available by Parliament through the Minister to a district municipality to compensate an owner for property that has been expropriated it could qualify as a zero rated supply. Provided of course that the property has been expropriated in the view to restore its ownership to previously disadvantaged individuals who have a legitimate claim to ownership of the property or the property is to be used as a commonage for people of the municipality.

2.4.3 The intended use or purpose of the land once expropriated

Section 11(1)(s) of the VAT Act refers to section 42E of the Restitution of Land Rights Act. Section 42E was inserted into the Restitution of Land Rights Act by the Restitution of Land Rights Amendment Bill in 2003 and states: “The Minister may purchase, acquire in any other manner or expropriate land, a portion of land or a right in land for the purposes of the restoration or award of such land, portion of land or right in land to a claimant in terms of this Act and for any other land reform purpose.” According to Bembridge (2004), section 42E was inserted into the Restitution of Land Rights Act to enable the Minister to expropriate land over which there is no claim so as to restore land to a claimant who is entitled to restitution and that even if the expropriated land was intended for restitution purposes, the land can be used for other reform purposes.

Bembridge (2004) goes on to explain that the Restitution of Land Rights Act provides for the restitution of land rights to people dispossessed of these rights after 19 June 1913 as a

result of past racially discriminatory laws or practices. Therefore, if property is expropriated, in order to be potentially considered a zero rated supply, the expropriating authority must vest the ownership of the property in parties that have previously been dispossessed of their property ownership rights as a result of the Apartheid laws.

Section 2 of the Provision of Land and Assistance Act requires that the expropriated land needs to be utilised for domestic settlement. The land will be subdivided and ownership of each piece of subdivided land will vest in the person who is allocated the subdivided piece of land for settlement. The beneficiaries of the expropriated land are people who have no land or have limited access to land or who have been dispossessed of land but do not have a right to restitution in terms of the Restitution of Land Rights Act.

Section 10(1)(c) of the Provision of Land and Assistance Act makes reference to land that is to be used as commonage. Commonage is defined as land held in common (Oxford dictionary). In other words the expropriated property must be used for a community for their communal benefit.

2.5 EXPROPRIATIONS IN TERMS OF THE HOUSING ACT

Now that the finer points of section 11(1)(s) and (t) of the VAT Act have been analysed the above criteria will be applied to the Housing Act No. 107 of 1997 (hereafter referred to as the Housing Act) in order to determine whether an expropriation under the Housing Act could potentially qualify for zero rating under the section 11(1)(s) and (t) of the VAT Act.

2.5.1 What the Housing Act says

Section 9(3)(a) of the Housing Act states that a municipality may by notice in the *Provincial Gazette* expropriate any land required by it for the purposes of housing development in terms of any national housing programme, if:

- i) it is unable to purchase the land on reasonable terms through negotiation with the owner thereof;

- ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the *Provincial Gazette*; and
- iii) such notice of expropriation is published within six months of the date on which the permission of the MEC was granted.

A housing development is described by the Housing Act as the establishment and maintenance of habitable, stable and sustainable public and private residential environment to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to:

- a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
- b) potable water, adequate sanitary facilities and domestic energy supply.

While a national housing programme is described in the Housing Act as any national policy framework to facilitate housing development, including, but not limited to, any housing assistance measure referred to in section 3(5) or any other measure or arrangement to

- a) assist persons who cannot independently provide for their own housing needs;
- b) facilitate housing delivery; or
- c) rehabilitate and upgrade existing housing stock, including municipal services and infrastructure.

The main objective of the Housing Act and the Provision of Land and Assistance Act is the provision of land to a community to create a permanent residential environment that will uplift communities.

2.5.2 Can an expropriation under the Housing Act be zero rated?

In order to determine whether these expropriations can be zero rated we will look at expropriations under the Housing Act under the same 3 distinct areas of focus.

2.5.2.1 *The expropriating authority*

Under section 9(3)(a) of the Housing Act, an expropriation is performed by the relevant municipality. In order to be zero rated under section 11(1) of the VAT Act, the Minister must be performing the expropriation. As previously indicated section 15(2) of the Provision of Land and Assistance Act allows the Minister to delegate his power to expropriate under The Provision of Land and Assistance Act to a Premier of a province or to a local municipality. Therefore, in terms of section 11(1)(s) and (t) of the VAT Act, a municipality would have the necessary authority to expropriate land in terms of the Provision of Land and Assistance Act, despite the fact that the expropriation is performed under the Housing Act.

2.5.2.2 *The source of the funds used to expropriate the land*

The Housing Act has a fund set aside called the South African Housing Fund that is utilised to finance the activities required by the Housing Act. This fund has funds appropriated to it by Parliament.

Under section 10 of the Provision of Land and Assistance Act, the Minister may make money available to a municipality to acquire land to be used as commonage. These funds are made available to the Minister by Parliament.

Therefore, despite the fact that the funds are utilised under two different Acts, namely the Housing Act and the Provision of Land and Assistance Act, the source of the funds is the same. In terms of the Housing Act and the Provision of Land and Assistance Act, the funds used to compensate the owner of the expropriated property originate from Parliament

2.5.2.3 *The intended use or purpose of the land once expropriated*

According to section 9(3)(a) of the Housing Act expropriated property is utilised for a housing development in terms of a national housing programme. A housing development is the creation of a sustainable residential environment.

While the Restitution of Land Rights Act makes specific reference to restitution of land rights to people dispossessed of their rights to ownership as a result of past racially discriminatory laws, the Provision of Land and Assistance Act requires that expropriated property be utilised for domestic settlement.

Section 11(1) of the VAT Act requires that the expropriated property must be utilised in accordance with the Restitution of Land Rights Act or the Provision of Land and Assistance Act. Therefore provided that the expropriated property is utilised for a sustainable residential communal environment, it could fall under section 11(1)(s) & (t) of the VAT Act and be a zero rated supply.

2.6 PRACTICAL ILLUSTRATIVE EXAMPLE

The following two examples illustrate the effect of an expropriation that meets the requirements of section 11(1)(s) and (t) and one that does not:

Illustrative example 1:

The Minister of Land Affairs in terms of the Restitution of Land Rights Act expropriates a property and all requirements of the Act are complied with. The original owner of the property receives R5 000 000 as compensation for his property.

In terms of section 11(1)(s) of the VAT Act, the expropriation of the property is zero rated and VAT is payable to SARS at a rate of 0%. Therefore the owner has a net cash inflow of R5 000 000.

Illustrative example 2:

The local provincial premier in terms of the Housing Act expropriates a property and all requirements of the Act are complied with. The original owner of the property receives R5 000 000 as compensation for his property.

Section 11(1)(s) and (t) are not applicable therefore the expropriation is not zero rated and VAT is payable to SARS at a rate of 14%. The owner therefore has a net cash inflow of R4 385 965 (R5 000 000/114x100). VAT of R614 035 is payable to SARS.

2.7 CONCLUSION

The literature review clearly highlights why there is significant confusion regarding the reason why some expropriations are zero rated and others are subject to VAT at 14%. Research needs to be undertaken in order to understand why the expropriations under the Housing Act are not zero rated and are subject to VAT at 14%, if all expropriations are fundamentally similar.

CHAPTER 3 RESEARCH DESIGN AND METHODS

There is clearly a lack of clarity on why certain expropriations are zero rated in terms of section 11(1)(s) and (t) of the VAT Act and what differentiates these expropriations from ones that are subject to VAT at 14%. The research methodology will be designed to enable the necessary data to be collected, analysed and conclusions to be drawn that will enable the questions that have been raised in the literature review to be addressed.

There are two kinds of approaches to research, namely a deductive approach or an inductive approach (Saunders, Lewis and Thornhill, 2009:124). A deductive approach's main goal is to explain a causal relationship between variables and it involves the development of a theory that is subjected to a rigorous test. It can be easily understood that a deductive approach is mainly used for scientific research. The alternative approach is an inductive one. An inductive approach is defined as the development of a theory as a result of the observation of empirical data. In other words it is obtaining a better understanding of the nature of the problem (Saunders *et al.*, 2009:124).

This research will be based on an inductive approach.

3.1 DESCRIPTION OF INQUIRY STRATEGY AND BROAD RESEARCH DESIGN

3.1.1 A description of the proposed study's strategy of inquiry

A study into how different expropriations are treated in terms of the VAT Act has significant complexities as there is little or no guidance provided by any authority that would help guide taxpayers. Expropriations are not a specialised area within a specific industry. Any company or individual within any industry in South Africa could be dealing with expropriations. The only requirements are that the taxpayer must be a landowner and be registered for VAT.

Therefore, based on the inherent limitations of identifying the relevant taxpayers who are land owners and VAT registered, the strategy of inquiry will be an exploratory, descriptive and evaluative research.

This study will seek to understand how different parties to an expropriation will view the expropriation in terms of the requirements of section 11(1)(s) and (t) of the VAT Act. In qualitative research, the researcher wants to find out not only what happens but also how it happens and more importantly, why it happens the way it does (Henning, 2004:3). In accordance with Leedy and Ormrod (2010: 94) a qualitative researcher typically aims to examine the many nuances and complexities of a particular phenomenon. The research will therefore be focused on obtaining qualitative information to help understand the uncertainty regarding the VAT consequences of land expropriations in South Africa.

A clearer understanding of the different elements of the research strategy will now be obtained.

