Tax Board Decision No 198
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(Gauteng West Tax Board)
1 November 2004

Income tax – whether raising of additional tax under s 76(1)(a) of the Income Tax Act, 1962 amounts to an invalid double penalty where taxpayer has already paid an admission of guilt fine under s 75(1)(a).

Taxpayer's reliance on s 336 read with s 106(1)(e) of the Criminal Procedure Act is misplaced – provisions only applicable to matters before the criminal courts and are not applicable to the Tax Board sitting as a specially constituted tribunal under the Income Tax Act and not as a criminal court.

Taxpayer's reliance on s 35(3)(m) of the Constitution is applicable – section should be read with s 33 of the Constitution dealing with just administrative action – principle is that a person should be protected from being repeatedly brought to answer in respect of the same conduct – principle intended to secure justice and reasonableness though finality of proceedings – s 39 of the Constitution dealing with the interpretation of the Bill of Rights is also applicable.

Double jeopardy cannot arise every time two different tribunals consider holding the same person responsible for some act or omission – same conduct can give rise not only to a civil claim in damages but also to disciplinary proceedings before a tribunal and to criminal charges.

Cumulative factors to determine whether a person has been subject to double jeopardy: classification of the proceedings in domestic law; nature of the offence; the nature and degree of severity of the penalty that the person concerned risked incurring.

Section 75(1)(a) deals with timeous submission of returns – intention of taxpayer is irrelevant – failure to render return suffices irrespective of reason – additional charges under s 76(1)(a) are in essence a penalty and are not tax on income although both are collected via the machinery of assessment. Main purpose of charges under s 76(1)(a) is to ensure accuracy of returns.

Both the provisions on s 75(1)(a) and s 76(1) are penal in character – essential nature of the conduct in respect of which the penalties are imposed is criminal – payment in terms of these sections is a penalty and not a tax on income – purpose of penalties is not to compensate Revenue but to punish and to deter.

Thus compliance with first of the two factors referred to – consideration of factor relating to nature and degree of severity of the penalty that the taxpayer risked incurring – question to be asked is whether the function

or the purpose of the penalty is the same under both sections – s 76(1)(a) is applied by reference to a formula that imposes a relatively minor penalty and which has regard to a purpose and function broader than that to which s 75(1)(a) relates – to the extent that there is an overlap, then an application of s 76(1)(a) will result in double jeopardy.

Although taxpayer was subject to double jeopardy the prejudice was removed by the deduction of the fines paid under s 75(1)(a) when revised assessments were issued – appeal failed.

BS Spilg SC: Chairman:

1. The issue before me is whether or not the raising of additional tax under s 76(1)(a) of the Income Tax Act, 58 of 1962, ('the Act') amounts to an invalid double penalty if the taxpayer has already paid an admission of guilt fine under s 75(1)(a) of the Act because he failed to submit tax returns timeously.
2. Section 75(1)(a) is headed "*Penalty on default*". During the 2000 tax year, when the taxpayer paid the fines, the section read:

> "Any person who . . . fails or neglects to furnish, file or submit any return or document as and when required by or under this Act . . . shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding 12 months or to both such fine and such

imprisonment".

3. Section 76 is headed "*Additional tax in the event of default or omission*" and subpara (1)(*a*) reads:

> "A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income . . . if he makes default in rendering a return in respect of any year of assessment, an amount equal to twice the tax chargeable in respect of his taxable income for that year of assessment".

4. The taxpayer had been called upon on several occasions to render returns for the 1995 to 1998 years of assessment. As a consequence of his failure to furnish these returns, he was summoned to the criminal courts under a charge of contravening s 75(1)(*a*) for each of those years.

5. Shortly before the hearing, the taxpayer signed an admission of guilt and was fined R300 for each return that he had failed to submit.

6. The taxpayer subsequently submitted returns for each of these years (*ie* 1995 to 1998) and was assessed.

   The Commissioner in each case levied additional tax under s 76(1)(*a*). The additional tax was based on a multiple of R300 for each subsequent year that the taxpayer had failed to submit a return. This meant that for the 1995 year of assessment, the additional tax was R600 (since additional tax of R300 had been levied for the 1994 tax year, which was the first year of default), R900 for the 1996 tax year, R1 200 for the 1997 tax year and R1 200 for the 1998 tax year.

