REMISSION OF PENALTIES IN INCOME TAX MATTERS

by

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ABSTRACT

The additional tax ("penalties") imposable in terms of section 76(1) of the Income Tax Act (No 58 of 1962) when a taxpayer is in default, can be very harsh (up to 200% of the tax properly chargeable). The Commissioner may, in terms of section 76(2)(a), remit any penalty imposed, as he sees fit. However, when there was intent on the part of the taxpayer to evade the payment of tax, the Commissioner may not remit any portion of the 200% penalty imposable, unless he is of the opinion that "extenuating circumstances" exist.

This dissertation examines the meaning of "extenuating circumstances", as interpreted by the judiciary, and lists the factors and defences that a taxpayer may plead to justify a remission of penalties, both in the case of an intention by the taxpayer to evade tax and in cases where the taxpayer is merely in default of section 76(1).

KEY TERMS

Section 76
Additional tax
Penalties
Discretion
Extenuating circumstances
Mitigating circumstances
Versagtende omstandighede
Constitution
Remission
Defences
Pleas

PREFACE

That great British statesman, Sir Winston Churchill, once remarked that “a nation trying to tax itself into prosperity is like a man standing in a bucket and trying to lift himself up by the handle”. Perhaps he was trying to say that overburdening its citizens with large tax increases or the introduction of new taxes to fill the coffers of government, will not increase the revenues of the State. Rather the increase in taxes will lead to tax fraud and accordingly a decrease in taxes recovered.

Realising the inevitability of errant taxpayers, be it pure tax evasion at the one extreme or merely the late rendition of a return of income at the other, the research objective has been to examine primarily the statutory offences provided for in the Income Tax Act, No. 58 of 1962, in particular section 76, and the defences or pleas available to the errant taxpayers to mitigate any penalties which may be imposed in terms of that section.

The conclusion reached is that taxpayers and representatives of taxpayers (lawyers, accountants, tax advisors) should generally be able to predict, within limits, the type of sanction that should befall errant taxpayers should they commit a statutory tax offence. Should the Commissioner impose penalties outside the limits generally adhered to or recommended by our judiciary, then it is open to the affected taxpayer to appeal against such inappropriate penalty. As a general rule, the judiciary treats an errant taxpayer far more leniently than the revenue authorities and more often than not reduces the original penalty imposed.

The other conclusion reached is that the South African Constitution provides for the protection of all its citizens' fundamental rights and the violation of these rights can have a major impact on the type of penalty, if any at all, which may be imposed. However, the potential violation of a taxpayer's fundamental rights, especially in relation to the investigative stage by the revenue authorities, was considered to be beyond the scope of this dissertation but needs further research and consideration.

In the Table of Cases, only the South African Income Tax Reports (SATC) references are given. If not included in those reports, the appropriate law report reference is given. The appropriate law report reference is given in the case of foreign decisions.

With regard to the reference works and articles cited in the text, the complete reference is not always given, especially if such work or article is quoted more than once. In such a case, reference should be made to the Bibliography for a full reference to the work cited.

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SUMMARY OF CONCLUSIONS

1. Harsh penalties for tax offences are provided for in the Income Tax Act (58 of 1962), in particular in section 76, which section is commonly referred to as the “triple tax” provision.

2. The initial penalties imposed on an alleged errant taxpayer are administered by the Commissioner and his subordinate officials. However, there is always the right to object to and appeal against the penalties imposed, to the Special Court for Hearing Income Tax Appeals and thereafter, to the High Court if the taxpayer is dissatisfied. The Special Court, on appeal, must exercise its own, original discretion.

3. One of the common problems faced by the revenue authorities and the judiciary is to establish whether the taxpayer has crossed the fine line between legally justified tax planning and tax evasion since penalties may only be imposed where a tax offender has committed a tax offence, as stipulated in the legislation. It is often difficult for the revenue authorities to establish whether the line has been crossed since the facts of the taxpayer’s affairs are peculiarly within his (the taxpayer’s) knowledge.

4. On the other hand, the taxpayer has a major hurdle to cross when the revenue authorities believe that he has committed an offence - that of discharging the reverse onus placed on him in terms of section 82 of the Income Tax Act.

5. However, when imposing penalties, the Commissioner may remit any penalty which is imposable in terms of section 76 as he sees fit, except where the taxpayer had the intention to evade taxes, in which case he may not remit the penalty unless "extenuating circumstances" exist.

6. The judiciary are very liberal in their interpretation of "extenuating circumstances" and have ruled that the phrase includes factors not normally taken into account in criminal law cases.

7. In establishing the intention of the taxpayer in regard to tax evasion, the judiciary apply a subjective test and appear to be reluctant to find that a taxpayer deliberately evaded tax except in the most blatant and obvious cases.

8. The judiciary do not appear to distinguish between pure tax evasion and an offence committed in terms of section 76 (which may not involve an intention to evade tax), when considering the remission of penalties - in both instances the judiciary look to find "extenuating circumstances" as a reason for the remission.

9. The greater the number of "extenuating circumstances" found to be present, the greater will be the remission of the penalty. However, the limiting factor for the remission appears to be the loss of interest to the *fiscus*. The judiciary appear to favour a penalty commensurate with the loss of interest as a starting point.

10. The judiciary, in accordance with the *stare decisis* doctrine, place great reliance on past judicial decisions. Unfortunately, the Commissioner and his revenue officials do not appear to always take previous norms of punishment, as recommended by our judiciary, into account when imposing penalties. Nevertheless, the judiciary is the watchdog over the excesses or even the perceived excesses of the revenue authorities and they are not adverse to criticising the actions of the revenue authorities in the appropriate circumstances.

11. The taxpayer must never allow himself to be a victim of justice. Rather, he should be a recipient of justice. The only way to ensure that this happens is if the taxpayer knows his rights in a conflict situation with the revenue authorities and is aware of the pleas, defences or "extenuating circumstances" which may be advanced to mitigate any penalty imposed.