IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: A3077/02

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

(3) REVISED.

DATE 27/11/02 SIGNATURE

In the matter between:

G A PITJE, Estate Late Appellant

and

COMMISSIONER FOR SOUTH AFRICAN REVENUE SERVICES Respondent

JUDGMENT

PONNAN, J:

[1] This is an appeal against the judgment of the Special Income Tax Court (Flemming DJP), sitting at Johannesburg.

[2] The appellant is the executrix of the estate of the late G M Pitje ("*the taxpayer*") who passed away on 23 April 1997. The appellant having elected to abandon the appeal in

respect of the 1998 tax year, this appeal relates to the tax years 1996 and 1997 ("*the relevant period*").

[3] During the relevant period, the taxpayer was employed as an advisor in the Office of the Premier of the Northern Province ("*the employer*") receiving what has been termed an "*all inclusive package*". For each year under consideration, the employer issued tax certificates (IRP5s) which specified the gross remuneration paid to the taxpayer as well as the tax deducted by the employer.

[4] After the death of the taxpayer, income tax returns for the relevant period accompanied in each instance by an IRP5 certificate were submitted to the respondent on behalf of the taxpayer. On the basis of the information supplied, the income tax assessments were raised and issued by the Commissioner. It was to those assessments that an objection was raised by the appellant. An unsuccessful appeal to the Special Income Tax Court, followed the disallowance of the objection by the Commissioner.

[5] It was submitted on behalf of the appellant, that the respondent was precluded from raising valid assessments on the returns submitted, inasmuch, as those returns had not been signed by a representative of the taxpayer. Accordingly, so the argument went, there had not been proper compliance with section 66(6) of the Income Tax Act 58 of 1962 ("*the Act*"). The court a quo held, quite correctly, in my view, that such a requirement was "*in the interests of* (the) *proper enforcement of the legislation*" affording as it did "*an important*

foundation for taking steps against the taxpayer who supplies wrong or incomplete information".

[6] It was never in dispute in the court a quo that the returns in question had been submitted on behalf of the taxpayer. In those circumstances section 66(7), which reads:-

> "*Any return made or purporting to be made or signed by or on behalf of any person for the purposes of this Act, shall be deemed to be duly made and signed by the person affected unless such person proves that such return was not made or signed by him or on his behalf.*"

emphatically disposes of that leg of the argument.

[7] Paragraph 2 of the Fourth Schedule of the Act places the responsibility for the deduction from an employee's salary and the consequent payment of income tax to the Commissioner, upon the employer.

[8] Paragraph 5.1 of the Fourth Schedule renders an employer "*personally liable for the payment to the Commissioner of the amount which he fails to deduct or withhold*". It is undisputed that the taxpayer received what his employer termed an "*all inclusive package*" of R25 920,00 per month. The income tax deducted by the employer for the tax years 1996 and 1997, expressed in a percentage was 23,36 and 25 respectively. Relying on the provisions of paragraphs 2 and 5(1) of the Fourth Schedule of the Act (the Fourth Schedule), it was argued on behalf of the appellant that the remedy available to the

respondent was to recover any underpayment of tax, should that have occurred, from the employer. That argument however, loses sight of the fact that upon a proper construction of paragraph 5.1 of the Fourth Schedule, it is to be read subject to subparagraph (2) which reads:-

> "*Where the employer has failed to deduct or withhold employees' tax in terms of paragraph 2 and the Commissioner is satisfied that the failure was not due to an intent to postpone payment of the tax or to evade the employer's obligations under this Schedule, the Commissioner may, if he is satisfied that there is a reasonable prospect of ultimately recovering the tax from the employee, absolve the employer from his liability under subparagraph (1) of this paragraph.*"

[9] It is safe to infer, in casu, that in electing to recover the shortfall from the taxpayer, the Commissioner must have been satisfied that there was no "*intent on the part of the employer to postpone payment of the tax or to evade his obligations*". I am thus satisfied that the Commissioner by his conduct, absolved the employer from liability under paragraph 5(1).

[10] Had the employer not been absolved from liability by the Commissioner, then paragraph 5(3) of the Fourth Schedule, which reads:-

> "*An employer who has not been absolved from liability as provided in sub-paragraph (2) shall have a right of recovery against the employee in respect of the amount paid by the employer in terms of sub-paragraph (1) in respect of that employee, and such amount may in addition to any other right of recovery be deducted from future remuneration which may become payable by the employer to that employee, in such manner as the Commissioner may determine.*"

would find application.