7. The taxpayer objected to the additional tax imposed on the ground that he had already been penalised for the same conduct. He sought to rely on the principle of *autrefois convic*t set out in various provisions of the Criminal Procedure Act. He also sought to rely on the protection against double jeopardy provided for in s 35(3)(*m*) of the 1996 Constitution.

8. The first issue concerns the taxpayer's reliance upon the provisions of the Criminal Procedure Act. In particular, reliance is placed on s 336 of the Code which provides that:

> "Where an act or an omission constitutes an offence under two or more statutory provisions or is an offence under statutory provision and the common law, the person guilty of such act or omission shall, unless the contrary intention appears, be liable to be prosecuted and punished under either statutory provision or, as the case may be, under the statutory provision or the common law, but shall not be liable to more than one punishment for the act or omission constituting the offence".

9. This provision is to be read together with s 106(1)(*e*) which allows an accused to plead that he has already been convicted of the offence with which he is charged.

10. In the present case, it is clear that the payment of an admission of guilt fine pursuant to a criminal summons constitutes a conviction and sentence in respect of the offence in question. This is by reason of the provisions of s 57(6) of the Code.

11. Nonetheless, reliance on these provisions of the Code is misplaced. The provisions can only be raised before the Criminal Courts and have no direct application outside them. The Tax Board sits as a specially constituted tribunal under the provisions of s 83A of the Act and not as a Criminal Court.

12. I now turn to the constitutional argument. Section 35(3)(*m*) of the Constitution reads:

> "Every accused person has a right to a fair trial, which includes the right . . . not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted".

13. I am of the view that the provisions of s 35(3)(*m*) do have application even though they are couched in terms consistent only with Criminal Court proceedings (*vide* the words "*accused*", "*trial*", "*offence*", "*acquitted or convicted*").

    My reasons are based on the fundamental principle of constitutional interpretation that the various provisions of the Constitution are illustrations of, and give expression to, the basic rights they embody.

14. In the present case, it is necessary to have regard to both s 33 (which deals with just administrative action) and the fair trial provisions of s 35(3)(*m*) in order to determine whether or not there is a constitutional safeguard against double jeopardy irrespective of whether the forum empowered to impose the sanction (be it on the first or second occasion) is a Criminal Court, a Civil Court or an administrative tribunal.

15. In my view, s 35(3)(*m*) gives expression to a fundamental principle that transcends the confines of purely criminal procedure. The provisions of that section are illustrative of the broader concept which underpins

the plea of *autrefois convict* and *acquit,* and also *res judicata*; nl "*. . . die eenvoudige feit dat dit weersinwekkend is vir ons gevoel van billikheid en regverdigheid,* dat . . . die *gestrafte vir die tweede maal . . . weens dieselfde misdaad vervolg sou word*" *R v Manasewitz* 1933 (AD) 165 at 177.

In short, these doctrines give expression to the same legal sentiments: that a person should be protected from being repeatedly brought to answer in

respect of the same conduct. They are intended to secure justice and reasonableness through finality of proceedings.

16. I believe that support is to be found in the decision of *S v Vorster* 1961 (4) SA 863 (O) where Eksteen J was of the view that the plea of *autrefois acquit* derived both from the doctrine of *res judicata* and from considerations of reasonableness expressed in the maxim "*nemo debet bis vexari pro una et eadem causa*" which has the effect of preventing repeated prosecutions arising out of the same cause of action.

17. Support is also to be found in the express provisions of s 39 of the Constitution which deal with the interpretation of the Bill of Rights and provide:

> "(1) When interpreting the Bill of Rights, a Court, tribunal or forum–
>
> (*a*) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (*b*) must consider international law; and
>
> (*c*) may consider foreign law.
>
> (2) When interpreting any legislation and when developing the common law or customary law, every Court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

18. The case of *Attorney General v Unity Dow* 1994 (6) BCLR 1 (Botswana) is instructive. This case has been regularly adopted by our Constitutional Court.