3.1.2 Exploratory and descriptive research

“An exploratory study is a valuable means of finding out what is happening; to seek new insights; to ask questions and to assess phenomena in a new light” (Robson 2002:59). Leedy and Ormrod (2010:138) explain further that an exploratory study is of particular use if the researcher wishes to clarify their understanding of a problem. One of the main goals of an exploratory study is to provide a researcher with a basic and preliminary understanding of a new phenomenon or topic about which little is known (University of Pretoria, 2011:5). A major part of this study is aimed at trying to understand what constitutes a zero rated supply in terms of the VAT Act and what differentiates these expropriations from others that attract VAT at 14%.

3.1.3 Research strategy: Single case study

Now that the strategy of inquiry has been defined, the next step is deciding which of the different research strategies will be best suited for this exploratory and descriptive research.

Saunders *et al.* (2009:141) defines one of the strategies that are available to a researcher as a **case study**, which “involves the empirical investigation of a particular contemporary phenomenon within its real life context, using multiple sources of evidence”.

Based on all the different strategies available, it is clear that the case study research strategy would be best suited in this study. The researcher has identified that the 'particular contemporary phenomenon' is the legislation regarding the VAT implications of expropriations. The researcher has to investigate 'multiple sources of evidence' by investigating how different parties interpret the legislation relating to VAT on expropriations.

Saunders *et al.* (2009:146) state that the case study strategy also has considerable ability to generate answers to the questions 'why?' 'what?' and 'how?' and for this reason the case study strategy is most often used in exploratory research. In trying to answer the research objectives it is important to look at specific cases and try to understand the underlying principles. Therefore by using a case study research the researcher will be able to ask questions and to 'dig' into the facts that underly each specific circumstance.

A single case study strategy, which focuses on a specific case, is appropriate in trying to ascertain how the legislation treats the different expropriations in South Africa. Saunders *et al.* (2009:146) explains that an important aspect of using a single case is defining the actual case and it provides an opportunity to observe and analyse a phenomenon that few have considered before. The researcher is trying to determine how different parties interpret the legislation regarding the VAT implications of expropriations. Therefore the actual case is the VAT implications of expropriations and how different parties interpret this legislation.

3.2 SAMPLING

Once the research approach is defined it is important to determine whether sampling is going to be used or not. In some instances it is possible to collect and analyse data from every possible case or group. This is defined by Saunders *et al.* (2009:210) as a census. But for most studies, including this research, it is impossible to analyse data from all sources as a result of time and money constraints and a restriction on access to data. Sampling techniques are therefore utilised in order to overcome these constraints and restrictions. In this study it is impossible to approach every VAT registered taxpayer in order to determine whether they have been faced with inconsistencies regarding the VAT

treatment of expropriations within South Africa, as the difficulty lies in trying to identify the relevant VAT registered taxpayers within a reasonable period of time. Therefore sampling will be used in order to obtain the data required for this study.

Saunders *et al.* (2009:213) distinguishes between two types of sampling. The second type of sampling known as **non-probability or judgemental sampling** which is a “selection of sampling techniques in which the chance or probability of each case being selected is not known” is the most appropriate form of sampling for this research. Each individual that will be selected will be judgementally selected based on his or her knowledge and expertise. It will be impossible to randomly identify individuals that are able to provide their opinion on the VAT implications of land expropriations due to the specialised knowledge required.

The advantage of collecting data from fewer cases also means that you can collect information that is more detailed and once the data has been collected more time can be devoted to checking and testing the data for accuracy prior to analysis (Saunders *et al.* 2009:213). However, one of the disadvantages of sampling is that there is a risk that the sample selected is not representative of the population. In order to mitigate this risk, adequate planning needs to be undertaken.

3.2.1 Sample size

It is important to determine the size of the sample upfront so that proper planning can be done to ensure that time and money is not wasted on collecting data from sources that are irrelevant in terms of the research objectives and purpose statement. A sample size will also help in focusing on the process of obtaining the required data.

With regards to non-probability or judgemental sampling, the issue of a sample size is often ambiguous and there are no defined rules as to what is considered adequate. Patton (2002) goes on to explain that in most instances the sample size is dependent on your research questions and objectives. Patton (2002) further explains that if the researcher is intending to collect qualitative data using interviews, the validity, understanding and insights gained from the data will be as a result of the data collection and analysis skills

and not the size of the sample. Therefore it is important to rather focus on quality and not the quantity of interviews.

However, in this study a sample size of not more than 5 individuals will be selected to be interviewed. Each individual will be selected based on their experience and knowledge within the required field.

3.2.2 Sampling technique to be utilised

There are many different types of sampling techniques. It is important to select a sample that will provide the data that will best meet the research objectives.

Based on the different types of sampling techniques described by Saunders *et al.* (2009:235) a **purposive sampling** technique will be utilised. A purposive sample is where the “judgement of the researcher is used to select the cases that make up the sample” (Saunders *et al.* 2009:235).

The target population also largely influences the choice of sampling technique that will be utilised. The target population is comprised of South African VAT registered taxpayers whose property is being expropriated and under ordinary circumstances it is very difficult to identify these individuals. Therefore the main focus of the sample that will be selected will be based on the quality of data each individual can contribute versus the quantity of individuals in the sample.

When selecting the sample in order to meet the research objectives, a sample will therefore be selected based on their importance and the quality of the data obtained from each sample case. The sample selected will help provide an analysis into the ‘typical’ treatment of expropriations in South Africa in terms of the VAT Act.

In this study the purposive sample that will be selected will comprise of the following individuals:

- A lawyer who has had experience in land expropriations under the Housing Act

- A VAT specialist working at SARS
- A tax manager working in a company that has recently had a property expropriated under the Housing Act
- A tax specialist of a major tax consulting firm
- A tax specialist of a major tax consulting firm

Conclusion

In order to meet the research objectives a purposive sampling technique with a typical case strategy will be utilised in selecting the sample. The sample selected will be representative of all the major parties involved in an expropriation, namely SARS, a South African VAT registered company, a conveyance and a tax consulting firm. It is important to mention at this point that every sample case could have their own perspective of how South African expropriations should be dealt with under the VAT Act and whether they attract VAT or are zero rated. This is described by Leery and Ormrod (2010:215) as bias in research sampling and is described as any influence, condition or set of conditions that singly or in combination distort the data. Sampling bias is further defined as any influence that may have disturbed the randomness by which the sample population has been selected. Therefore, while the sample is being selected, it is very important to ensure that sampling bias is kept to a minimum.

3.3 DATA COLLECTION

While collecting the data it is important to remember that the data collected is only valid at that specific point in time as data is ever changing and transient and therefore every researcher must keep this factor in mind while collecting their data.

3.3.1 Data collection method

In this study, primary data will be obtained. Saunders *et al.* (2009:599) defines **primary data** as “data collected specifically for the research project being undertaken”. The data

collection methods available for the collection of qualitative information include observation, interviews or questionnaires.

The most appropriate method will be an interview. In an interview, a researcher would not be bound by an observation or a questionnaire. The researcher would be able to follow different angles in the interview with the different respondents based on the different answers or opinions given in the interview. The interviewer would be able to adapt the questions as the interview is being done. An interview allows for more flexibility and would enable the interviewer to follow a line of questioning that is better suited to the individual and to follow up on an interesting issue that arises in the interview. In addition, respondents tend to take the research objectives more seriously if you are dealing with the respective party in person. An interview would be a much more effective process in obtaining the necessary data to meet the research objectives.

The disadvantage of using an interview is that the ideas and perceptions of the interviewer could be projected onto the respondent in the type of questions that are asked, the responses to answers and the interviewee could be led to make certain responses based on the type and way in which the interviewer asks the questions.

There are different kinds of interviews namely highly structured interviews, semi structured interviews and unstructured interviews which are informal. The highly structured interviews make use of a standardised set of questions and there are no deviations from these questions. A semi structured interview is not as formal as the previous interview but the researcher has a list of questions and themes which need to be covered. An unstructured interview is informal with no predetermined set of questions or points that need to be covered in the interview (Saunders *et al.* 2009:320). The type of interview that will be done in this study in order to gather data will be a semi structured interview.

A semi structured interview structure will be best suited to this study due to the fact that while the interviewer does not want to be bound by the yes/no answers of a structured interview, there needs to be a list of minimum questions that needs to be prepared and answered in the course of the interview. These questions will not be yes/no type of questions but ones that require explanation. The list of questions will be adapted to suit the

knowledge and experience of the different respondents. An informal interview with no prepared list of questions to guide the interviewer through the interview could lead to insufficient quality and quantity of information gathered.

In each interview there will be guidelines as to which issues must be covered in each interview (refer to Appendix B) but in order to obtain the best quality data the interviewee must be allowed to speak freely on the said topic in order to provide as much information as possible.

3.3.2 Conducting the informal interviews

The individuals selected to be interviewed will be contacted first telephonically by the researcher followed by an email outlining the purpose of the study. It will be determined with each individual if any authority is required by a superior in order to conduct the interview. The researcher will contact the necessary superiors to ensure that the individual has permission to conduct the interview. It will be emphasised in the email and telephonically that the anonymity of the individual being interviewed and the organisation in which the individual works will be maintained at all times.

If the participant has agreed to be interviewed, an interview will be scheduled and the interviewee will be required to sign an informed consent form (see Appendix B). This consent form will be completed by the start of the interview and will be submitted as part of the data collected.