Paragraph 5(3) thus confers upon an employer a right of recovery against an employee in circumstances where liability has attached to the employer pursuant to the provisions of paragraph 5(1).

[11] It is thus clear, even on a superficial reading of paragraph 5 in its entirety, that the ultimate liability to pay income tax rests with an employee. It follows, in my view, that the collection mechanism created by the Act to give efficacy to the legislation and in particular the pivotal role played by the employer in that scheme, does not extinguish the liability of the employee.

[12] My view is fortified by paragraph 28(1)(b) of the Fourth Schedule, which provides:-

> "*There shall be set off against the liability of the taxpayer in respect of any taxes (as defined in subparagraph (8)) due by the taxpayer, the amounts of employees tax deducted or withheld by the taxpayer's employer during any year of assessment for which the taxpayer's liability for normal tax has been assessed by the Commissioner and the amounts of provisional tax paid by the taxpayer in respect of any such year, and if –*
>
> *(a)* ...
>
> *(b)* *the taxpayer's total liability for the aforesaid taxes exceeds the sum of the said amounts of employees tax and provisional tax, the amount of the excess shall be payable by the taxpayer to the Commissioner.*"

Simply stated, the legislature in that provision has in clear and unambiguous language, placed the burden for the payment of any shortfall on the taxpayer.

[13] The practical advantage to be gained by the appellant in insisting that the Commissioner exercises his right of recovery against the employer pursuant to paragraph 5(1) of the Fourth Schedule, escapes me. The futility thereof is immediately apparent when one has regard to the employer's right to recover any amount so paid, from the appellant pursuant to paragraph 5(3) of the Fourth Schedule.

[14] A further submission made on behalf of the appellant is that the Commissioner failed to take cognisance of certain expenses which fell to be deducted by the taxpayer in computing his taxable income. Section 11(a) of the Act which contains what is often described as the general deduction formula, reads:-

> *"For the purpose of determining the taxable income derived by any person from carrying on any trade, there shall be allowed as deductions from the income of such person so derived –*
>
> *(a) expenditure and losses actually incurred in the production of the income provided such expenditure and losses are not of a capital nature."*

[15] Complementary to section 11(a) and forming an integral part of the general deduction formula, is section 23. The proper method of approach in determining whether a deduction should be allowed is firstly to ascertain whether it is permissible under section 11(a) and

then to find out whether it is prohibited by section 23.[1] Much would therefore turn on a proper application to the facts of sections 11(a) and 23.

[16] The relevant portions of section 23 provide as follows:-

> "*No deduction shall in any case be made in respect of the following matters, namely* –
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> ...
>
> *(f) any expenses incurred in respect of any amounts received or accrued which do not constitute income as defined in section 1;*
>
> *(g) any monies claimed as a deduction from income derived from trade, which are not wholly or exclusively laid out or expended for the purposes of trade:*
> ..."

[17] "*Section 11(a) provides positively and in general terms, in the case of a person deriving income from the carrying on of a trade within the Republic, what expenditure and losses shall be allowed as deductions from income so derived in order to determine his taxable income. The subsection limits the deductions to expenditure and losses incurred in the Republic in the production of the income, other than those of a capital nature.*

Taxable income is the basis upon which normal tax is levied. ... Taxable income is arrived at by first determining the taxpayer's gross income and then deducting therefrom any amounts exempt from normal tax in order to arrive at the taxpayer's income. Taxable

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1 Sub-Nigel Ltd v Commissioner for Inland Revenue 1948 (4) SA 580 at 588.

income is then determined by deducting from income the various amounts which the Act allows by way of deduction from income, including those covered by section 11(a): see the definitions of 'gross income', 'income' and 'taxable income' contained in section 1 of the Act.

Section 23 prescribes what deductions may not be made in the determination of taxable income. Subsections (f) and (g) represent, in a general sense, the negative counterpart of section 11(a) and, in determining whether a particular amount is deductible, it is generally appropriate to consider whether or not such deduction is permitted by section 11(a) and whether or not it is prohibited by section 23(f) and/or (g): cf Sub-Nigel Ltd v Commissioner for Inland Revenue 1948 (4) SA 580 (A) at 588."