In *Unity Dow*, the Court was concerned with the citizenship laws of Botswana which conferred automatic citizenship to a child provided the father was a Botswana citizen, but not if the mother was a Botswana citizen. The Botswana Constitution contains a first generation Bill of Rights. The constitutional provision dealing specifically with discriminatory treatment did not expressly identify gender discrimination although it did specifically itemise other forms of discrimination. The majority of the Botswana Court of Appeal nonetheless struck down the citizenship laws as unconstitutional on the grounds *inter alia* that the Constitution must be interpreted purposively and that specific provisions in the Constitution were simply illustrative of broader constitutional values which permeated the fundamental rights provisions.

19. I now turn to the circumstances where double jeopardy may arise outside the context of the criminal justice system.

20. Firstly, it is self-evident that double jeopardy cannot arise every time two different tribunals consider holding the same person responsible for some act or omission.

In particular, it is necessary to bear in mind that the same conduct can give rise not only to a civil claim sounding in damages, but also to disciplinary proceedings before a tribunal and to criminal charges. Theft by an employee is an obvious illustration. Moreover, the mere fact that a statute may entitle a party to a punitive award (*eg* double damages) does not necessarily mean that the amount is intended to represent a strict penalty as opposed to providing a pool of funds to compensate a class of victim (*eg* the Insider Trading Act and the Insolvency Act).

21. It therefore becomes necessary to establish when double jeopardy arises.

22. My task has been made considerably easier because the issue has come before the Strasbourg Courts of the European Community. They have been obliged to determine what constitutes a "*criminal charge*" under Article 6 of the European Convention for the Protection of Human Rights and Fundamental

Freedoms which provides:

> "In the determination of the civil rights and obligations or of any *criminal charge* against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

23. The broad issue before me has also been considered by the English Court of Appeal in a tax related matter. See *Han & Another v Commissioner of Customs & Excise & similar cases* [2001] 4 All ER 687 (CA). In that case, the Court was concerned with civil penalties imposed by the Commissioner of Customs and Excise on taxpayers for dishonest evasion of VAT where there existed parallel provisions for criminal proceedings in respect of the same conduct.

24. Although the English Court of Appeal was split 2-1, it was unanimous as to the requirements for determining whether or not a person had already been subjected to a "*criminal charge*" as that term is understood in the European Convention. In interpreting the term "*criminal charge*", the Court agreed that it was necessary to have regard to the "*substantive*" rather than the "*formal*" conception of the term "*charge*", and, quoting from a Strasbourg Court decision, said that this ". . . *impels the Court to look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a "charge" within the meaning of Article 6. In particular the Applicant's situation under domestic legal rules in force has to be examined in the light of the object and purpose of Article 6, namely the protection of the rights of the defence*" (at 703e–f).

25. I have already given my reasons for holding that our internal constitutional dispensation achieves the same result and need not dwell on that aspect further.

26. Both the majority and minority in *Han* were agreed that the laws developed by the Strasbourg Courts identified three factors which determine whether a person has been subject to double jeopardy for purposes of Article 6. They are:

> "1. the classification of the proceedings in domestic law;
>
> 2. the nature of the offence;
>
> 3. the nature and degree of severity of the penalty that the person concerned risked incurring".

27. It was pointed out that these three factors are to be considered cumulatively. The point of departure between the majority and minority of the Court lay in the weight placed on the first factor.

28. The majority in *Han* considered that the categorisation of the proceedings is not decisive. A Court is simply concerned with whether or not the allegations required to sustain the sanction are criminal in character (at para 65 and para 75). In that case, the VAT legislation under scrutiny (s 60) provided for a civil penalty pursuant to the de-criminalisation of elements of the VAT Act as a consequence of the recommendations of the 1983 Keith Report.

29. It is evident that the penal provisions of s 75(1)(*a*) of the Act are imposed in order to facilitate the timeous submission of returns. It is unnecessary to demonstrate an intention (*mens rea*) on the part of the taxpayer to withhold the submission of a return. A failure to render a return suffices, irrespective of the reason.

    I wish to make it clear that this feature distinguishes other provisions of s 75(1) where intention in the form of *mens rea* appears to be an element of the offence.