The researcher who, due to the small number of interviews that need to be conducted and the extensive research that has been undertaken by the researcher, is best equipped in performing the interviews will conduct the interview. Each interview will be recorded using a dictaphone in order to ensure that the individual's exact response is noted.

3.4 DATA ANALYSIS

Once the qualitative data has been collected in the in-depth informal interviews, the data obtained should provide information on what the VAT consequences are of expropriations

in South Africa. This qualitative data will need to be analysed in order to develop theory from the data (Saunders *et al.*, 2009:480). The qualitative data analysis procedure ranges from simple categorisation of responses to processing for identifying relationships between categories. Saunders *et al.* (2009:482) go on to explain that the nature of the qualitative data collected has implications for its analysis, and that during analysis the non standardised and complex nature of the data you have collected will need to be condensed, grouped or restructured as a narrative to support meaningful analysis.

3.4.1 Preparation of data for analysis

The recorded interview will be transcribed, in other words a written account will be produced, word for word.

3.4.2 Qualitative data analysis technique

In determining the approach to the qualitative data analysis, an inductive approach will be used. Saunders *et al.* (2009:489) describes this approach as analysing the data as you collect them and develop a conceptual framework to guide the researcher's subsequent work.

There is no standardised procedure for analysing such data, but Saunders *et al.* (2009:490) explains that it is still possible to group data into 3 main types of processes:

- Summarising (condensation) of meanings
- Categorisation (grouping) of meanings
- Structuring (ordering) of meanings using narrative

Each interview will be analysed based on the research objectives and will be compared to each other in order to identify any similarities or opposing issues. Once this has been done, an overall conclusion will be formulated dealing with a 'typical' treatment of land expropriations in South Africa in terms of the VAT Act.

3.4.3 Interview summaries

The details of each interview will be summarised and documented while still maintaining anonymity of the individuals who were interviewed. All questions and responses will be documented. Conclusions will be drawn on the different research objectives based on these documented responses.

3.5 ASSESSING AND DEMONSTRATING THE QUALITY AND RIGOUR OF THE RESEARCH DESIGN

3.5.1 Reliability

Saunders *et al.* (2009: 326) explains that the lack of standardisation in informal interviews could raise issues regarding reliability of data. These issues of reliability are as a result of bias, namely interviewer/researcher and interviewee bias.

Interviewer or researcher bias is described by Saunders *et al.* (2009:326) as where the comments, tone or non-verbal behaviour of the interviewer creates bias in the way that the interviewee responds to the questions being asked. In other words the interviewer or researcher imposes their own beliefs and frame of reference through the questions that are asked. Bias may also be demonstrated in the way in which the responses to the questions are interpreted (Easterby-Smith, Thorpe & Jackson,2008).

In this study the risk of researcher bias is low due to the fact that the researcher is not personally involved in any expropriations in which this study is concerned and would like to just obtain clarity on how expropriations are dealt with in terms of the VAT Act.

Interviewee or participant bias is described by Saunders *et al.* (2009:326) as where the interviewee does not feel comfortable in giving their opinion freely, in other words, the interviewer is unable to develop the trust of the interviewee, or where the interviewer's credibility is seen to be lacking, the value of the information given may also be limited, raising doubts as to its reliability and validity.

In order to reduce the risk of interviewee or respondent risk, an open and honest attitude will be maintained by the interviewer at all times in the interview allowing the interviewee to feel comfortable to share information. The interviewer will be punctual for the interview, be dressed appropriately and be prepared for the interview.

3.5.2 Validity

The external validity of a research study is the extent to which its results apply to situations beyond the study itself – in other words, the extent to which the conclusions drawn can be generalised to other contexts (Leedy & Ormrod, 2010:99). The aim of this study is to provide clarity regarding the VAT treatment of expropriations in South Africa. While this research is not going to be dealing with every different type of expropriation it will, however, provide a framework in trying to establish whether an expropriation is subject to VAT at 14% or whether it is zero rated in terms of the VAT Act.

3.5.3 Conclusion

There is a small risk relating to reliability and validity but the proposed study has various strategies to mitigate these risks in order to reduce them to an acceptable low level. Therefore the quality and rigour of the proposed research design has been demonstrated.

3.6 RESEARCH ETHICS

Leedy and Ormrod (2010:101) state that whenever human beings or other creatures with the potential to think, feel, and experience physical or psychological distress are the focus of investigation, we must look closely at the ethical implications of what we are proposing to do. Research ethics therefore relates to questions about how we formulate and clarify our research topic, design our research and gain access, collect data, process and store our data, analyse data and write up our research findings in a moral and responsible way (Saunders *et al.* 2009:184). Furthermore there are four categories of ethical issues: protection from harm, informed consent, right to privacy, and honesty with professional colleagues.

One of the tools to ensure that the study maintains an ethical standard is by obtaining each participant to complete and sign an informed consent form (refer to Appendix B). This informed consent form will form part of the data collected from each individual. The informed consent form will emphasise the following:

- Any participation in this study should be strictly voluntary
- The anonymity of the individual and the organisation for which the individual works will be maintained at all times
- The information obtained in this study is strictly for academic research purposes.

It is therefore important to ensure that this informed consent form is read and signed by the participant before the interview is undertaken to ensure that the participant is aware of his rights. And it is very important to keep the participant informed of any changes.

One of the most important ethical issues regarding a proposed study is the confidentiality of the identity of the participant and the anonymity of his responses to the questions in the interviews. At all times a professional respect must be shown to all participants in the study.

In order to ensure that the highest level of ethical standard is maintained in this study, the researcher will endeavour to maintain the ethical standards set by the University of Pretoria.

CHAPTER 4 FINDINGS

4.1 INTRODUCTION

While selecting the sample, the researcher had to ensure that the individuals that would be selected would ensure that the quality of data obtained would be sufficient in order to meet the research objectives. However, identifying these individuals would not be a simple task as there are probably a handful of individuals that have personally dealt with expropriations or are familiar with the relevant legislation. Therefore, in order to determine whether an individual would qualitatively be of value, a brief background of the research proposal was initially sent to each participant via email in order to determine whether they would be able to provide the necessary insight that would be valuable to this research. The document that was emailed as the 'Background' has been included as part of Appendix A: Interview Schedule.

Interviews were conducted with five individuals from different financial and legal backgrounds. In order to maintain their anonymity, participants have been allocated a unique code – EX01 to EX05. The responses of each participant will be detailed under their unique code in order to track each participant's responses under the different questions. In conducting the interviews, the questions as outlined in Appendix A: Interview Schedule were used as a guideline. These questions have been detailed below in point form followed by each individual's response under their respective unique code.

While conducting the interviews, a dictaphone was used. The permission of each participant was obtained in order to record the interview. Each participant's responses have been transcribed verbatim. The name of each organisation has been omitted or altered to ensure the confidentiality of the respective participants.

Each question will be followed by the respective responses and a conclusion. In some cases questions have been combined based on the fact that participants' answers covered more than one question in a particular response. In maintaining the anonymity of the participants, the administrative questions (as listed on Appendix A: Interview Schedule) have been omitted.

Participant EX03 and EX04 first completed the questions as per the Interview Schedule (Appendix A) and their answers were documented as each participant answered it. With regard to some of the answers, contact was made via email in order to obtain clarity on their answer. In the opinion of the researcher, EX04, who is in a position that administers the legislation relating to VAT and expropriations, failed to understand the purpose of some of the questions. It was either a lack of understanding or a concern relating to the confidentiality of the participant's identity. This occurred despite being assured by the researcher that the anonymity of all participants would be maintained at all times throughout the research. Due to the important role that the participant's organisation plays in the expropriation and its VAT implications, participant EX04's responses could not be omitted as it could help in providing a focus area as to how these misconceptions can be resolved or even prevented.

While performing the interview with participant EX05, who is a lawyer, it was noted that while this person did not have the necessary knowledge to answer the specific VAT related questions, the participant had first hand experience relating to land expropriations under the Housing Act. Therefore this participant's responses have been noted under its own heading as in some cases he was unable to provide an answer for some of the questions as per the Interview Schedule as per Appendix A but was able to provide some valuable information regarding practical experience. Therefore the questions were adjusted to be more specific to the participant's experience. Wherever possible questions were kept as close to the questions presented to the other 4 participants in order to maintain consistency.

4.2 HAVE YOU OR YOUR ORGANISATION WITH WHICH YOU ARE CURRENTLY EMPLOYED HAD ANY EXPERIENCE RELATING TO THE EXPROPRIATION OF LAND AND ITS VAT IMPLICATIONS?

Both EX02 and EX04 have personally had no experience with expropriations and its VAT implications. However, EX01 answered positively to having had experience while EX03 has only dealt with the legislation regarding the zero rating of expropriations.

4.3 HOW WOULD YOU DEFINE AN EXPROPRIATION?

EX01

An expropriation is usually where a governing authority takes possession of an asset, usually involuntarily supplied by the owner.

EX02

The politically motivated and forceful confiscation and redistribution of private property outside the common law.

EX03

A forced act by the state or a state entity to acquire land for the furtherance of the state or that entity's objectives.

EX04

It is the enforced transfer of ownership from private ownership to state ownership for use by the state in the furtherance of a specific objective that the state has determined to be in the public interest or for a public purpose.