(Per Corbett JA (as he then was) – Commissioner for Inland Revenue v Nemojim 1983 (4) SA 935 at 946E-947A.)

[18] Accordingly, the requirements to be satisfied for the deduction of expenditure or losses in terms of the general deduction formula, may be summarised as follows:-

"*(a)* *The taxpayer must be carrying on a trade;*

(b) *The taxpayer must in carrying on that trade derive income;*

(c) *The amount to be claimed must constitute expenditure or losses;*

(d) *The expenditure or losses must be actually incurred during the year of assessment;*

(e) The expenditure or losses must be incurred in the production of the income referred to in (d);

(f) The expenditure or losses must to some extent have been laid out or expended for the purposes of the trade; and

(g) The expenditure or losses must be of a capital nature."[2]

[19] Section 82 of the Act reads:-

> *"Burden of proof as to exemptions, deductions, abatements, disregarding or exclusions. – The burden of proof that any amount is –*
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> *(a) exempt from or not liable to any tax chargeable under this Act; or*
>
> *(b) subject to any deduction, abatement or set-off in terms of this Act; or*
>
> *(c) ...*
>
> *shall be upon the person claiming such exemption, non-liability, deduction, abatement or set-off, or that such amount must be disregarded or excluded, and upon the hearing of any appeal from any decision of the Commissioner, the decision shall not be reversed or altered unless it is shown by the appellant that the decision is wrong."*

In a matter therefore, where the onus clearly rested on the appellant, the highwater mark of the appellant's case was that she was unable to furnish the Commissioner with "*an accurate and precise record of the expenditure incurred*". Thus, instead of producing proof of actual expenditure, as the appellant was obliged to do, the objection by her to the assessment, advanced a purely speculative hypothesis that the taxpayer must have

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2 De Koker Urquhart: Income Tax in South Africa – Volume 1 paragraph 10.2 (edited by David Clegg and Rob Stretch).

incurred certain expenses that were "*incidental to*" or "*obligatory for*" the proper performance and execution of his duties. One is here not concerned with deductions that may be considered proper from an accountant's or the appellant's point of view. The Act provides for permissible and non-permissible deductions. It is thus only "*deductions which are permissible according to the language of the Act*"[3] that one is here concerned with. No proof of permissible deductions having been adduced by the appellant to the Commissioner, it is hardly surprising that the court a quo was unimpressed by the appellant's case on this score.

[20] Finally, it was submitted on behalf of the appellant, that section 78(2) which reads:–

> "*Any such estimate of the taxable income shall be subject to objection and appeal: Provided that if it appears to the Commissioner that any person is unable from any cause to furnish an accurate return of his income, ...the Commissioner may agree with such person as to what amount of such income, ... shall be taxable income, ... and any amount so agreed upon shall not be subject to any objection or appeal.*"

finds application in casu. What the appellant seeks, under the guise of section 78 is to conclude an agreement with the Commissioner which would limit the liability of the taxpayer in flagrant disregard of the legislative scheme provided by the Act. Such an approach which is wholly untenable is deserving of censure not judicial approval. Section 78(2) finds application inter alia when a person is unable to furnish an accurate return of his income. As the income of the taxpayer was self-evident from the documentation

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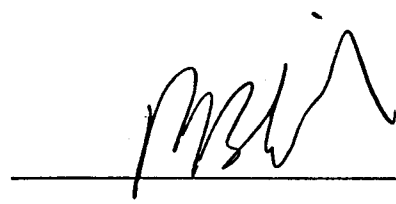
3 Sub-Nigel Ltd v Commissioner for Inland Revenue @ 588.

submitted to the Commissioner, the appellant's reliance on section 78(2) is entirely misplaced.

[21] In the result, for the aforegoing reasons, I would dismiss the appeal with costs.

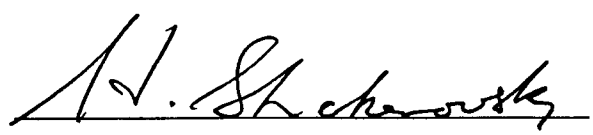
V M PONNAN
JUDGE OF THE HIGH COURT

I agree, it is so ordered.



P BLIEDEN
JUDGE OF THE HIGH COURT

I agree:



H SHAKENOVSKY
ACTING JUDGE OF THE HIGH COURT