30. The nature and purpose of the provisions of s 76(1) were set out by the Supreme Court of Appeal in *Israelsohn v CIR* 1952 (3) SA 529 (AD) at 539 to 540. The Court said that these additional charges are "*in essence a penalty*" and are not "*a tax on income*" even though they are collected *via* the machinery of assessment. The Appellate Division held that the main purpose of these charges was to ensure the accuracy of returns. See also *CIR v McNeil* 1959 (1) SA 481 (AD) at 487F. In *McNeil* at 487G, the Court said that ". . . *the provision is there to ensure, if possible, that returns shall be honest and accurate. Its amount depends only indirectly on the size of the taxpayer's income; directly it depends on the size of his default . . . but a percentage of a penalty imposed for failure to make a return or for an omission from a return or for an inaccurate statement in a return is not at all like a tax on income*".

31. These cases have been applied by the Tax Courts. See *ITC 1430* (50 SATC 51) at p 54 where the Court considered the imposition of additional charges under s 76, as well as a remission of such charges and said

    that three factors were involved; namely the punishment of the taxpayer, the deterrent effect on the

taxpayer himself and the deterrent effect on other taxpayers. The Court added at pp 54 to 55 that "*it is in this respect fortuitous additional revenue and the decision whether or not to remit any portion thereof and the extent of such remission, is not restricted by considerations of estimates of State revenue and expenditure, save in one respect* . . ." (which was loss of interest on income that should have been disclosed in the original return – see at p 59).

See also *ITC 1489* (53 SATC 99) at 106.

32. Although the purpose of s 76(1) read as a whole is somewhat different to that of s 75(1)(*a*), nonetheless there is an overlap.

33. Moreover, penalties under s 75(1)(*a*) are determined not by prosecutors employed by the Department of Justice nor through guidelines issued by that department. On the contrary, it is SARS' employees who are engaged as prosecutors for offences under s 75(1)(*a*) and who determine the amount of the admission of guilt. Indeed, if a taxpayer wishes to avoid a criminal court appearance, he has little option but to approach the SARS' employee engaged in prosecutions before the date set for trial, pay the fine and undertake to submit the return by the hearing date. Furthermore, there are presently clear guidelines issued by SARS as to how the penalties are determined.

34. Whilst s 76(1) allows the Commissioner to charge double penalties for a wide array of omissions, including a failure to furnish the returns timeously, there is a basic formula which governs the determination of a s 76(1)(*a*) penalty. The basic formula is that additional tax penalties of R300 are

imposed for the first failure to submit a tax return timeously, and then in multiples of R300 for each subsequent failure. Until recently, the maximum amount that could be imposed was R1 200 (hence the capping of the last amount at R1 200 in the present case). Now there is a discretion which allows the assessor to go higher.

35. I am satisfied that both the provisions of s 75(1)(*a*) and s 76(1) are penal in character. The Supreme Court of Appeal case law to which I have referred says as much.

Furthermore, the essential nature of the conduct in respect of which the penalties are imposed remains criminal. In this regard, both the Supreme Court of Appeal and Tax Court decisions to which I have referred recognise that the amount is a penalty and is not a tax on income.

36. For the same reasons, the purpose of the penalties is not to compensate Revenue (save to the inconsequential extent referred to in *ITC 1430 supra*) but one of punishment and deterrence. This remains so even if the penalty under s 76(1)(*a*) read with (2), in respect of a failure to render a return timeously, was calculated by reference to the tax chargeable as opposed to the current position where a reasonably nominal amount is imposed.

37. Furthermore, both s 75(1)(*a*) and s 76(1)(*a*) envisage strict liability. It may be argued that this is ameliorated by the nominal penalties imposed. Nonetheless, the nature of the offence remains consistent with the imposition of a criminal sanction and the purpose of both sections (as determined by the quoted Supreme Court of Appeal authority and that of the Tax Courts) is consistent with the objectives of a criminal sanction: namely to act as a punishment and as a deterrent both to the taxpayer and to other taxpayers.

38. Accordingly, two of the three factors identified both by the Strasbourg Courts and by the English Court of Appeal indicate that an application of s 76(1)(*a*) where the taxpayer has already been convicted, or has paid an admission of guilt fine, under s 75(1)(*a*) would amount to double jeopardy.