Conclusion

Based on the respondents' definitions, an expropriation can be defined as the forced transfer of the ownership of land from a private party to the state or government. The expropriated land will be used for the furtherance of the state or government's objectives and for public interest or public purpose. In most cases the supply of land is an involuntary act by the seller, in other words the sale is forced upon the seller/owner. Expropriations are in some cases politically motivated in order to obtain a desired outcome outside the common law.

4.4 HOW WOULD YOU DEFINE A SUPPLY UNDER THE VAT ACT?

EX01

As is defined in the VAT Act a supply will include performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly. I have literally taken my answer straight out of section 1 of the VAT Act.

EX02

The word 'supply' is very widely defined in the VAT Act and, in fact, it is not an all inclusive definition. It includes performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly.

EX03

It is very broadly defined particularly post the court cases mentioned in this thesis. It basically encompasses every possible transaction where use or enjoyment or ownership is transferred or granted.

EX04

The definition of supply in the VAT act is very wide and "includes performance in terms of a sale, rental, instalment sale under a credit agreement and all other forms of supply, whether voluntary or by operation of law irrespective of where the supply is effected and any derivative of supply shall be construed accordingly". In the context of expropriation of land, such supply would be deemed to be a supply "by operation of law".

Conclusion

The word supply is defined in the VAT Act and will include performance in terms of a sale, rental agreement, instalment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of 'supply' shall be construed accordingly. In layman's terms a supply can be defined as any transaction in which enjoyment or ownership is transferred.

4.5 WOULD YOU CONSIDER AN EXPROPRIATION A VOLUNTARY OR INVOLUNTARY SUPPLY?

EX01

An involuntary supply as in most cases the owner of the property is an unwilling seller.

EX02

Involuntary supply as it is initiated by a person other than the seller of the fixed property.

EX03

Involuntary.

EX04

It would in most instances be an involuntary supply, unless the original owner had the intention to sell the land anyway. In terms of the VAT Act as stated above, it would be a supply 'by operation of law'.

Conclusion

An expropriation is considered an involuntary supply as in most cases the owner is an unwilling seller. The supply would be by operation of law.

4.6 DO YOU THINK IT IS APPROPRIATE THAT THE DEFINITION OF A SUPPLY UNDER THE VAT ACT INCLUDES INVOLUNTARY SUPPLIES?

EX01

Yes, I do think it is appropriate to include involuntary supplies in the definition of supply. Its exclusion would or more importantly could create a loophole for the avoidance of the levying of VAT on transactions for which consideration is received but which in terms of relevant laws may be deemed to be involuntary.

EX02

Yes, in order to provide clarification and certainty in instances where expropriation occurs. We would have scenarios arising where every Joe Soap will claim that their sale is involuntary and therefore not taxable as it is not a supply as defined by the VAT Act. And this is not just confined to expropriations; it could be a potential can of worms for any transaction.

EX03

Yes I do think it is appropriate as it aligns with the principles of VAT. In other words, any supply made by a vendor in the course of that vendor's enterprise should be subject to VAT at the applicable rate.

EX04

I think that the VAT Act caters for an involuntary supply already in that it states that a supply includes "all forms of supply, whether voluntary or by operation of law". The opposite of a voluntary supply is an involuntary supply, so if a landowner did not want to sell his/her land, but was forced to sell 'by operation of law' (forced to do so due to expropriation) then it is automatically an involuntary supply. No one is going to sell an asset involuntarily unless forced to do so due to a particular law applying to such asset assuming that there is no need to sell the asset.

Conclusion

Yes, it is appropriate that involuntary supplies are included in the definition of supply as defined in the VAT Act. The potential exclusion of involuntary supplies from the definition could create a loophole for the avoidance of VAT on transactions that are bona fide vatable supplies.

4.7 DO YOU THINK THAT AN EXPROPRIATION SHOULD BE DEEMED A SUPPLY AS DEFINED BY THE VAT ACT?

EX01

Yes, an expropriation would meet the definition of a supply and should therefore be included so that it can also then be treated as a taxable supply – not exempt, thereby allowing the vendor to claim input VAT incurred on the transactions relating to such expropriation. In other words the seller would have claimed the input VAT on the original acquisition of the land and any improvements which were made to the property would have been claimed prior to expropriation.

EX02

The definition of supply is written so widely. Whenever you read the definition and it says it: “includes”, you must ask yourself what doesn’t it include? Because when it says that it means something, then whatever you read, that is it and no more. But when it says it “includes the following”, then it means that that it includes the following and anything else that is not specified in there because it is just so open ended. And now it is just so completely open ended the word supply. Almost everything that you do where there is a transfer of rights or transfer of ownership or possession becomes a supply. So whether it is involuntary or voluntary, it is definitely a supply.

EX03

As the definition of supply incorporates an expropriation and the definition has intentionally a wide application. It is not recommended that a deeming provision be used for this specific scenario. Should there only be a deeming provision with regard to expropriation the other possible “supplies” will not be caught in the VAT net which is contrary to the design of the broad based VAT system.

EX04

Yes, I do agree that it should be a deemed supply under the VAT Act. I believe that it falls within the definition of “supply” in the VAT Act. The problem is that the expropriating authority being a government body, provincial authority or local authority although registered for VAT, the VAT Act states that the supply of goods and services by that entity is deemed not to be the carrying on of an enterprise. It appears that the entity should not be VAT registered in the first instance if it is not carrying on an enterprise. The other problem related to the VAT act is that the land being expropriated may be private land and the owner may or may not be a VAT vendor.

Conclusion

Based on the interviewees’ responses, yes, it is appropriate that an expropriation is included in the wide application of the term supply as defined in the VAT Act. Where there is a transfer of rights or ownership, a vendor has made a supply and should be accountable for the corresponding VAT implications.

4.8 DO YOU KNOW THE PURPOSE OF THE FOLLOWING ACTS:

This question has been broken up into four parts, namely:

4.8.1 The Housing Act?

EX01

To establish and promote a sustainable social housing environment and to define the functions of national, provincial and local governments in respect of social housing. In layman's terms, the Act is there to allow the government to build houses for those with little or no means.

EX02

In broad terms the Housing Act is designed to help the government house its people. However I looked it up and found this more sophisticated definition. The Act is to provide for the facilitation of a sustainable housing development process and to lay down general principles that are applicable to housing developments in all spheres of government. It is also there to help define the functions of the national, provincial and local governments in respect of housing development and to provide for the establishment of a South African Housing Development Board. This Act would also assist in the continued existence of provincial boards under the name of provincial housing development boards and the financing of national housing programmes.

EX03

I have extracted this definition from the Housing Act.

The Act has been promulgated to provide for the facilitation of a sustainable housing development process. It helps in laying down general principles applicable to housing development in all spheres of government. It also helps to define the functions of national,

provincial and local governments in respect of housing development and it provides guidance with regards to the financing of national housing programmes.

EX04

The purpose of this Act is to provide for the facilitation of a sustainable housing development process, laying down general principles applicable to housing development in all spheres of government, to define the functions of national, provincial and local governments in respect of housing development and to provide for the establishment of a SA Housing Board.

Conclusion

The Housing Act was enacted to help the government, national and provincial, in establishing and maintaining a sustainable housing development programme. This housing development programme basically facilitates the housing needs for those individuals in South Africa who have little or no means to help themselves obtain suitable housing. This Act will also serve as the guidelines with regards to the housing development programmes within South Africa.

4.8.2 The Restitution of Land Rights Act?

EX01

This Act allows the government to legally expropriate land in circumstances where a landowner is not willing to sell for purposes of restitution. To provide for the restitution of land to people who were previously dispossessed as a result of Apartheid or racial reasons.

EX02

The purpose of this Act is to provide for the restitution of rights in land to persons or communities that were previously dispossessed of such rights after the 19th of June 1913

as a result of past racially discriminatory laws or practices. This Act has also assisted in the establishment of the Commission on Restitution of Land Rights and a Land Claims Court.

EX03

I have extracted this definition from the Restitution of Land Rights Act.

To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices. It also provides guidelines to establish a Commission on Restitution of Land Rights and a Land Claims court.

EX04

The purpose of this Act is to regulate the restoration of the land lost by parties dispossessed by virtue of racial legislation (ie Group Areas Act) and other forms of restitution such as monetary compensation and the provision of alternative land are possible.

Conclusion

The purpose of the Restitution of Land Rights Acts is to compensate or reconstitute the rights in land to individuals that were dispossessed of their rights to their land after 19 June 1913 as a result of racially discriminatory laws or practices.

4.8.3 The Expropriation Act?

EX01

This Act was promulgated to help define the process of expropriation. In other words, this Act details the procedures to be followed for expropriations by the government, almost like a recipe.

EX02

This Act will provide for the expropriation of land and other property for public and certain other purposes and to provide for matters connected therewith.

EX03

Expropriation of land for government's purposes

EX04

To provide for the facilitation of the expropriation of property within the requirements as laid down in section 25 of the Constitution (The property Clause) which states that: "Property may be expropriated only in terms of the law of general application for public purpose or in the public interest and; subject to compensation, the amount of which have either been agreed to by those affected or decided by or approved by a court, and the amount of compensation and the time and manner of payment must be "just and equitable" , reflecting an equitable balance between public interest and the interests of those affected, having regard to all the relevant circumstances..."

