

REPORTABLE

IN THE TAX COURT JOHANNESBURG

HELD AT MEGAWATT PARK

CASE NO: 11641

In the matter between:

Appellant

and

**THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE**

Respondent

Judgment given on 4 December 2006

J U D G M E N T

BORUCHOWITZ, J:

[1] This is an appeal against the assessment of the appellant's liability to pay additional tax in terms of section 76(1)(a) of the Income Tax Act No. 58 of 1962 (*'the Act'*).

[2] The question at issue is one of law, namely, whether it is constitutionally permissible for the Commissioner to impose additional tax in circumstances where the taxpayer has already paid an admission of guilt fine under section 75(1)(a) of the Act.

[3] Section 75(1)(a) provided, at the relevant time, that any person who failed or neglected to furnish, file or submit any return or document as and when required by or under the Act would be guilty of an offence and liable on conviction to a fine not exceeding R2 000,00 or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment. In terms of section 76(1)(a) a taxpayer is obliged to pay additional tax, in an amount equal to twice the tax chargeable in respect of the taxpayer's taxable income for the relevant year of assessment, if the taxpayer defaults in rendering a return in respect of any year of assessment. This is subject to the Commissioner's right to remit such additional charge or any part thereof in specified circumstances (section 76(2)).

[4] The appellant was charged in the Magistrate's Court with a contravention of section 75(1)(a) as a result of his failure to submit income tax returns in respect of the 1994 to 1998 years of assessment. After submitting the relevant returns the appellant paid admission of guilt fines of R300,00 for each year of assessment. Additional tax was thereafter imposed in terms of section 76(1)(a) for the late submission of the returns. Following an objection lodged by the appellant revised assessments were issued by the Commissioner in which the additional taxes for the 1995, 1997 and 1998 tax

years were reduced to R300,00 each. No reduction was made in respect of the 1996 tax year. The position that obtained after the issue of the reduced assessments was as follows:

<u>Tax year</u>	<u>Fines</u>	<u>Original Assessments</u>	<u>Reduced Assessments</u>
	<u>s. 75(1)(a) R</u>	<u>s. 76(1)(a) R</u>	<u>s. 76(1)(a) R</u>
1995	300	600	300
1996	300	900	900
1997	300	1200	300
1998	<u>300</u>	<u>1200</u>	<u>300</u>
	R1200	R3900	R1800

[5] Having unsuccessfully appealed to the Tax Board under section 83A of the Act, the appellant now appeals to this Court in terms of the provisions of section 83A(13)(a) of the Act.

[6] The appellant submits that the imposition of additional tax, after the appellant had already been convicted and fined in the Magistrate's Court in respect of the late submission of the tax returns, infringes his fair trial rights embodied in section 35(3)(m) of the Constitution of the Republic of South Africa¹. Section 35(3)(m) stipulates that:

¹ Act 108 of 1996.

'Every accused person has a right to a fair trial, which includes the right –

...

(m) 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.'

[7] The appellant argues that by virtue of the provisions of section 57(6) of the Criminal Procedure Act² the payment of fines by way of admission of guilt meant that he was deemed to have been convicted and sentenced by the court in respect of the offence in question. The additional tax authorised by section 76(1) of the Act is not a tax on income but is in essence a penalty. *Israehlson v CIR*³; *CIR v McNeil*⁴ and *ITC 1430*. Its imposition had the effect that the appellant was being punished twice in respect of the late submission of the tax returns.

[8] The appellant further argues that it would subvert the purpose of section 35(3)(m) of the Constitution were another tribunal or official to be lawfully able to impose a further penalty in respect of an offence of which a person had already been convicted and sentenced in a court. Although there is no express prohibition on being punished twice for the same offence, this Court should favour an interpretation of section 35(3)(m) that harmonises with the '*double jeopardy*' rule against multiple punishments for the same offence.

² Act 51 of 1977.

³ 1952 (3) SA 529 (A) at 539-540.

⁴ 1959 (1) SA 481 (A) at 487F.

[9] I do not agree with the appellant's contentions. Section 35(3) rights only accrue to an accused person, that is a person facing criminal prosecution or someone called upon to answer a criminal charge. *Nel v Le Roux NO and Others*⁵. The purpose of the right contained in section 35(3)(m) is to protect citizens against the possibility of repeated prosecutions for the same conduct. *McIntyre en Andere v Pieterse NO en 'n Ander*⁶; *S v Basson*⁷. A taxpayer upon whom additional tax is levied is not an accused person within the meaning of section 35(3) of the Constitution, there is no question of him being tried for an offence or of the proceedings culminating in a conviction with a concomitant criminal record⁸. There is no likelihood of the taxpayer being sentenced to a term of imprisonment or of being deprived of his liberty.

[10] In the case of *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v the Competition Commissioner and Another*⁹ the Competition Appeal Court, in considering an argument similar to that in the present matter, said the following:

'The rights set out in section 35(3) of the Constitution are reserved for those people who have been charged in criminal matters and who are likely to be sentenced to a term of imprisonment. It is the imprisonment aspect, which deprives a charged or accused person, of his liberty, which is sought to be protected by the entrenchment of the rights, set out in section 35(3). It is thus the threat of imprisonment which triggers off the rights set out in section 35(3).'

⁵ 1996 (4) BCLR 592 (CC) para 11.

⁶ 1998 (1) BCLR 18 T.

⁷ 2005 (1) SA 171 paras [61] to [66].

⁸ Section 75A of the Act permits the publication of the names of convicted offenders.

⁹ 2005 (6) BCLR 613 (CAC).

[10] Additional tax in terms of section 76(1)(a) of the Act is a penalty of an administrative nature which cannot be equated with a fine imposed by a criminal court. It is collected via the machinery of assessment and its main purpose is to ensure the accuracy of returns. See the *Israehlson and McNeil* cases *supra*. Its imposition is mandatory and the manner of its enforcement is entirely different from a fine imposed in terms of section 75. Section 76(2) affords the Commissioner the right to remit the additional charge imposed under subsection (1) or any part thereof and in the event of the Commissioner deciding not to remit the whole of the additional charge, such decision is subject to objection and appeal. It is the court that is the ultimate arbiter of the fairness of an additional tax or penalty. *Commissioner for the South African Revenue Service v Hawker Air Services (Pty) Ltd*¹⁰. The payment of additional tax can only be enforced by the employment of the ordinary civil process of execution. (See section 91 of the Act.)

[11] For these reasons I am of the view that there is no merit in the appellant's principal submission. The only issue raised in the appeal is the constitutionality of the imposition of the additional tax. It was not suggested and nor was any evidence led that the amount of additional was excessive or inappropriate. It follows that the appeal cannot succeed.

¹⁰ 2006 (4) SA 292 (SCA) at para [14].

[12] The appeal is dismissed and the revised assessments appealed against are confirmed.

P BORUCHOWITZ - PRESIDENT

This judgment should be reported YES / NO

MR J H C FRIEDMAN REPRESENTED THE APPELLANT

ADV B VAN VUUREN REPRESENTED THE COMMISSIONER

FOR THE SOUTH AFRICAN REVENUE SERVICE