39. The final factor to be considered is the nature and degree of severity of the penalty.

40. I understand the distinction between the nature of the penalty and the nature of the offence to relate to the circumstances in which the penalty is applied and its purpose as opposed to a classification of whether the offence embodies elements which are consistent with a criminal law penalty.

41. In my view, the final factor is determined by whether the function or the purpose of the penalty is the same under both provisions.

42. In the present case, the penalty under s 75(1) is applied in a manner consistent with inducing a taxpayer to submit a return prior to the date of the criminal trial and to punish him for not already having done so. The considerations for imposing a penalty under s 76(1)(*a*) coincides in part but s 75(1)(*a*) is more limited in scope. Section 76(1)(*a*) does have broader objectives, being those mentioned in the cases to which I

have already referred.

43. There may be other cases where the provisions of s 76(1)(*a*) require a fuller consideration of the conduct of the taxpayer, a feature that is absent in the formula driven penalties imposed under both ss 75(1)(*a*) and 76(1)(*a*).

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44. I am not asked to consider the constitutionality of s 76(1)(*a*) nor the way in which it has been implemented. I am only asked to consider whether in the present case, the taxpayer has been placed in double jeopardy where the penalty actually imposed under s 76(1)(*a*) is itself nominal and the way in which it is applied ensures that it remains nominal insofar as it relates to delays in rendering a return.

45. I should also add that just because s 76(4) confers upon the Commissioner powers in addition to those provided under other sections of the Act, does not save any of the provisions of s 76 from the consequences of a plea of double jeopardy if the features identified in *Han* (and which I have adopted) are present.

    Nonetheless, s 76(4) demonstrates that the legislature did not intend to create alternative regimes to deal with the same conduct or for the same purpose. Whilst s 75(1)(*a*) in its application may impose penalties on the basis of strict liability, s 76(1)(*a*) and the case law which has considered its ambit preclude procedural considerations from blinding us as to the nature of the penalty under consideration.

46. Accordingly, the nature and degree of severity of the penalty is dependent upon its application. At present, s 76(1)(*a*) is applied by reference to a formula that imposes a relatively minor penalty and which has regard to a purpose and function broader than that to which s 75(1)(*a*) relates. To the extent that there is an overlap, then an application of s 76(1)(*a*) will result in double jeopardy.

47. Although I have treated the penalties imposed as minor, that is a relative consideration. The enormous disparity between lower and higher income earners makes it inappropriate to place too much reliance upon the degree of severity of the penalty as a definitive part of the test.

48. It also would be unfair to penalise a person against whom a summons has been issued more severely than a person in the same position but against whom no summons was issued. There is a need for consistency of application, otherwise issues of inequality and partiality may arise.

    I should add that I am unpersuaded by the Commissioner's argument that there are extra administrative costs involved in issuing a summons which account for this penalty. It is evident that the penalty was not based on administrative costs. Administrative costs are budgeted for and form part of the overall expenditure of running Revenue. SARS may run up more costs simply chasing a taxpayer than are incurred in processing a summons.

49. I have found that the basis for the imposition of the penalties under s 75(1)(*a*) and the basis for imposing a penalty under s 76(1)(*a*) do overlap up to a point. To that extent, a double penalty has been imposed. The extent of the overlap is readily discernible by reference to the different formulae adopted.

50. In paras 5 and 6, I set out respectively the admission of guilt fines paid by the taxpayer for failing to submit the 1995 to 1998 tax returns timeously pursuant to s 75(1)(*a*) and the amount of additional tax levied on assessments under s 76(1)(*a*).

    In response to the taxpayer's objection, the revised assessments were reduced.

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51. Whilst the calculation of the overall revised assessment appears to be erroneous, nonetheless it is evident that in total, the amount of the fines paid under s 75(1)(*a*) have been deducted under the revised assessment. In particular, the total amount levied under s 76(1)(*a*) in the original assessment for the 1995 to 1998 tax years was R3 900. This was reduced to a total of R1 800 under the revised assessment. The difference between these two amounts, namely R2 100 is greater than the total of fines paid under s 75(1)(*a*) of R1 200.

52. Although I find that the taxpayer was placed in double jeopardy to the extent described in this judgment, the prejudice was removed by the deductions effected in the revised assessment. Accordingly, the revised assessment stands.