Conclusion

The Expropriation Act is basically the set of rules and guidelines under which all expropriations are performed under the different Acts. In other words, the Housing Act, Restitution of Land Rights Act and the Provision of Provision of Land and Assistance Acts will all refer to the Expropriation Act in order to ensure that the expropriations are performed in a consistent and law abiding manner.

4.8.4 The Provision of Land and Assistance Act?

EX01

As identified in the Provision of Land and Assistance Act Amendment Bill: “to give effect to the state’s obligations to facilitate within its available resources, land reform and reforms to bring about equitable access to all South Africa’s natural resources”.

EX02

This Act will provide for the designation of certain land, to help regulate the subdivision of such land and the settlement of persons thereon. It will also assist in the acquisition, maintenance, planning, development, improvement and disposal of property and the provision of financial assistance for land reform purposes.

EX03

Concerned with land reform and financial assistance to qualifying beneficiaries to rectify past inequalities regarding land ownership.

EX04

This Act provides for the designation of certain land, to regulate the sub-division of such land and the settlement of persons thereon, to provide for the rendering of financial assistance for the acquisition of land and to secure tenure rights and for matters connected therewith.

Conclusion

The Provision of Land and Assistance Act will provide for the designation of certain land, to help regulate the subdivision of such land and the settlement of persons thereon. It will also assist in the acquisition, maintenance, planning, development, improvement and disposal of property and the provision of financial assistance for land reform purposes.

**4.9 PLEASE COMPLETE A COMPARISON OF THE HOUSING ACT AND THE RESTITUTION OF LAND RIGHTS ACT UNDER THE FOLLOWING 3 HEADINGS:
 THE INTENDED RECIPIENTS OF THE EXPROPRIATED LAND
 THE SOURCE OF THE FUNDS UTILISED TO EXPROPRIATE THE LAND
 THE EXPROPRIATING AUTHORITY**

Each participant's responses have been documented in the form of a table.

Table 2: Response from EX01

	<u>Housing Act</u>	<u>Restitution of Land Rights Act</u>
The intended recipients of the expropriated land	Individuals who cannot afford their own housing	Those with a claim to the land in question (previously dispossessed)
The source of funds utilised to expropriate the land	The South African Housing Fund	The South African Government
The expropriating authority	The Minister of Housing	The Minister of Land Affairs

Table 3: Response from EX02

	<u>Housing Act</u>	<u>Restitution of Land Rights Act</u>
The intended recipients of the expropriated land	Priority will be given to the needs of the poor in respect of housing development	A person, deceased estate, community or part of a community dispossessed of a right in land after 19 th of June 1913 as a result of past racially discriminatory laws or practices
The source of funds utilised to expropriate the land	The South African Housing Fund and appropriations by Parliament	In the absence of any specially raised funds, I understand that the funds required to settle any payments arising from the expropriation of land under the Restitution of Lands Rights Act will come, directly or indirectly, from the National Revenue Fund
The expropriating authority	National, provincial or local government	Land Claims Commissioner or Land Claims Court

Table 4: Response from EX03

	<u>Housing Act</u>	<u>Restitution of Land Rights Act</u>
The intended recipients of the expropriated land	First time home owners within certain income brackets	Communities or individuals (including descendants) dispossessed of their land under the apartheid regime
The source of funds utilised to expropriate the land	The South African Housing Fund	Funds made available by Parliament
The expropriating authority	The local government	Minister of Land Affairs

Table 5: Response from EX04

	<u>Housing Act</u>	<u>Restitution of Land Rights Act</u>
The intended recipients of the expropriated land	The poor and previously disadvantaged communities of South Africa	The persons who have been removed from where they resided due to racial laws prior to 1994
The source of funds utilised to expropriate the land	South African Housing Fund	Funds allocated by Parliament to the Minister of Land Affairs
The expropriating authority	The municipality once approval has been granted by the provincial government	The Minister of Land Affairs

Table 6: Conclusion

	<u>Housing Act</u>	<u>Restitution of Land Rights Act</u>
The intended recipients of the expropriated land	The poor and previously disadvantaged communities of South Africa	A person, deceased estate, community or part of a community dispossessed of a right in land after 19 th of June 1913 as a result of past racially discriminatory laws or practices
The source of funds utilised to expropriate the land	South African Housing Fund and appropriations by Parliament	Funds allocated by Parliament to the Minister of Land Affairs
The expropriating authority	National, provincial or local government	The Minister of Land Affairs

4.10 IN TERMS OF THE VAT ACT, HOW DO YOU THINK EXPROPRIATIONS SHOULD BE TREATED: EXEMPT, ZERO RATED OR VATABLE AT 14%

EX01

The most ideal situation is for expropriations to be zero rated, as the buyer would be able to claim all the relevant input credits relating to the expropriated land and the seller would not have the burden of paying VAT at 14% on the expropriation price.

Expropriations should not be exempt as this could result in the seller having to reverse all VAT input credits claimed in the past on costs incurred in relation to the land and any improvements thereto. This would create an administrative nightmare as in some cases it is virtually impossible to go back and find all the records and supporting documentation on which input credits were claimed. This problem could arise in cases like farmland in which instances the farms have been registered to one owner for lets say more than 10 years. It

would be impossible to accurately determine the credits previously claimed. Therefore exempting expropriations would not be the answer.

Expropriations should not be vatable at 14% as this would result in one arm of the government effectively paying another which would then require redistribution back to the original arm in terms of budgets and this would result in money being shuffled back and forth between the different departments.

EX02

If an expropriation is done in terms of the Housing Act it almost seems like it is not supposed to be an expropriation type activity but maybe a housing development that is going to take place through local government. Now if local government is going to be doing housing is it going to be part of their taxable activities as a VAT vendor because unlike national and provincial government where most expropriations are done by non vendor department or entity, your local authorities like your local municipality are VAT vendors. Now they [*the municipality*] are doing it [*the expropriation of land*] as part of a scheme, which could be a taxable activity for them and you have to add VAT onto the price that you have paid to the person that you are taking the land away from, then so be it. It gets washed out. At the end of the day you account for VAT as a seller and you know the VAT forms part of the municipality's taxable activities. So to answer that question of whether it should be subject to VAT at the standard rate or 0% or exempt, I am inclined to say that if it doesn't make a difference to the end purchaser then I don't see a difference to making it a standard rate or zero rate. Making something zero rate is almost like a concession. And you don't want to use concessions too broadly. Therefore I think zero rating should be utilized cautiously but if the recipient government department can't take the VAT deduction or can't get the VAT deduction it becomes a tax burden to you and I as taxpayers. So I think that that was the logic behind making it zero rated if it is done in terms of the 2 sections catered for in terms of the VAT Act at the moment. But beyond that if it is going to be taken over or bought by a local authority and used as a local housing development like activity and maybe it is going to be on sold to a new recipient then why shouldn't it be a taxable activity and therefore why cant VAT be added onto it? As long as it does not leave the seller out of pocket. Making it exempt is of no good. If an expropriation is exempt, in

other words there will be no VAT liability for the seller, then that means that they must change the use for the seller because often this land is going to be farmland. Because if you make it exempt you then have to make the seller go back and undo any VAT deductions previously claimed over the years and pay it back to SARS. So exemption is not the answer either.

Zero rating is great as it is still taxable and you can still claim inputs. Therefore the municipality will be able to claim all its input credits relating to the property, and the buyer does not have to pay VAT on top of that price.

Therefore either standard rated or zero rated depending on who the expropriating authority is.

EX03

Depends on the nature of the goods being expropriated. The general view is that it should follow the normal VAT rules.

EX04

I think that the expropriations should be treated as an exempt or zero rated transaction. Private land where the owner is a non VAT vendor should be treated as an exempt sale as the land owner should receive full compensation for the land/property being expropriated. In the case of the land owner being a VAT vendor, the expropriation should be treated as a zero rated transaction being deemed to be that sale of a going concern. The reason again being that the sale is “by operation of law” and the whether the expropriating authority is a VAT vendor or not should not affect the seller receiving less than the agreed value. If the standard rate of 14% were to apply, then the value should be increased by 14% to compensate for the VAT payable by the seller/owner.

Conclusion

Making an expropriation an exempt supply would not be a recommended course of action as in most cases expropriated land is farmland that belongs to second or third generation farmers. By exempting the expropriation would effectively be a change in use as defined by the VAT Act and the farmer, if a VAT vendor, would be required to go back and reverse all input VAT credits previously claimed in connection to the expropriated property. The documentation required to prove these reversals could span many years and not be available.

The VAT treatment of an expropriation hangs in a balance as to whether it should be zero rated or vatable at 14%. At least either way the previously claimed input credits that were claimed would not be required to be reversed. The main contributing factor as to whether it should be zero rated or exempt would be dependent on who the expropriating authority is. In the case of the government, who is a VAT exempt organisation, making the expropriation zero rated would make the most sense. If the government paid VAT at 14% on an expropriation, they would be placing themselves in a VAT refund position and due to the fact that they are VAT exempt they would end of forfeiting the VAT claimable.

Similarly if the expropriating authority was a municipality who is a VAT vendor and the expropriating land formed part of their taxable supplies, in other words, the municipality expropriated the property in the course or furtherance of their business then the supply of the expropriated land should be vatable at 14%. The expropriated property will form part of their taxable supplies.

4.11 DO YOU THINK THAT THE EXPROPRIATIONS OF LAND UNDER THE DIFFERENT ACTS SHOULD BE TREATED THE SAME OR INDEPENDENTLY UNDER THE VAT ACT? IN OTHER WORDS SHOULD THERE BE A BLANKET RULE FOR ALL EXPROPRIATIONS IRRESPECTIVE OF WHO THE EXPROPRIATING AUTHORITY IS AND UNDER WHICH ACT THE EXPROPRIATION IS DONE?

EX01

Yes there should be a blanket rule applied to expropriations provided that they are being performed by the government or municipal bodies, and **NOT** *[author's own emphasis]* bodies where there is an opportunity for personal or private profit.

EX02

If the ultimate intention is to remove VAT as an additional cost burden, the VAT treatment should be adapted accordingly to the ability of the expropriating authority's ability to claim a deduction for any VAT levied by the vendor making the supply of the land. By way of example, if the government department expropriating the land is not a vendor then the supply should be zero rated for VAT purposes. Similarly, if the government department or entity is a vendor and entitled to an input tax deduction for the supply of the expropriated land, the supply should be standard rated for VAT purposes. In my view, the 'normal rules' which are applicable to all other taxable supplies should be followed wherever possible and the preferential zero rating provisions in the VAT Act should be used cautiously and only where the underlying circumstances justify the application thereof.

But there is one issue that could be of significance. Why do they *[expropriating authority]* choose to go and expropriate through the Housing Act? Was it because they were forced to or did they have an option? If they had an option was it easier to go through the Housing Act then going through the Redistribution Act, where you have to go through quite a regiment process or go through a land claims commission? It is a lot more difficult to have another authority intervene in this process while the local authority can almost laterally do it using the Housing Act and there is less legal tape to do it through. Was that thought

through at the time when they set up the zero rating provisions? Or maybe not. But if the end result is the same and that you are actually just redistributing land from people who can afford it or people who become unfairly advantaged in terms of how they acquired it then you are redistributing to someone who is poor and needy and does require that housing. This makes the end result similar to the Redistribution Act then what makes the Housing Act so different and why should an expropriation be dealt with differently under the Housing Act? I can't see why it should be.

EX03

All expropriations should follow the normal VAT rules where the supplier is a vendor.

EX04

There should be a blanket rule for all expropriations, irrespective of who the expropriating authority is provided that the owner is compensated as stated above and is not prejudiced by the VAT Act.

Conclusion

Inconclusive. Two of the participants feel that there should be a blanket rule and one feels that it should depend on who the expropriating authority is and their VAT status. To ensure that all expropriations are treated equitably and consistently, it would be appropriate to have all expropriations under one blanket rule where irrespective of who performs the expropriation or the purpose thereof, they would all be subjected to the same VAT treatment.

However, one cannot ignore the significance of the VAT status of the expropriating authority on whether a transaction should be vatable or not. As explained in the conclusion of question 6.10 above. Having a blanket rule to be applied consistently to each expropriation would not be appropriate then as it would not take into account the VAT status of the expropriating authority in each individual case.

4.12 DO YOU THINK THAT VAT SHOULD BE PAID ON LAND THAT IS EXPROPRIATED BY THE GOVERNMENT?

EX01

No, I do not think that VAT should be paid on expropriations as outlined in question 6.10 above. And in addition, from practice it appears that government will not pay any VAT on these transactions as they understand them to be zero rated. The anomaly in the legislation could result in penalising the supplier who has involuntarily already disposed of their asset.

EX02

I am of the view that VAT should not be levied at the standard rate on supplies of expropriated land by vendors to the extent that the government department expropriating the land is unable to claim a deduction for any VAT that would otherwise be leviable. If the supply were to be treated as an exempt supply, the supplying vendor would have to account for a change in use adjustment for any previously deducted input tax and this would probably be then be recouped as part of the expropriation proceeds. If this is not recouped, the supplying vendor would be worse off.

If the supply were to be subject to VAT at the standard rate, the VAT levied will be an added cost to the government department expropriating the land in those circumstances where the government department is not registered for VAT. Arguably, if the government department or entity expropriating the land is a 'designated entity' for VAT purposes, any VAT levied on the expropriation could be deducted by the 'designated entity' as input tax. In so doing the VAT would then not become an added burden.

EX03

Yes, government is the final consumer. Section 86 of the VAT Act provides that the government must bear the VAT.

The following extract from the VAT Act has been provided in order to obtain a better understanding of the participant's answer. Section 86 of the VAT Act states "This Act shall bind the State, and no provision contained in any other law providing for an exemption from any tax or duty shall be construed as applying or referring, as the case may be, to the tax leviable under this Act unless such tax is specifically mentioned in such provision."

EX04

The government is not a VAT vendor and any land expropriated by government (eg Minister of Land affairs) (not a local municipality that is VAT registered) should not have any VAT connection. Alternatively it should be an exempt sale under the VAT Act.

Conclusion

No, VAT should not be paid on land that is expropriated by the government, due to the fact that the government is not a VAT vendor. Alternatively VAT should be levied at 0 %.

4.13 EX05

As mentioned above the questions relating to participant EX05 were tailored as this participant had personal experience with expropriations under the Housing Act. At the time of the interview participant EX05 was involved in legal proceedings regarding an expropriation under the Housing Act by a municipality. Therefore, questions were more specific to the Housing Act and not generally phrased. The following questions were asked, followed by the participant's response. In order to maintain anonymity, the names of the municipality and parties involved have been omitted.

4.13.1 Have you had any experience relating to an expropriation and its VAT treatment?

Yes. I have dealt with many cases involving expropriations.

4.13.2 Please can you provide a brief overview of the case that you are currently involved in with regards to an expropriation under the Housing Act?

One of our clients contacted us to handle a case in which they had received a notice of expropriation regarding a portion of farmland located in the ZZZZ municipality's district. The expropriation was performed by the ZZZZ municipality and in terms of the notice of expropriation; the expropriation was stated to be "for the implementation of the YYYY Slums Clearance Housing Project for housing development". The notice of expropriation made it clear that the MEC of the Department of Housing for the Province of AAAA had provided his permission as contemplated in section 9(3)(a)(ii) of the Housing Act No. 107 of 1997 for the expropriation to continue. The notice of expropriation was then published in the Provincial Gazette within the required 6 months from the date on which the permission of the MEC was granted.

As the expropriation progressed, the actual expropriation negotiation was taken over from the municipality by the Department of Rural Development and Land Reform. By way of explanation, the municipality said that the Department of Rural Development and Land Reform were providing the funds for the expropriation and were therefore doing the negotiating. However, the expropriating body still remained the municipality.

A meeting with the Department of Rural Development and Land Reform was held in which the following 3 issues were discussed:

1. The Capital portion of the amount outstanding
2. The interest payable on the capital portion outstanding in terms of the Expropriation Act
3. The VAT that was payable as it formed part of the claim and was therefore payable by the expropriating party.

The last point was met with some indignation as the Department of Rural Development and Land Reform said that they were part of the government and therefore do not pay VAT.

As far as I was concerned they were required to pay us VAT unless they could prove to us the contrary. In typical fashion, they ultimately paid us the capital amount outstanding. They refused to pay the VAT maintaining that the expropriation was not vatable, or rather vatable at 0 %, as SARS had given them a blanket clearance on all matters relating to poverty housing.

I then set out to establish why we thought initially VAT was payable at 14% and why the Department of Rural Development and Land Reform thought they had a blanket clearance from SARS that all matters relating to poverty housing were vatable at 0 %.

Firstly it made no difference to me that the Department of Rural Development and Land Reform were supplying the funds to the municipality. To me, that is considered an internal matter and has no bearing as according to the notice of expropriation, the expropriating authority was ZZZZ municipality. Where the municipality obtained the funds is unimportant.

After I did my investigation I came up with the view that section 11(2)(s) of the VAT Act read together with section 8(23) of the VAT Act created a situation whereby this was a housing scheme for the provision of poverty housing that fell within the National Housing programme and as such was zero rated.

The following information has been provided in order to obtain an understanding of the participants referrals to section 11(2)(s) and section 8(23) of the VAT Act:

An extract from the VAT Act: section 11(2)(s) states: “Where, but for this section, a supply of services would be charged with tax at the rate referred to in section 7(1), such supply of services shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of zero per cent where-.... (s) The services are deemed to be supplied to a public authority or municipality in terms of section 8(23);”

An extract from the VAT Act: section 8(23) states: “For the purposes of this Act a vendor shall be deemed to supply services to any public authority or municipality to

the extent of any payment made to or on behalf of that vendor in terms of a national housing programme contemplated in the Housing Act, 1997 (Act No. 107 of 1997), which is approved by the Minister by regulation after consultation with the Minister responsible for Human Settlements.”

4.13.3 On what reasoning can you base your theory that this expropriation is zero rated?

In terms of section 1 of the Housing Act, a National Housing Programme is defined as any national policy framework to facilitate housing development in order to assist persons who cannot independently provide for their own housing needs. The notice of expropriation issued by ZZZZ municipality specified that the land would be used “for the implementation of the YYYY Slums Clearance Housing Project for housing development”. There can be no argument that the purpose of the expropriation was for a housing development for a community that could not provide for themselves.

Furthermore, section 9 of the Housing Act provides that every municipality must take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy inter alia to initiate, plan, coordinate, facilitate and enable appropriate housing development in its area of jurisdiction, and to identify and designate land for the housing development. Furthermore, section 9(2)(a) of the Housing Act provides that any municipality may participate in a national housing programme in accordance with the rules applicable to such programme.

Section 9(3)(a) of the Housing Act states that a municipality may by notice in the Provincial Gazette expropriate any land required by it for the purposes of housing development in terms of any national housing programme if,

- (i) it is unable to purchase the land on reasonable terms through negotiation with the owner,
- (ii) it has obtained the permission of the MEC to expropriate such land before the notice of expropriation is published in the Government Gazette and,
- (iii) the notice of expropriation is published within six months from the date on which the MEC granted his/her permission.

Prior to the service of the notice of expropriation through the municipality's attorneys, it is clear from the notice of expropriation that all the requirements of section 9(3)(a) had been duly complied with. It follows in my view that the YYYY Slums Clearance Housing project for Housing Development was a preconceived housing development project under the control of the ZZZZ municipality that would fall within a national housing programme in accordance with the Housing Act.

And if you read section 11(2)(s) of the VAT Act together with section 8(23) of the VAT Act it specifies that in fact the deemed supply by a vendor, in this case XYZ Limited, of services to a municipality relative to a housing project would fall within a national housing programme and would be subject to VAT at the zero rate. There is no specific authority that says that land reform is going to be zero rated. Fact of the matter is that these two sections of the VAT Act have to be read together. Section 11(2)(s) read with section 8(23) specifies that the deemed supply by a vendor of services to a municipality relative to a housing project falling within a national housing programme would be subject to VAT at a zero rate. Now SARS might say that the expropriation of land, in other words the supply of land is not a service but rather goods. That is the only loophole I can see in my opinion and if that is so and the supply of land is not considered a service than it is not zero rated. It will all depend on the assessing officers interpretation of what is a service.

4.13.4 Do you know the purpose of the following Acts, namely:

a) The Housing Act?

The Housing Act and the Provision of Land and Assistance Act is there to provide land and housing for people who are unable to afford it. These two Acts have a very similar purpose. But perhaps the Provision of Land and Assistance Act can be used for purposes other than just housing. But the provisions of these two Acts do overlap.

b) The Restitution of Land Rights Act?

The Restitution of Land Rights Act has a political aim to give back land that has been unlawfully been dispossessed. This Act is a political Act unashamedly so. If people have been deprived of their land through some political act, they are entitled to have it back.

c) The Provision of Land and Assistance Act?

Answered under “The Housing Act” above.

d) The Expropriation Act?

All the above mentioned Acts use the Expropriation Act as the mechanism to expropriate. There is no intent or policy behind the Expropriation Act other than to acquire land for public purposes. In other words it details the rules by which expropriations are performed.

4.13.5 What are the main differences between an expropriation under the following Acts: the Housing Act, the Provision of Land and Assistance Act and the Restitution of Land Rights Act? And does the expropriating authority make a difference as to the VAT consequences of an expropriation?

There is no distinction what so ever between the purpose of an expropriation of land under the Provision of Land and Assistance Act and the Housing Act.

However, there is a difference between an expropriation under the Housing Act and an expropriation under the Restitution of Land Rights Act. In terms of the Housing Act, all that has to happen is that the MEC has to certify that the land is needed for poverty housing and off they go. But under the Restitution of Land Rights Act you have got to go through the whole government in order for the claimant to prove that they have a valid claim. The claim that the claimant has is not against the owner of the land but rather against the government. Once the government is satisfied that the claimant has a valid claim the government has got two options. It can either compensate the claimant or it can

compensate the current owner. If the government wants to reinstate the land to the claimant, they will then enter into negotiations with the current owner. If the owner and the government don't agree on an amount for compensation, the government can then issue a notice of expropriation. And this could be two, 3 years down the track. This could prove to be a very lengthy process. Government will acquire the land from the landowner generally by expropriation and then transfers it to the deprived community.

With regards to the difference between the Acts in respect of the expropriating authority, in the case of the Restitution of Land Rights Act, the expropriating authority is the government who is a VAT exempt body. Therefore I can understand the rationale that expropriations under the Restitution of Land Rights Act is not vatable as the government would not like to put themselves in a position where they could not be able to claim the VAT paid. However, I can see a distinct difference between the Restitution of Land Rights Act and the two Acts: The Housing Act and the Provision of Land and Assistance Act. In the latter two Acts, expropriations are performed by municipalities who make vatable supplies. Therefore they would be able to claim the input credit relating to the VAT paid on the expropriation.

4.13.6 Do you think that expropriations performed under the Housing Act are zero rated?

Fiscal legislation needs to be interpreted strictly. Section 11(2)(s) read in conjunction specifically states that any services supplied in terms of a housing programme will be zero rated. But is this was the intention – to zero rate the expropriation of land under the Housing Act – then why was it not included in section 11(1)(s) and (t) as part of the original exemption clauses. Once again the only issue I can see is that potentially they do not view the expropriation of land as a service.

Extract from the VAT Act: section 1 states: “services’ means anything done or to be done, including the granting, assignment, cession or surrender of any right or the making available of any facility or advantage, but excluding a supply of goods , money or any stamp, form or card contemplated in paragraph (c) of the definition of ‘goods’;”

Conclusion

Participant EX05 stated that while a municipality is a VAT vendor, it makes little difference as to whether an expropriation by a municipality is subject to VAT at 0% or 14% as section 11(2)(s) of the VAT Act read in conjunction with section 8(23) states that any services performed by a municipality in terms of a housing programme is zero rated. However, EX05 mentions that if it was the intention of the authors of the legislature to zero rate these types of expropriation transactions, then they would have been included in the original zero rating clauses: section 11(1)(s) and (t) of the VAT Act. Potentially the reason for the omission is the fact that the expropriation of land is not viewed as a 'service' as mentioned in section 11(2)(s) of the VAT Act. However, under the section 1 of the VAT Act the expropriation of land can fall under the definition of a 'service' as it is the transfer of the right to ownership of land.

This brings to question as to whether the expropriating authority has any influence on the VAT consequences of an expropriation transaction and whether it would rather be more prudent to create a blanket rule to apply to all transactions.

CHAPTER 5 DISCUSSIONS, CONCLUSIONS AND RECOMMENDATIONS

Once the interviews were performed and documented and all relevant correspondences were concluded and documented, each specific question was concluded based on the responses made by the participants. However, it is necessary to perform an overall conclusion based on the research objectives that were set out at the beginning of this thesis. These conclusions will be based on the literature review done and the interviews conducted by the researcher and the conclusions reached for each question presented to the interviewees.

The overriding issues are whether these expropriations should be subject to VAT and at what rate, and more importantly, whether they should all be treated the same or each case handled individually.

5.1 CONCLUSIONS REACHED ON RESEARCH OBJECTIVES

In order to draw the final conclusions, each objective is addressed and concluded on below:

5.1.1 To evaluate the definition of ‘supply’ according to the VAT Act and whether an expropriation, which is involuntary, falls within the definition

In section 1 of the VAT Act the definition of ‘supply’ has a very wide meaning. The word ‘includes’ indicates that all transactions where there is a transfer of something like goods, rights to ownership or services shall fall into the wide net that is cast by the definition. In order for a supply to be made under the VAT Act there does not need to be a willing buyer and willing seller scenario. Most expropriations are involuntary supplies that are specifically included in the definition of supply. To allow involuntary supplies to fall outside the definition would create an ideal scenario for the avoidance of VAT as you would have VAT vendors claiming that valid taxable supplies were involuntary supplies. Therefore, the conclusion is that to ensure a consistent and equitable administration of the VAT Act, it is appropriate that all involuntary supplies are included as a supply under the VAT Act.

5.1.2 To analyse whether there are significant differences between an expropriation under the Housing Act, the Restitution of Land Rights Act and the Provision of Land and Assistance Act

Based on the interviews performed by the researcher, it is noted that there is a distinct difference between expropriations under the Housing Act and the Provision of Land and Assistance Act versus the Restitution of Land Rights Act. In the latter the process leading to an expropriation is significantly more onerous for the claimant and the time taken is considerably lengthier. It is important to note that the government will only expropriate under the Restitution of Land Rights Act if it is proven that the claimant has a valid claim, and the seller and government have failed to agree on a reasonable compensation for the land. All claims under the Restitution of Land Rights Act are politically supported in that the claimant was dispossessed of their land as a result of past racially motivated laws.

The Housing Act and the Provision of Land and Assistance Act are less cumbersome. Generally expropriations are made only with the permission of the local provincial Member of Executive Council (hereafter referred to as MEC) and more importantly the land must be used for poverty housing or any housing development for disadvantaged communities.

In all 3 Acts, the funds required for the expropriations are made available through the different funds by Parliament and the National Fund.

5.1.3 To evaluate whether expropriations performed by the national, provincial government or local municipalities should be subject to VAT at 0% or 14% or should be an exempt supply

The most important factor driving the VAT consequences of expropriations under the different Acts is the VAT vendor status of the expropriating authority, as this would influence whether or not the input VAT credit would be claimed or forfeited.

Of the 3 options, exempting the supply of an expropriation is the least desirable. If an expropriation were to be exempt from VAT then this would result in a change of use of the asset and all prior input VAT claims made in respect to the respective land would need to

be reversed. There is no simple way to monitor that all prior input credits claimed are reversed. The process would rely on the integrity of the owner.

By either zero rating the supply or charging VAT at 14% the problem that exempting the supply creates would be resolved. However, if the government, being a VAT exempt entity, pays VAT at 14% on the expropriation of land it would not be able to claim the input VAT and it would be forfeited. So then it appears as if the answer is to zero rate the supply. If we were to change the expropriating authority to a municipality which is a VAT vendor, however, the expropriation is performed in the course and furtherance of their enterprise. In order to uphold the fundamentals of the VAT Act, the supply by way of expropriation would be taxable at 14%.

5.1.4 To establish whether there should be a blanket rule applied to all expropriations with respect to their VAT consequences

It is evident from the above conclusion that there is no clear cut answer and if the VAT consequences of the expropriations were to depend on the VAT status of the expropriating authority, we could end up with a situation where a fundamentally similar expropriation could be treated differently due to the fact that the government or municipal department that signed the notice to expropriate is different. This would result in huge inconsistencies and could also result in the different parties involved 'bargain hunting' for the best VAT deal as opposed to doing right by all parties involved. While the researcher performed the literature review and the interviews it was apparent that different parties dealt and understood the different legislations to their own benefit. Therefore, a blanket rule would resolve all these issues. It would ensure that all expropriations are dealt with equitably and consistently. A blanket rule that all expropriations should be zero rated would be the most appropriate solution.

5.2 FINAL CONCLUSION AND RECOMMENDATIONS

It would appear that while SARS has introduced the zero rating of certain expropriations in terms of section 11(1)(s) and (t) and section 11(2)(s) together with section 8(23) of the VAT Act it has still left significant room for interpretation. Throughout the research and

interviews there appeared to be no definitive answers to whether or not certain expropriations were viable and at what rate. Each participant had their own views supported by their own interpretations. In most instances the interviewees were basing their opinions on their own deductions and what they felt SARS intended.

There appears to be no uniform treatment of expropriations nor is there any explanation provided for the different VAT treatments under the different Acts. The fundamental idea of an expropriation is the forced removal of land from one party by the State for public use, irrespective of who performs the expropriation, the intended beneficiaries of the land and the source of the funds used to acquire the land. If the fundamental elements of all expropriations are the same, then surely the VAT consequences should be, too. This research that has been undertaken has been unable to provide a definitive answer to this question. Whether this lack of consistency is as a result of the different pieces of legislation from the different Acts not being updated when one Act was changed, or whether it was SARS' intention to treat these expropriations differently, it would appear imperative that SARS issue some guidelines regarding the VAT consequences of land expropriations in South Africa. This would aid in clearing up any misconceptions before expropriations are effected.

5.3 FURTHER RESEARCH

While it is important to understand that the participants' responses have been thoroughly reviewed and the focus of the literature review contained herein, the responses of only a selected sample were reviewed and used to draw the above conclusions. The extent of the research conducted was based on the research objectives that were identified. These conclusions are therefore not absolute and further research may be conducted to extend this study. It would be appropriate for SARS to hold a workshop or conference during which all the issues relating to the VAT treatment of expropriations under the different Acts are dealt with and discussed in order to ensure a certain level of conformity.

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APPENDIX A
-Interview Schedule -

INTERVIEW SCHEDULE

THE CONSEQUENCES OF LAND EXPROPRIATIONS IN TERMS OF THE SOUTH AFRICAN VAT ACT

Background

The main purpose of this research is to obtain an understanding of the VAT implications of an expropriation in South Africa under the VAT Act. In most instances companies assume that all expropriations are zero rated under section 11(1)(s) and (t) of the VAT Act. However in some instances the proceeds received as a result of an expropriation could attract VAT at 14%.

The history of the VAT Act and expropriations are explored starting with the court case Snell's Annandale Farm (Pty) Ltd v C:SARS (62 SATC 97). In this case the court held that the expropriation of land was not a 'supply' as defined in section 1 of the VAT Act as the act of expropriation was an involuntary supply due to the fact that the original owners of the land were involuntary suppliers of land and as a result the expropriation fell outside the Vat Act. Shortly after this ruling the definition of a 'supply' in the VAT Act was amended to include "all forms of supply, whether voluntary, compulsory or by operation of law." This clearly resulted in expropriations falling within the boundaries of the VAT Act.

In October 2010 the VAT Act was amended to insert section 11(1)(s) and (t). These 2 sections specifically deal with expropriations and their VAT consequences and state the following:

"11) ..such supply of goods shall, subject to compliance with subsection (3) of this section, be charged with tax at the rate of 0 % -

s) the goods (being fixed property) are supplied to the Minister of Land Affairs who acquired those goods in terms of the Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993), or section 42E of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994); or

- t) the goods (being fixed property) are supplied to a person to the extent that the consideration for those goods is in advance or subsidy granted in terms of the Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993)..."

These 2 sections contained certain factors that needed to be present before an expropriation could be considered zero rated, namely –

- 1) In section 11(1)(s) the fixed property needed to be expropriated by the Minister of Land Affairs under the Provision of Land and Assistance Act or the Restitution of Land Rights Act
- 2) In section 11(1)(t) the consideration paid for the expropriated property was considered an advance or subsidy under the Provision of Land and Assistance Act.

While it is generally understood that the government performs expropriations, there are many departments within the government that have authority to perform expropriations. But based on section 11(1)(s) and (t) depending on which department performs the expropriation and under which Act the expropriations was made will determine whether the expropriation will attract VAT at 14% or 0%.

A specific case has been taken to determine whether it is a zero rated supply and if not, what differentiates it from expropriations that are zero rated. The details of the specific case are as follows:

The MEC of KwaZulu Natal under the Housing Act No. 107 of 1997 expropriated a piece of land, owned by a registered VAT vendor. In this specific case SARS has issued an assessment for VAT to be levied at 14% on the consideration paid for the supply of the land stating that the expropriation fell outside the zero rating of section 11(1)(s) and (t).

The research study then draws a comparison between expropriations under the Housing Act and those performed under the Provision of Land and Assistance Act and the Restitution of Land Rights Act in terms of section 11(1)(s) and (t). The comparison focuses on 3 main areas:

1. Who is the expropriating authority
2. The source of the funds used to expropriate the land

3. The intended use of the land of the expropriated property

This comparison helps to determine the fundamental differences between the different kinds of expropriations resulting in VAT being levied at 14% vs 0%.

Below please find attached a list of questions that will be covered in the interview:

ADMINISTRATIVE QUESTIONS:

1. Please state your name
2. Who is your current employer?
3. Please state your current position
4. Do you mind if your name is used in the study or would you prefer to remain anonymous?
5. Do you understand the purpose of this study and its intended purpose?

INTERVIEW QUESTIONS:

1. Have you had any experience relating to the expropriation of land and its VAT implications?
2. How would you define an expropriation?
3. How would you define a supply under the VAT Act?
4. Would you consider an expropriation a voluntary or involuntary supply?
5. Do you think it is appropriate that the definition of a supply under the VAT Act includes involuntary supplies?
6. Do you think that an expropriation should be deemed a supply as defined by the VAT Act?
7. Do you know the purpose of the following Acts?
 - a) The Housing Act?
 - b) The Restitution of Land Rights Act?
 - c) The Expropriation Act?
 - d) The Provision of Land and Assistance Act?

8. Please complete a comparison of the Housing Act and the Restitution of Land Rights Act under the following 3 headings:
 - a) The intended recipients of the expropriated land
 - b) The source of funds utilised to expropriate the land
 - c) The expropriating authority
9. In terms of the VAT Act, how do you think expropriations should be treated: exempt, zero rated or vatable at 14%?
10. Do you think that the expropriations of land under the different Acts should be treated the same or independently under the VAT Act? In other words should there be a blanket rule for all expropriations irrespective of who the expropriating authority is and under which Act the expropriation is done?
11. Do you think VAT should be paid on land that is expropriated by the government?

APPENDIX B
- Informed consent form -



Informed consent for participation in an academic research study

Dept. of Faculty of Economic and Management Sciences

THE CONSEQUENCES OF LAND EXPROPRIATIONS IN TERMS OF THE SOUTH AFRICAN VAT ACT

Research conducted by:

Mrs. R. Smit (97051765)

Cell: 082 317 3333

Dear Respondent

You are invited to participate in an academic research study conducted by Roxane Smit, a Masters student from the Department of Faculty of Economic and Management Sciences at the University of Pretoria.

The purpose of the study is to obtain clarity with regards to the VAT consequences of the expropriations of land in South Africa. This study will focus on whether an expropriation under the Housing Act qualifies as a zero rated supply in terms of the VAT Act.

Please note the following:

- This study involves an interview that will be performed in person by the researcher. The interview should not take more than 1 hour.
- Your participation in this study is very important to us. You may, however, choose not to participate and you may also stop participating at any time without any negative consequences.
- The results of the study will be used for academic purposes only and may be published in an academic journal. We will provide you with a summary of our findings on request.
- Please contact my study leader, Mrs. H. Du Preez, business telephone: 012 420 4638, email: Hanneke.DuPreez@up.ac.za if you have any questions or comments regarding the study.

Please sign the form to indicate that:

- You have read and understand the information provided above.
- You give your consent to participate in the study on a voluntary basis.

Respondent's signature

Date